

French Judgements on Article 5(1)(b) of the Brussels I Regulation, Part II

In a recent post, I presented two 2006 judgements of the French supreme court for private matters (*cour de cassation*) on the application of Article 5 (1)(b) to distribution contracts. The *Cour de cassation* had held twice that the distribution contracts were Contracts for the Provision of Services in the meaning of article 5.

On January 23, 2007, the same court held in *Waeco* that another kind of distribution contract, a *concession exclusive* (exclusive concession in English?) was neither a Sales of Goods, nor a Provision of Services in the meaning of article 5(1)(b), and that, as a consequence, article 5(1)(a) had to be applied.

In *Waeco*, a distribution contract of *concession exclusive de vente* (Sale exclusive concession agreement) had been concluded in 2000 between a German seller, Waeco Int'l, and a French distributor, Waeco France. When the German party terminated the contract in December 2002, the French party decided to initiate proceedings in France. The Court of appeal of Aix-en-Provence had found that article 5 (1)(b) applied. The Cour de cassation reversed and held that article 5(1)(a) applied as exclusive concession agreements were neither sales of goods, nor provisions of services. It then went on to determine the applicable law pursuant to article 4 of the Rome convention to assess where the obligation in question was being performed. It held that the characteristic obligation was the provision of the sales exclusivity by the German seller to the French distributor, and that German law thus applied.

French judgements never mention previous cases. It is thus left to commentators to guess whether what may appear as a contradiction is not, or is. The only way to reconcile these cases that I can think of is to distinguish them on the nature of the distribution contract involved. In the 2006 cases, the distributor was not buying to resell, but was only making the sale happen: he was either facilitating the sale, or an agent. The distribution contract did not entail any sale. In *Waeco*, the distributor was buying the goods from the seller to resell them, and had the exclusivity of the sales on his commercial territory. The distribution contract

involved both a sale and a service. For choice of law purposes, the Cour de cassation rules that one (sales exclusivity) is more important than the other, but for jurisdictional purposes, it refuses to choose and comes back to the good old article 5(1)(a) rule.