

ECJ: AG Opinion on Article 5 (1)

(b) Brussels I Regulation

On February 15th, *Advocate General Bot* delivered his Opinion in Case C-386/05 (*Color Drack GmbH v LEXX International Vertriebs GmbH*).

The proceedings for a preliminary ruling concern for the first time the interpretation of Article 5 (1) Brussels I Regulation, **in particular the question whether Article 5 (1) (b) Brussels I is applicable if several places of delivery (all situated in a single Member State) are involved - which is answered affirmative by the Advocate General.**

I.) The Background of the Case

The case concerns a dispute between a company the registered office of which is in Austria (Color Drack GmbH) and a company (LEXX International Vertriebs GmbH) the registered office of which is in Germany. Color Drack purchased sunglasses from LEXX International Vertrieb and paid them in full, but had the latter company deliver them directly to its customers in different places in Austria. Subsequently, Color Drack returned the unsold sunglasses to LEXX International Vertrieb and asked to repay the respective sum. Since LEXX International Vertrieb did not pay, Color Drack brought a payment action against LEXX International at the District Court in St. Johann (Austria), in the jurisdiction of which its registered office is situated. While the District Court ruled that it had jurisdiction under Art. 5 (1) (b) Brussels I, LEXX International appealed and the Regional Court Salzburg set aside the judgment due to the fact that the District Court had lacked territorial jurisdiction. The Austrian Supreme Court to which Color Drack appealed, decided to stay the proceedings and to submit the following question to the European Court of Justice for a preliminary ruling:

Is Article 5 (1) (b) of Council Regulation (EC) No 44/2001 [...] to be interpreted as meaning that a seller of goods domiciled in one Member State who, as agreed, has delivered the goods to the purchaser, domiciled in another Member State, at various places within that other Member State, can be sued by the purchaser regarding a claim under the contract relating to all the (part) deliveries - if need be, at the plaintiff's choice - before the court of one of those places (of performance)?

II.) Legal Questions

The request for a preliminary ruling raises – according to the Advocate General – two questions (para. 23 et seq.):

First, the referring court asks whether Art. 5 (1) (b) Brussels I is applicable if, as agreed between the parties, goods have been delivered to different places in a single Member State.

In case this question is answered in the affirmative, the court seeks to know secondly whether, where the claim relates to all the deliveries, the plaintiff may sue the defendant in the court of the place of delivery of his choice.

With regard to the first question, the applicability of Art. 5 (1) (b) Brussels I where there are several places of delivery in a single Member State, the Advocate General holds, along with the UK Government and the European Commission, that Article 5 (1) (b) Brussels I was applicable where, as agreed by the parties, the goods have been delivered in different places within a single Member State (para. 32).

With this holding, the Advocate General did not follow the opinion of the German and the Italian government which argued, Article 5 (1) (b) Brussels I was not applicable where there are several places of delivery.

The Advocate General referred, *inter alia*, to one of the main objectives of the Regulation, which is to prevent irreconcilable judgments given in several Member States and sets forth that there was “no risk that irreconcilable judgments may be given by courts in different Member States” even if several courts of the respective Member State had – due to the plurality of places of delivery – jurisdiction since these were all courts of the same Member State (para. 101).

Since the Advocate General answered the first question in the affirmative, he had also to address the second question, i.e. the issue whether, pursuant to Article 5 (1) (b) Brussels I, the plaintiff can bring his action before the court of the place of delivery of his choice or before the court of a particular place of performance (cf. para. 117 et seq.).

With regard to this question, the European Commission proposed to transfer the distinction between a principal obligation and an ancillary obligation as

established in the *Shenavai* judgment, to Article 5 (1) (b) Brussels I. Thus, the Commission argues, the claimant should bring his action in the court of the place of performance of the principal delivery.

This point of view is not shared by the Advocate General. He argues (at para. 128) that it was a question of the national procedural law of the Member States to decide whether all the courts in the area of which a delivery has been made have jurisdiction or whether this action falls within the jurisdiction of only one of these courts. Thus, the defendant could – as long as there were no special jurisdiction rules within the respective Member State – be sued in the court of one of the places of delivery, at the choice of the plaintiff (para. 129).

III.) Conclusion of the Advocate General

On the basis of these considerations, the Advocate General proposed to reply to the submitted questions as follows:

Where there are several places of delivery, 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 is applicable if, as agreed between the parties, the goods have been delivered in different places in a single Member State.

If the action relates to all the deliveries, it is for the law of the Member State in which the goods have been delivered to determine whether the plaintiff may sue the defendant in the court of the place of delivery of his choice or only in the court of one of those places. If the law of that State does not lay down rules on special jurisdiction, the plaintiff may sue the defendant in the court of the place of delivery of his choice.