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ECJ: THE CONCEPT OF 'THE PLACE OF DELIVERY OF THE GOODS' in TERMS of ARTICLE 5(1) (b) of BRUSSELS I REGULATION (*CAR TRIM CASE*)

Abstract

The paper discusses the judgment C-381/08 of the European Court of Justice (ECJ) of 25 February 2010 on a reference for preliminary ruling made by the German Federal Court of Justice (BGH) in the case of the Car Trim. This reference for preliminary ruling concerns the interpretation of Article 5(1) (b) of Brussels I Regulation and, more specifically, concerns the issue of how to determine the place of delivery of the goods in the case of contracts involving carriage of goods. The question of BGH was whether in case of a sales contract involving carriage of goods, the place where the goods were delivered or should have been delivered is to be determined by reference to the place of physical transfer to the purchaser. ECJ came to the conclusion that in the case of a sale involving carriage of goods, the first indent of Article 5 (1) (b) of Brussels I Regulation must be interpreted as meaning that the place where, under the contract, the goods sold were delivered or should have been delivered must be determined on the basis of the provisions of that contract. Where it is impossible to determine the place of delivery on that basis, without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.

Key words: *European Court of Justice, contract for the sale of goods, place of delivery of the goods, jurisdiction*

1. INTRODUCTION

Article 5(1) of Brussels I Regulation[1] deals with special international jurisdiction in the matter of contracts. Compared with Article 5(1) of Brussels

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[1] Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.01.2001. Brussels I

Convention 1968[2], article 5(1) of Brussels I Regulation introduces a sub-classification of contracts with different connecting factors and reads as follows:

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

- In matters relating to a contract, in the court for the place of performance of the obligation in question;

- 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 the services, the place in a Member State where, under the contract, the services were provided or should have been provided,

- if subparagraph (b) does not apply than subparagraph (a) applies.

This provision is a result of the European legislator's policy and idea that the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and must always be available on this ground, but in addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on the close link between the court and the action or in order to facilitate the sound administration.[3] Thus, the Article 5(1) of Brussels I Regulation, like other special, alternative jurisdiction rules, foresees in additional forum for claims related to contractual matters. This solution is initially justified on two grounds. First, it justified by the objective of proximity or close connection between the forum and the claim. Second, it aims at procedural balance

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Regulation is the key European instrument on jurisdiction and enforcement in civil and commercial matters. This Regulation is not only the most relevant EU regulation for international litigations in practice, it is also a symbolically loaded pieces of EU cooperation. This Regulation has undergone an extensive review and has been replaced by the recast Brussels Regulation (Regulation (EU) No 1215/2012 OJ L 351/1 (the 'Recast Regulation') which is applicable in EU Member States from 10 January 2015. Article 5(1)(b) of Brussels I Regulation essentially has remained unrevised except numbering - in Recast Brussels Regulation it is Art (7)(1).

[2] Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, of 27.09.1968. as amended, OJ C 027, 26.01.1998 (consolidated version).

[3] See the recital 11 and 12 in the preamble to Brussels I Regulation.

between parties, by giving the plaintiff a choice to bring proceedings to a forum of his convenience, rather than to the *forum rei*.[4]

Article 5(1) of the Brussels I Regulation comprehends a *general* contract jurisdiction rule under Article 5(1)(a) which applies to all types of contracts and *lex speciali* jurisdiction rule under Article 5(1)(b) for two specific types of contracts: contracts for sale of goods and contracts for the provision of services.[5] These two rules establishes a deferent connecting factors: the rule under Article 5(1)(a) confers jurisdiction on 'the place of performance of the obligation in question', while the rule under Article 5(1)(b) is based on the close connection justification and confers jurisdiction on 'the place where the goods were delivered or should have been delivered' (contracts for sale of goods) and 'the place where the services were provided or should have been provided' (contracts for provision of services) respectively.

Practical application of the connected factor of a *general* jurisdiction rule has been problematic from the very beginning since the concept of 'obligation in question' was interpreted differently and it was the reason that national courts referred to European Court of Justice (ECJ) a lot of questions for a preliminary rulings.[6] So, the new rule of subparagraph (b) was expected to overcome the main difficulties raised in practice.

