AG Opinion on Art. 5 No. 1 (b) Brussels I

As pointed out already in the "asides category", on 12 January 2010 AG Trstenjak's opinion in case C-19/09 (*Wood Floor Solutions*) on Art. 5 No. 1 Brussel I has been published.

Since the opinion is not available in English (yet), here's a short summary:

The case concerns basically the questions, whether Art. 5 No. 1 (b) second indent Brussels I Regulation is applicable in case of a contract for the provision of services where the services are provided in several Member States and which criteria should be applied for determining the court having jurisdiction.

The *Oberlandesgericht Wien* had referred the following questions to the ECJ for a preliminary ruling:

> *1. (a) Is the second indent of Article 5(1)(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 ('Regulation No 44/2001') applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?*
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> *If the answer to that question is in the affirmative,*
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> *Should the provision referred to be interpreted as meaning that*
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> *(b) the place of performance of the obligation that is characteristic of the contract must be determined by reference to the place where the service provider's centre of business is located, which is to be determined by reference to the amount of time spent and the importance of the activity;*
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> *(c) in the event that it is not possible to determine a centre of business, an action in respect of all claims founded on the contract may be brought, at the applicant's choice, in any place of performance of the service within the Community?*
>
> *2. If the answer to the first question is in the negative: Is Article 5(1)(a) of*

Regulation No 44/2001 applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?

In her opinion, the AG turns first to the question whether the reference is admissible at all (para. 47 et seq.). The question of **admissibility** arises in the present case since under the former Art. 68 EC-Treaty only courts against whose decisions there is no judicial remedy under national law were competent to request the ECJ to give a preliminary ruling on the interpretation of Community law. (Thus, this question will not arise under the Lisbon Treaty since under Art. 267 of the Treaty on the Functioning of the European Union this restriction does not exist anymore).

In the present case it is questionable whether the referring court can be regarded as a court of last instance in terms of (the former) Art. 68 EC-Treaty since the question whether there are judicial remedies against the decision of the *Oberlandesgericht Wien* depends – according to Austrian civil procedural law – on the decision of the referring court: As the AG points out, in case the referring court should confirm the decision of the first instance court, there would be be no remedy against its decision – and vice versa (para. 48 et seq.).

According to the AG, the reference is admissible: She points out that otherwise the referring court would – as intended – confirm the first instance court's ruling which would result in the fact that – under Austrian law – there would be no remedy against this decision; i.e. the referring court would (then) be a court of last instance in terms of Art. 68 EC (para. 50).

In the AG's opinion, the mere possibility that the referring court *might* be the court of last instance has to be regarded as sufficient for the purposes of admissibility. Thus, *in favorem* of admissibility, the AG regards the reference as admissible (para. 50).

With regard to the **first question (1 (a))** (para. 52 et seq.), i.e. the question of the applicability of Art. 5 (1) b second indent Brussels I with regard to contracts for the provision of services if the services are provided in different Member States, the AG refers to the judgments given by the ECJ in *Color Drack* and in particular *Rehder*: In *Color Drack*, the ECJ held with regard to the sale of goods

that the first indent of Art. 5 (1) (b) Brussels I has to be interpreted as applying where there are several places of delivery *within a single* Member State. Further, the Court stated that the court of the principal place of delivery – which had to be determined on the basis of economic criteria – had jurisdiction. In the absence of determining factors for establishing the principal place of delivery, the plaintiff could sue the defendant in the court for the place of delivery of its choice.

In *Rehder* – which has been decided *after* the Austrian court had referred the present questions to the ECJ – the Court has already answered the question of whether Art.5 (1) (b) second indent Brussels I is applicable with regard to provisions of services where the provision is effected in *different* Member States. In this decision the Court held that "[t]he factors on which the Court based itself in order to arrive at the interpretation set out in *Color Drack* are also valid with regard to contracts for the provision of services, including the cases where such provision is not effected in one single Member State" (*Rehder*, para. 36). Thus, the AG concludes that Art. 5 No.1 (b) second indent Brussels I is applicable with regard to contracts for the provision of services also in cases where the services are provided in several Member States (para. 67)

With regard to the question whether the place of performance of the obligation that is characteristic of the contract must be determined by reference to the place where the service provider's centre of business is located (**question 1 (b)**), the AG emphasises the principle of predictability as well as the principle of the closest linking factor (para. 70 et seq.) which are crucial for the determination of jurisdiction.

Also in this respect, the AG refers to the ECJ's decision in *Rehder* where the ECJ has held that "the place with the closest linking factor between the contract in question and the court having jurisdiction [is] in particular the place where, pursuant to that contract, the main provision of services is to be carried out" (*Rehder*, para. 38).

The AG argues that these considerations apply to this case as well, taking into account, however, that it has not been agreed upon in the present case where the main provision of services has to be carried out. Therefore, under these circumstances it is – according to the AG – decisive where the main provision of services was actually carried out, which has to be determined by the national court (para. 80).

With regard to **question 1 (c)** the AG argues that, in the event that it is not possible to determine the place where the main provision of services was carried out, with regard to commercial agency contracts, the place of establishment of the commercial agent is regarded as the place of the provision of services (para. 94).

See with regard to this case also our previous post on the reference which can be found here.