



## Reports of Cases

### JUDGMENT OF THE COURT (First Chamber)

19 December 2013\*

(Jurisdiction in civil and commercial matters — Regulation (EC) No 44/2001 — Article 2 — Article 5(1)(a) and (b) — Special jurisdiction in matters relating to contract — Concepts of ‘sale of goods’ and ‘supply of services’ — Agreement for the distribution of goods)

In Case C-9/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal de commerce, Verviers (Belgium), made by decision of 20 December 2011, received at the Court on 6 January 2012, in the proceedings

**Corman-Collins SA**

v

**La Maison du Whisky SA,**

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet and M. Berger (Rapporteur),  
Judges,

Advocate General: N. Jääskinen,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 31 January 2013,

after considering the observations submitted on behalf of:

- Corman-Collins SA, by P. Henry and F. Frederick, avocats,
- La Maison du Whisky SA, by B. Noels and C. Héry, avocats,
- the Belgian Government, by T. Materne, J-C. Halleux and C. Pochet, acting as Agents,
- the Swiss Government, by O. Kjelsen, acting as Agent,
- the European Commission, by M. Wilderspin, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 25 April 2013,

\* Language of the case: French.

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 2 and Article 5(1)(a) and (b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1; ‘the Regulation’).
- 2 The request has been made in proceedings between Corman-Collins SA (‘Corman-Collins’), established in Belgium, and La Maison du Whisky SA (‘La Maison du Whisky’), established in France, concerning a claim for compensation on account of the termination of an agreement for the distribution of goods between those companies.

### **Legal context**

#### *European Union law*

- 3 Article 2(1) of the Regulation in Section 1, entitled ‘General provisions’, in Chapter II thereof, on the rules of jurisdiction, lays down the principle according to which ‘[s]ubject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State’.
- 4 Article 3 of the Regulation, which is also in Section 1 of Chapter II thereof, states:
  - ‘1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.
  2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.’
- 5 Article 5, which appears in Section 2, entitled ‘Special jurisdiction’, of Chapter II of Regulation No 44/2001, provides:

‘A person domiciled in a Member State may, in another Member State, be sued:

  1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
  - (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
    - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered
    - in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;
  - (c) if subparagraph (b) does not apply then subparagraph (a) applies;

...’

*Belgian law*

6 The Law of 27 July 1961 on Unilateral Termination of Exclusive Distribution Agreements of Indefinite Duration (*Moniteur belge* of 5 October 1961, p. 7518, as amended by the Law of 13 April 1971 on Unilateral termination of distribution agreements (*Moniteur belge* of 21 April 1971, p. 4996) ('the Belgian Law of 27 July 1961') defines 'distribution agreements' in Article 1(2) as being 'any agreement pursuant to which a grantor reserves, to one or more distributors, the right to sell, in their own name and for their own account, products which it manufactures or distributes'.

7 Article 4 of that law provides:

'If a distributor has suffered damage further to the termination of a distribution agreement covering all or part of Belgian territory, he may in any event bring legal proceedings against the supplier before the Belgian courts or before the courts for the place where supplier is domiciled or has its registered office.

If the proceedings are brought before the Belgian courts, they must apply Belgian law exclusively.'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

8 Corman-Collins and La Maison du Whisky had a commercial relationship for approximately 10 years, during which Corman-Collins purchased various brands of whisky from La Maison du Whisky, of which it took delivery in France for resale in Belgium.

9 During the whole of that period, Corman-Collins used the appellation 'Maison du Whisky Belgique' and an internet site called 'www.whisky.be', without that usage causing any reaction from La Maison du Whisky. Furthermore, Corman-Collins' contact details were mentioned in *Whisky Magazine*, edited by a subsidiary of La Maison du Whisky.

10 In December 2010, La Maison du Whisky banned Corman-Collins from using the appellation 'Maison du Whisky Belgique' and closed the website www.whisky.be. In February 2011, it informed Corman-Collins that, as from 1 April and 1 September 2011, respectively, it would confer exclusive distribution of two brands of its products to another company, through which Corman-Collins was henceforth invited to place its orders.

11 Corman-Collins sued La Maison du Whisky before the Tribunal de commerce de Verviers seeking, principally, an order for payment of compensation in lieu of notice and additional compensation under the Belgian Law of 27 July 1961.

12 La Maison du Whisky challenged the jurisdiction of the court seised on the ground that the French courts had jurisdiction under Article 2 of the Regulation. Corman-Collins responded to that objection by invoking Article 4 of the Belgian Law of 27 July 1961.