According to Article 5(1) (b) of Brussels I Regulation, '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'. So, the obligation to deliver, which is generally considered as the characteristic obligation of a sales contract, is the determinative obligation for contract jurisdiction under the first indent of Article 5(1) (b) of Brussels I Regulation. The connecting factor consists in an objective localization of the place of performance for sales

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[4] See Jenard Report on the Convention on the jurisdiction and the enforcement of judgments in civil and commercial matters, (1968) OJ No C59/1, at 22; R. Michaels, *Re-Placements. Jurisdiction for Contracts and Torts under the Brussels I Regulation When Arts. 5(1) and 5(3) Do Not Designate a Place in a Member State,* International Civil Litigation in Europe and Relations with Third States, 2005, 129-156, 149.

[5] See H. van Lith, *International Jurisdiction and Commercial Litigation – Uniform Rules for Contract Disputes,* The Hague, 2009. 85.

[6] Shortly after the Brussels Convention entered into force, the Court was asked to clarify what was meant with 'the place of performance of the obligation in question' (two crucial cases were: Tessili case (Case 12/76 Tessili v. Dunlop, 1976, ECR 1473) and the De Bloos case (Case 14/76 De Bloos v. Bouyer, 1976, ECR 1497). See more: M. Petrović, *Posebna međunarodna nadležnost za sporove iz ugovornih odnosa prema pravu EU i pravu Republike Srbije,* Anali Pravnog fakulteta u Beogradu, Beograd, 2014, 48-50.

contracts, i.e. the place of delivery, regardless of the obligation that forms the basis of the legal proceedings.[7] By introducing this new rule, the European legislator wanted to create an 'autonomous' rule, independent of the *lex causae*.[8]

Although the Article 5(1) (b) of Brussels I Regulation was generally welcomed, the determination of the place of delivery was more problematic than it was initially thought to be and needed further clarification or interpretation by the ECJ. In other words, new questions and new problems have arisen, such as for example, the meaning of the word 'under the contract', than the question of factual delivery without a contractual place of delivery, than non-delivery and no specified place of delivery or wrongful delivery, delivery in a third state or the question what should be in the case of multiple places of delivery.[9] Keeping in mind that one of the main objectives of Brussels I Regulation is to avoid multiplication of competent forums, especially when these are located in different Member States, and to avoid irreconcilable judgments,[10] importance of uniform interpretation of these notions is doubtless.

Only in the year 2010 and in the first half of 2011, the Court of Justice has rendered several decisions concerning the Brussels I Regulation. For some authors, the 'star' of the year has been Article 5(1) (b), one of the most often applied European provisions on jurisdiction in civil and commercial matters.[11]

This paper deals with *Car Trim* case and ECJ decision rendered in that matter.[12] In this case the Court had to decide what is the place of delivery in the case of sale contract involving carriage of goods. One has to wonder whether this is the place of final destination of the goods or whether the relevant place is that where the goods are handed over to the first independent carrier. Since the Brussels I Regulation itself does not allow one

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[7] U. Magnus and P. Mankowski, *European Commentaries on Private International Law - Brussels I Regulation,* European Law Publisher, 2007, paragraph 100, 136.

[8] See F. Ferrari, *Remarks on the autonomous interpretation of the Brussels Regulation,* in particular of the concept of "place of delivery" under Art.5(1)(b), and the Vienna Sales Convention (on the occasion of a recent Italian court decision) available at: www.ialsnet.org/meetings/ business/Ferrari franko-USA.pdf

[9] For more details see: H. van Lith, *op.cit.,* 87-94.

[10] See C-125/92 Mulox v. Geels, (1993) ECR 4075, para. 11.

[11] M. A. Lupoi, *A Year in the Life of Regulation (UE) N. 44 of 2001,* available at: www.academia.edu/887924/Ayear-in-the-life-of-regulation-EU-44-of-2001, date of access: April 15, 2016.

[12] Case C-381/08, Car Trim GmbH v. KeySafety Systems Srl, ECLI:EU:C:2010:90.

to infer an answer from either its legislative history or its wording, the Court was asked to clarify and determine this concept.

The aforementioned decision is worth being commented since it defined the concept of the 'place of delivery' in the case of sales contract involving carriage of goods. This means that all national courts of the Member States have to interpret this concept in the same way, what further means that the uniform application of Article 5(1) (b) of Brussels I Regulation is ensured. Nevertheless, one can wonder whether it means that there are no remaining uncertainties concerning this matter.

2. THE CIRCUMSTANCES OF THE CASE

KeySafety, which is established in Italy, supplies Italian car manufacturers with airbag systems. Between July 2001 and December 2003, KeySafety purchased from Car Trim components used in the manufacture of those systems, in accordance with five supply contracts. ('the contracts').

