

Reference on Art. 5 No. 1 (b) Brussels I: Distinction between sales of goods/provision of services and determination of place of performance regarding contract involving carriage of the goods

With decision of 9th July 2008, the German Federal Supreme Court (*Bundesgerichtshof*) has referred a reference to the ECJ for a preliminary ruling on the interpretation of Art. 5 No. 1 (b) Brussels I Regulation.

The German-Italian case concerns contracts for the delivery of goods to be manufactured or produced which, however, showed certain elements of a provision of services as well. Further, the contracts involved carriage of the goods in terms of Art. 31 (a) CISG.

The reference basically deals with two issues which have been discussed controversially so far:

First, the case concerns the question on how the place of performance in terms of Art. 5 No. 1 (b) Brussels I should be determined if the contract shows elements of a sale of goods as well as a provision of services and thus raises the question of the delimitation of the first and the second indent of Art. 5 No. 1 (b) Brussels I. This question has not been decided by the ECJ so far. With regard to contracts for the delivery of goods to be manufactured or produced, the *Bundesgerichtshof* tends - in view of Art. 1 (4) of the Directive on certain Aspects of the Sale of Consumer Goods and Associated Guarantees according to which also contracts for the supply of consumer goods to be manufactured or produced shall be deemed contracts of sale for the purpose of the directive - to regard certain specifications made by the ordering party e.g. on the purchasing, the processing or the guarantee of the quality of the goods not as leading necessarily to a qualification as contracts for the provision of services. Rather, the

Bundesgerichtshof supports a qualification according to the main emphasis of the contract.

Secondly, the referring decision deals with the question of how the place of performance in terms of Art. 5 No. 1 (b) first indent Brussels I Regulation has to be determined if the contract involves carriage of the goods: Is it the place where the goods are handed over to the buyer or the place where the goods are consigned to the first carrier for transmission to the buyer? The *Bundesgerichtshof* refers in its decision not only to the - in this respect divided - German case law, but also to Italian and Austrian decisions: While the Italian *Corte Suprema di Cassazione* regarded in its judgment of 27th September 2006 Art. 31 (a) CISG to be applicable and thus regarded the place of performance to be the place where the goods were handed over to the first carrier for transmission to the buyer, the *Oberste Gerichtshof* of Austria held in its decision of 14th December 2004 that the place of delivery was the place where the buyer actually takes the goods as a delivery in conformity with the contract. The *Bundesgerichtshof* tends to regard as the place of performance in terms of Art. 5 No. 1 (b) first indent Brussels I - also with regard to sales of goods involving carriage of the goods - the place where the buyer obtains, or should have obtained under the contract, control over the goods.

However, since both questions raised in this case have not been decided by the ECJ yet, the *Bundesgerichtshof* referred the **following questions to the ECJ for a preliminary ruling**:

1. Has Art. 5 No. 1 (b) of Regulation (EC) No. 44/2001 to be interpreted as meaning that contracts concerning the delivery of goods to be produced or manufactured have to be qualified as sales of goods (first indent) and not as provision of services (second indent) even in cases where the ordering party has made certain specifications regarding the acquisition, processing and delivery of the goods to be produced including the guarantee of the quality of manufacture, reliability of delivery and the smooth administrative processing of the order? Which criteria are decisive with regard to the delimitation?

2. In case a sale of goods has to be assumed: Has - in case the contract of sale involves carriage of the goods - the place in a Member State where, under the contract, the goods were delivered or should have been delivered, to be

determined according to the place where the goods are handed over to the buyer or according to the place where the goods are consigned to the first carrier for transmission to the buyer?

(Approximate translation of the German referring decision.)

The decision of the Bundesgerichtshof of 9th July 2008 (VIII ZR 184/07) can be found (in German) at the website of the German Federal Supreme Court.

Update: The case is pending at the ECJ under C-381/08 (*Car Trim GmbH v KeySafety Systems SRL*).