13 In that connection, the parties in the main proceedings are in dispute as to how to classify their commercial relationship. Corman-Collins submits that it was a distribution agreement, while La Maison du Whisky contends that that relationship consisted of simple contracts for purchase and sale concluded on the basis of weekly orders according to the wishes of Corman-Collins.

14 In the order for reference, the Tribunal de commerce de Verviers expressly states that Corman-Collins and La Maison du Whisky 'were bound by an oral agreement' and that 'pursuant to ... the Belgian Law of 27 July 1961, the legal relationship between the parties may be analysed as a distribution agreement, in so far as the plaintiff was authorised to resell in Belgium the goods purchased from the defendant in Belgium'.

- 15 However, that court expresses doubts as to whether it may base its jurisdiction on the rules in Article 4 of the Belgian Law of 27 July 1961. It points out that, under Article 2 of the Regulation, which, it states, is applicable to the facts in the present case, the French courts should have jurisdiction, but Article 5(1) of the Regulation may also be applied. In that connection, it asks, in the light of the Court's case-law, whether a distribution agreement may be classified as a contract for the sale of goods and/or the provision of services, within the meaning of Article 5(1)(b) of the Regulation. It adds that, if none of those classifications may be adopted for such a type of agreement, it would then be necessary to determine which, in the dispute in the main proceedings, is the obligation on which the application in the main proceedings is based for the purposes of Article 5(1)(a) of the Regulation.
- 16 Given those findings, the Tribunal de commerce de Verviers decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:
1. Must Article 2 of Regulation No 44/2001, where appropriate in conjunction with Article 5(1)(a) and (b), be interpreted as precluding a rule of jurisdiction, such as that set out in Article 4 of the Belgian Law of 27 July 1961, which provides for the jurisdiction of Belgian courts when the exclusive distributor has its registered office in Belgian territory and when the distribution agreement covers all or part of that territory, irrespective of where the grantor of the exclusive distribution rights has its registered office, when the latter is the defendant?
  2. Must Article 5(1)(a) of Regulation No 44/2001 be interpreted as applying to a distribution of goods agreement, pursuant to which one party purchases goods from another party for resale in the territory of another Member State?
  3. If Question 2 is answered in the negative, must Article 5(1)(b) of Regulation No 44/2001 be interpreted as meaning that it refers to a distribution agreement, such as that at issue between the parties?
  4. If Questions 2 and 3 are answered in the negative, is the contested obligation in the event of the termination of an exclusive distribution agreement the obligation of the seller-grantor or that of the buyer-distributor?

### **Consideration of the questions referred**

#### *The first question*

- 17 By its first question, the referring court asks essentially whether the provisions of the Regulation preclude, if the grantor in the dispute is domiciled in a Member State other than that in which the court seised is situated, the application of a national rule of jurisdiction such as that in Article 4 of the Belgian Law of 27 July 1961, which confers jurisdiction on the national courts to hear and determine proceedings relating to the termination of an exclusive distribution agreement if the distributor is established in Belgium.
- 18 In the first place, as regards the scope of the Regulation, it is clear from Recital 2 in the preamble thereto that it aims, in particular, to unify the rules of conflict of jurisdiction in civil and commercial matters, it being stated that, accorded to settled case-law, the application of those rules requires the existence of an international element (see, in particular, Case C-327/10 *Hypoteční banka* [2011] ECR I-11543, paragraph 29).
- 19 In accordance with Recital 8 in the preamble to the Regulation, the common rules it lays down must, in principle, be applied when the defendant is domiciled in a Member State.

- 20 In the second place, as regards the rules of jurisdiction laid down by the Regulation, the general rule of jurisdiction laid down in Article 2 thereof provides that where a defendant is domiciled in a Member State, the courts of that State are to have jurisdiction.
- 21 Article 3(1) of the Regulation states that the only exceptions to that rule of principle are those laid down by the rules of jurisdiction set out in Sections 2 to 7 of Chapter I thereof. Article 3(1) thereby impliedly, but necessarily, excludes the application of national rules of jurisdiction. That exclusion is confirmed by Article 3(2), which refers to a non-exhaustive list of national rules of jurisdiction that cannot be relied on.
- 22 It follows that, if a case presenting an international element falls within the scope *ratione materiae* of the Regulation, which is not disputed in the present case, and if the defendant is domiciled in a Member State, which is the case in the dispute in the main proceedings, the rules of jurisdiction laid down by the Regulation must in principle be applied and prevail over national rules of jurisdiction.
- 23 Therefore, the answer to the first question is that Article 2 of the Regulation must be interpreted as meaning that, where the defendant is domiciled in a Member State other than that in which the court seised is situated, it precludes the application of a national rule of jurisdiction such as that provided for in Article 4 of the Belgian Law of 27 July 1961.