KeySafety terminated the contracts with effect from the end of 2003. On the view that those contracts should have run, in part, until summer 2007, Car Trim claimed that the terminations were in breach of contract and brought an action for damages before the Landgericht Chemnitz (Regional Court, Chemnitz), which at that time had jurisdiction for its place of production. Landgericht Chemnitz rejected the action as inadmissible, on the ground that the German courts have no international jurisdiction.

The Oberlandesgericht (Higher Regional court) dismissed the appeal brought by Car Trim. The claimant (Car Trim) then brought an appeal on a point of law before the Bundesgerichtshof (German Federal Court of Justice). According to the Bundesgerichtshof, the success of that action turns on whether the Landgericht Chemnitz was wrong in denying that it had international jurisdiction, an issue which has to be determined on the basis of Brussels I Regulation.

The answer to that question depends on the interpretation of Article 5(1)(b) of Brussels I Regulation, given that KeySafety has its 'business domicile' – which, under Article 2 of Brussels I Regulation, can determine jurisdiction – in Italy, and the Oberlandesgericht found that the German courts neither have exclusive jurisdiction under Article 22 of Brussels I Regulation, nor express or implied jurisdiction under Articles 23 and 24 of that regulation respectively.

Consequently, it is possible for the German courts to have jurisdiction to adjudicate the action for damages only if the place of production is to be

regarded as the place of performance of 'the obligation in question' within the meaning of Article 5(1) of Brussels I Regulation.

The Bundesgerichtshof considers that jurisdiction lies with the court which has the closest geographical connection to the place of performance of the obligation which characterises the contract. For those purposes, it is necessary to identify the preponderant contractual obligations, which, in the absence of any other suitable connection, must be determined by reference to economic criteria.[13]

In the event that the place of performance determining jurisdiction is the place identified in the first indent of Article 5(1)(b) of Brussels I regulation, it would be necessary to determine the place to which the goods sold were delivered, or should have been delivered, under the contracts. The Bundesgerichtshof considers that, even in the case of sales contracts involving carriage of goods, that place of performance refers to the place where, under the contracts, the purchaser obtained, or should have obtained, actual power of disposal over the delivered goods.

In those circumstances, the Bundesgerichtshof decided to stay the proceeding and to refer the matter to the ECJ.

3. THE QUESTION REFERRED FOR A PRELIMINARY RULING

The question referred was whether, "in the case of a sales contracts involving carriage of goods, the place where, under the contract, the goods sold were 'delivered' or should have been 'delivered' within the meaning of the first indent of Article 5(1)(b) of Brussels I Regulation is to be determined by reference to the place of physical transfer to the purchaser, or according to the place at which the goods were handed over to the first carrier for transmission to the purchaser".[14]

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[13] The criterion of the preponderant economic obligation is also that specified in Article 3(2) CISG or Article 6(2) of the United Nations Convention on the Limitation Period in the International Sale of Goods of 14 June 1974. See para. 24 of the ECJ Judgment C-381/08.

[14] See para 26.2. Actually, it was the second question referred to ECJ. The first one essentially asked whether contracts for the supply of goods to be produced or manufactured were contracts for the sale of goods or contracts for the provision of services, in particular where the customer has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced. In other words, this question concerned the distinction of contracts for the sale of goods and contracts for the provision of services within the meaning of Article 5(1) (b) Brussels I

The second possibility in defining the concept at hand, referred by Bundesgerichtshof, is actually implicit in United Nations Convention on Contracts for the International sale of Goods (CISG) (1980) which is the international substantive law instrument. Namely, under the Article 31(a) CISG the place of delivery relevant for the purpose of establishing jurisdiction is that where 'the goods (are handed) over the first carrier for transmission to the buyer'.[15]

By this question, the referring court essentially asks the Court to interpret the meaning of 'the place in a Member State where, under the contract, the goods were delivered or should have been delivered' in the first indent of Article 5(1)(b) Brussels I Regulation in order to determine the place of performance of the obligation, which is a linking factor to determine the competent court in matters relating to contract.[16]

It should be recalled that all requests from the national court for a preliminary ruling are published in the Official Journal, in order inter alia to give other institutions and Member States the opportunity for submitting observations. In this particular case, written observations were submitted by the defendant in the main proceedings, the German, Czech and United Kingdom Governments and by the Commission of the European Communities.

4. THE JUDGMENT OF ECJ

With regard to the referred question, the Court (Fourth Chamber) held that 'the first indent of Article 5(1)(b) of Brussels I Regulation must be interpreted as meaning that, in the case of a sale involving carriage of goods, the place where, under the contract, the goods sold were delivered or should have been delivered must be determined on the basis of the provisions of

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Regulation in the case of contracts for the supply of goods to be produced where the customer has specified certain requirements. Id. 26.1.

[15] Opinion that 'autonomous' interpretation can be achieved by resorting to the ('autonomous') definition contained in CISG has been criticized, on the grounds that an international procedural law instrument of European origin, such as the Brussels I Regulation, cannot be interpreted in the light of a substantive law instrument of 'extra-European' origin such as the CISG. See Tribunale di Rovereto, 28 August 2004, International Lis, 2005, 132, cit. according: F. Ferrari, *op cit.*, 9. Generally, this question made national courts of Member States confused, since some of them decided contrary (see Tribunale di Padova, 10 January 2006, Giurisprudenza italiana, 2006).

[16] See para 27 of The Opinion of Advocate General Mazak delivered on 24 September 2009, ECLI:EU:C:2009:577.

that contract. Where it is impossible to determine the place of delivery on that basis, without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction'.

5. EXTRACT FROM THE REASONS

In order to answer the question referred, the Court based its considerations on the origins, objectives and scheme of Brussels I Regulation (see Case C-386/05 *Color Drack* (2007) ECR I-3699, paragraph 18, and Case C-204/08 *Rehder* (2009) ECR I-0000, paragraph 31).[17] In that sense, Advocate General stressed that the interpretation sought must take account of the objectives of proximity and predictability and be in conformity with the requirement of legal certainty.[18]

The Court started by recalling that it is the settled case-law that the rule of special jurisdiction in matters relating to a contract, as set out in Article 5(1) of Regulation, reflects an objective of proximity and the existence of a close link between the contract and the competent court, with the further corollary that provisions on the special jurisdiction are justified only in so much as they enhance in this principle, vis a vis the general rule which grants jurisdiction to the place where the defendant is domiciled.[19]

Moreover, the Court then moved to examine the historical context in which Article 5(1) of the Brussels Convention of 1968 came to be redrafted in the context of the new Regulation. In particular, the Court reminded that the Commission, in its Proposal of 14 July 1999, stated that it was intended 'to remedy the shortcomings of applying the rules of private international law of the State whose courts are seised' and that that 'pragmatic determination of the place of enforcement' was based on a purely factual criterion.[20] From this point of view, the Court came to conclude that autonomy of the linking factors provided for in Article 5(1)(b) precludes the application of the rules of private international law of the Member State with jurisdiction and the substantive law which would be applicable thereunder.[21]

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[17] See para. 47 of the ECJ Judgment C-381/08.
[18] See para 37 of The Opinion of Advocate General Mazak
[19] See para. 48 of the ECJ Judgment C-381/08.
[20] *Ibid.,* at 52.
[21] *Ibid.,* at 53.

According to the Court, the rule of special jurisdiction in matters relating to a contracts of sale of goods, contained in the first indent of Article 5(1)(b) of Regulation establishes the place of delivery as the autonomous linking factor based on the close connection between the contract and the court called upon to hear and determine the case. The place of delivery, as the autonomy linking factor need to be applied to all claims founded on one and the same contract for the sale of goods rather than merely to the claims founded on the obligation of delivery itself (*Color Drack,* paragraph 26).[22]

Keeping in mind that the Regulation is silent as to the definition of the concepts of 'delivery' and 'place of delivery' for the purposes of the first indent of Article 5(1)(b) thereof,[23] the Court has concluded that the first indent of Article 5(1)(b) of the Regulation must be interpreted as meaning that, in the case of sale involving carriage of goods, the place where, under the contract, the goods sold were delivered or should have been delivered, must be determined on the basis of the provisions of the contract. By this the Court made it explicitly clear that parties enjoy a freedom to contract in defining the place of delivery of the goods. The court must therefore determine whether the place of delivery is 'apparent' from the provisions of the contract, without reference to its substantive law. If it is, then that place is to be regarded as the place of delivery for the purposes of Article 5(1)(b) of Regulation.[24] Where the contract is silent however, regardless of the substantive law of the contract, according to the Court, it is necessary to determine that place in accordance with another criterion which is consistent with the origins, objectives and scheme of the Regulation.[25]