*The second and third questions*

- 24 By those questions, which it is appropriate to examine together, the referring court asks essentially whether Article 5(1)(b) of the Regulation, which refers to contracts for the sale of goods and contracts for the provision of services, is applicable to a distribution agreement or whether, in the case of a contract of that type, the jurisdiction of the court to hear and determine an action based on such a contract must be determined in accordance with Article 5(1)(a).
- 25 In order to answer those questions it is necessary, in the first place, to clarify the concept of a distribution agreement.
- 26 As the Advocate General noted in point 40 of his Opinion, the concept of ‘distribution agreement’ used by the referring court in its questions, is not defined in European Union law and is likely to refer to different situations in the laws of the Member States.
- 27 However, regardless of the diversity of distribution agreements in commercial practice, the obligations for which they provide depend on the purpose of that type of agreement, which is to ensure the distribution of the grantor’s products. To that end, the grantor undertakes to sell to the distributor, which it has chosen for that purpose, the goods to be ordered by the distributor in order to satisfy the requirements of its clients, while the distributor undertakes to purchase from the grantor the goods he needs.
- 28 According to an analysis widely accepted in the laws of the Member States, a distribution agreement takes the form of a framework agreement, which lays down the general rules applicable to the future relations between the grantor and the distributor as to their obligations of supply and/or provision and prepares the subsequent sale agreements. As the Advocate General observes in point 41 of his Opinion, the parties often also lay down specific terms concerning the distribution by the distributor of the goods sold by the grantor.
- 29 It is by referring to a specimen contract containing such undertakings that the second and third questions must be answered, in so far as they concern the application to a distribution agreement of Article 5(1) of the Regulation, it being stated in that regard that, according to the separation of functions between the national courts and the Court of Justice on which the procedure referred to in

Article 267 TFEU is based, any assessment of the facts falls with the jurisdiction of the national courts (see, in particular, Case C-469/12 *Krejci Lager & Umschlagbetrieb* [2012] ECR, paragraph 29 and the case-law cited).

- 30 In the second place, as far as concerns the determination of the court with jurisdiction to hear a dispute based on an exclusive distribution agreement as defined above, it must be recalled, as a preliminary point, that the concepts used by the Regulation must, as a general rule, be interpreted independently, by reference principally to the general scheme and objectives of the regulation, in order to ensure that it is applied uniformly in all the Member States (see, in particular, Case C-419/11 *Česká spořitelna* [2013] ECR, paragraph 25).
- 31 As regards the rule of special jurisdiction laid down in Article 5(1) of the Regulation in matters relating to contract, which supplements the rule that the courts for the place where the defendant is domiciled have jurisdiction, the Court has ruled that it reflects an objective of proximity and the reason for that rule is the existence of a close link between the contract and the court called upon to hear and determine the case (Case C-19/09 *Wood Floor Solutions Andreas Domberger* [2010] ECR I-2121, paragraph 22 and the case-law cited).
- 32 The Court also observed, regarding the place of performance of the obligations arising from contracts for the sale of goods, that the Regulation, in the first indent of Article 5(1)(b), defines that criterion of a link autonomously, in order to reinforce the objectives of unifying of the rules of jurisdiction and predictability (*Wood Floor Solutions Andreas Domberger*, paragraph 23 and the case-law cited). Those objectives are also those of the second indent of Article 5(1)(b), since the rules of special jurisdiction provided for by the regulation for contracts for the sale of goods and the provision of services have the same origin, pursue the same objectives and occupy the same place in the scheme established by that regulation (*Wood Floor Solutions Andreas Domberger*, paragraph 26 and the case-law cited).
- 33 It is by taking account of those objectives that it must be examined whether a distribution agreement falls into one of those two categories of contracts referred to in Article 5(1)(b) of the Regulation.
- 34 In that connection, the Court has stated that, in order to classify a contract in the light of that provision, the classification must be based on the obligations which characterise the contract at issue (Case C-381/08 *Car Trim* [2010] ECR I-1255, paragraph 31 and 32).
- 35 Thus, the Court has held that a contract which has as its characteristic obligation the supply of a good will be classified as a ‘sale of goods’ within the meaning of the first indent of Article 5(1)(b) of Regulation No 44/2001 (*Car Trim*, paragraph 32).
- 36 That a classification may be applied to a long-term commercial relationship between two economic operators, where that relationship is limited to successive agreements, each having the object of the delivery and collection of goods. However, it does not correspond to the general scheme of a typical distribution agreement, characterised by a framework agreement, the aim of which is an undertaking for supply and provision concluded for the future by two economic operators, including specific contractual provisions regarding the distribution by the distributor of goods sold by the grantor.
- 37 As to whether an exclusive distribution agreement may be classified as a contract for the ‘supply of services’ within the meaning of the second indent of Article 5(1)(b) of the Regulation, it must be recalled that, according to the definition given by the Court, the concept of ‘services’ within the meaning of that provision requires at least that the party who provides the service carries out a particular activity in return for remuneration (Case C-533/07 *Falco Privatstiftung and Rabitsch* [2009] ECR I-3327, paragraph 29).

- 38 As far as the first criterion in that definition, namely, the existence of an activity, it is clear from the case-law of the Court that it requires the performance of positive acts, rather than mere omissions (see, to that effect, *Falco Privatstiftung and Rabitsch*, paragraphs 29 to 31). That criterion corresponds, in the case of an exclusive distribution agreement, to the characteristic service provided by the distributor which, by distributing the grantor's products, is involved in increasing their distribution. As a result of the supply guarantee it enjoys under the exclusive distribution agreement and, as the case may be, its involvement in the grantor's commercial planning, in particular with respect to marketing operations, factors in respect of which the national court has jurisdiction to make a ruling, the distributor is able to offer clients services and benefits that a mere reseller cannot and thereby acquire, for the benefit of the grantor's products, a larger share of the local market.
- 39 As to the second criterion, namely the remuneration paid as consideration for an activity, it must be stated that it is not to be understood strictly as the payment of a sum of money. Such a restriction is neither stipulated by the very general wording of the second indent of Article 5(1)(b) of the Regulation nor consistent with the objectives of proximity and standardisation, set out in paragraphs 30 to 32 of the present judgment, pursued by that provision.
- 40 In that connection, account must be taken of the fact that the distribution agreement is based on a selection of the distributor by the grantor. That selection, which is a characteristic element of that type of agreement, confers a competitive advantage on the distributor in that the latter has the sole right to sell the grantor's products in a particular territory or, at the very least, that a limited number of distributors enjoy that right. Moreover, the distribution agreement often provides assistance to the distributor regarding access to advertising, communicating know-how by means of training or yet even payment facilities. All those advantages, whose existence it is for the court adjudicating on the substantive action to ascertain, represent an economic value for the distributor that may be regarded as constituting remuneration.
- 41 It follows that a distribution agreement containing the typical obligations set out in paragraphs 27 and 28 above may be classified as a contract for the supply of services for the purpose of applying the rule of jurisdiction in the second indent of Article 5(1)(b) of the Regulation.
- 42 That classification excludes the application to a distribution agreement of the rule of jurisdiction laid down in Article 5(1)(a) of the Regulation. Taking account of the hierarchy established between points (a) and (b) by point (c) of that provision, the rules of jurisdiction laid down in Article 5(1)(a) of the Regulation is intended to apply only in the alternative and by default with respect to the other rules of jurisdiction in Article 5(1)(b) thereof.
- 43 In the light of all the foregoing considerations, the answer to the second and third questions is that on a proper construction of Article 5(1)(b) of the Regulation, the rule of jurisdiction laid down in the second indent of that provision for disputes relating to contracts for the supply of services is applicable in the case of a legal action by which a plaintiff established in one Member State claims, against a defendant established in another Member State, rights arising from an exclusive distribution agreement, which requires the contract binding the parties to contain specific terms concerning the distribution by the distributor of goods sold by the grantor. It is for the national court to ascertain whether that is so in the proceedings before it.

#### *The fourth question*

- 44 By that question, the referring court asks essentially which obligation, in the case of a dispute based on the termination of an exclusive distribution agreement, is the basis for the claim.
- 45 Read in the light of the reasoning of the order for reference, that question thereby concerns the interpretation of Article 5(1)(a) of the Regulation.

46 Given the answer to the second and third questions, there is no need to answer the fourth question.

### **Costs**

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 2 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, where the defendant is domiciled in a Member State other than that in which the court seised is situated, it precludes the application of a national rule of jurisdiction such as that provided for in Article 4 of the Law of 27 July 1961 on Unilateral Termination of Exclusive Distribution Agreements of Indefinite Duration, as amended by the Law of 13 April 1971 on Unilateral termination of distribution agreements.**
2. **Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that the rule of jurisdiction laid down in the second indent of that provision for disputes relating to contracts for the supply of services is applicable in the case of a legal action by which a plaintiff established in one Member State claims, against a defendant established in another Member State, rights arising from an exclusive distribution agreement, which requires the contract binding the parties to contain specific terms concerning the distribution by the distributor of goods sold by the grantor. It is for the national court to ascertain whether that is the case in the proceedings before it.**

[Signatures]