After considering that both places proposed by the referring court seem to be the most suitable,[26] the Court concluded that the place where the goods were physically transferred or should have been physically transferred to the purchaser at their final destination is the most consistent with the origins, objectives and scheme of the Regulation as the 'place of delivery' for the purposes of the first indent of Article 5(1)(b) of that regulation. According to the Court, that criterion is highly predictable. It also meets the objective of

[22] *Ibid.,* at 50. According to the Explanatory Memorandum of the Regulation's proposal, the place of delivery applies 'regardless of the obligation in question, even where this obligation is the payment of the financial consideration for the contract. It also applies where the claim relates to several obligations' (see Explanatory Memorandum, 14).
[23] See para. 51 of the ECJ Judgment C-381/08.
[24] *Ibid.,* at 54 and 55.
[25] *Ibid.,* at 57.
[26] *Ibid.,* at 59.

proximity, in so far as it ensures the existence of a close link between the contract and the court called upon to hear and determine the case. The Court pointed out, in particular, that the goods which are the subject-matter of the contract must, in principle, be in that place after performance of the contract. Furthermore, according to the Court, the principal aim of a contract for the sale of goods is the transfer of those goods from the seller to the purchaser, an operation which is not fully completed until the arrival of those goods at their final destination.[27]

In the opinion of Advocate general, given interpretation makes the place of physical transfer of the goods to the purchaser the basis for determining the place of delivery of the goods, without reference to the national law of the various Member States. By him, that criterion is easily identifiable and easy to prove, so that the court with jurisdiction can be identified without any difficulty.[28]

6. WRITTEN OBSERVATIONS SUBMITTED

The defendant and Czech and German Governments unanimously agree, in principle, that, in the case of contracts involving carriage of goods, the place where, under the contract, the goods were delivered or should have been delivered should be determined according to the place of their physical transfer to the purchaser.[29]

The Commission's answer corresponds, in principle, to the answer proposed by the defendant and Czech and German Governments. In the Commission's view, in the case of sales which require the carriage of goods and for which the seller has to hand over those goods to the first carrier for transmission to the purchaser ('sale by consignment'), the place of delivery must be determined according to the place where the purchaser obtains actual possession of the goods or should have obtained it under the contract (place of destination of the goods sold).[30]

According to the United Kingdom Government, the determination of the place of delivery depends on the terms of the contract. In cases where the seller's essential obligation is to ship the goods and (if applicable) provide documents transferring title to the buyer, then, subject to any contractual terms to the contrary, the relevant place of delivery is that at which the goods

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[27] *Ibid.*, at 61.
[28] See para. 40 of The Opinion of Advocate General Mazak.
[29] *Ibid.*, at 28.
[30] *Ibid.*, at 30.

were handed over to the carrier for transmission to or at the direction of the buyer.[31]

7. CONCLUSION

Generally, Article 5(1) (b) of Brussels I Regulation, which provides for jurisdiction in matter of contracts for sale of goods and provision of services, was welcomed as it introduces autonomous fact-based concepts for the purposes of establishing jurisdiction.

Concerning the contracts for sale of goods, the 'place of delivery' of the goods is determined as linking factor for establishing jurisdiction. Although it was welcomed, this factual concept is more problematic than it was initially thought to be and needed further clarification and interpretation by the ECJ. The question is particularly troublesome in case of sales contract involving carriage of goods.

In *Car Trim* case the Court was ready to make clear that the place of delivery of the goods is in principle to be that agreed by the parties in the contract. Where it is possible to identified the place of delivery in that way, without reference to the substantive law applicable to the contract, therefore, it is that place which is to be regarded as the place where, under the contract, the goods were delivered or should have been delivered, for the purposes of the first indent of Article 5(1) (b) of the Regulation. It means that the courts of the Member States are supposed to examine the contract and check whether it contains and express provision on the place where the goods are supposed to be delivered. The Court then went on to determine the place of delivery in the absence of an agreement between the parties. The answer to this question, given by the Court, is that place of delivery is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sale transaction. According to the Court, such criterion should be preferred because it is highly predictable and also because it meets the objective of proximity, in so far as it ensures the existence of a close link between the contract and the court seized to hear and determine the case.

It must be stressed that the facts underlying *Car Trim* do not reveal the use of a particular INCOTERM nor another contractual clause governing the delivery. The Court did not examine the role of these clauses in determining jurisdiction issue in disputes concerning contracts of sale. Indeed, the Court

[31] *Ibid.,* at 31.

was not required to consider in details that question and examine whether that kind of contracts terms could constitute agreement concerning the place of delivery. So, this very important question has remained without the answer in this Court decision.

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