AG Opinion on the Interpretation of Art. 5 (1) Brussels I Regulation

Yesterday, *Advocate General Trstenjak`s* opinion in case C-533/07 (*Falco Privatstiftung und Rabitsch*) was published.

This case is of particular interest since it concerns the interpretation of the notion of "services" (Art. 5 (1) (b) second indent Regulation (EC) Nr. 44/2001 (Brussels I Regulation)) which has not been interpreted by the ECJ in the context of the Regulation so far. Further, with Art. 5 (1) Brussels I Regulation, the case concerns the interpretation of a provision which has been highly discussed in the course of the transformation of the Brussels Convention to the Regulation.

I. Background

The case concerns – briefly worded – proceedings between two plaintiffs, the first being a foundation managing the intellectual property rights of the late Austrian singer "Falco" established in Vienna (Austria), the second being a natural person domiciled in Vienna as well and a defendant domiciled in Munich (Germany) who are arguing about royalties regarding DVDs and CDs of one of the late singer's concerts: While a licence agreement was concluded between the plaintiffs and the defendant concerning the distribution of the DVDs in Austria, Germany and Switzerland, the distribution of the CDs was not included by this agreement. In the following, the plaintiffs sued the defendant for payment – based, with regard to the DVDs, on the licence agreement and with regard to the CDs on the infringement of their intellectual property rights.

The first instance court in Austria (*Handelsgericht Wien*) assumed its international jurisdiction according to Art. 5 (3) Brussels I Regulation arguing that it had jurisdiction with regard to the infringement of intellectual property rights since the respective CDs were sold inter alia in Austria. Due to the close connection between the claim based on the licence agreement and the claim based on the infringement of intellectual property rights, the court assumed jurisdiction for the contractual claim as well.

The court of second instance *(Oberlandesgericht Wien*), however, held that it had no jurisdiction with regard to the claim based on the licence agreement arguing

Art. 5 (1) (a) Brussels I Regulation was applicable. Since the principal contractual obligation was a debt of money, which had to be fulfilled under German law as well as under Austrian law at the debtor's domicile (Munich), German (and not Austrian) courts had jurisdiction. According to the *Oberlandesgericht Wien*, jurisdiction could not be based on Art. 5 (1) (b) Brussels I Regulation either, since the licence agreement did not involve the "provision of services" in terms of the Regulation.

Subsequently, the plaintiffs appealed to the Austrian Supreme Court of Justice (*Oberster Gerichtshof*).

II. Reference for a Preliminary Ruling

Since the *Oberste Gerichtshof* had doubts on the interpretation of Art. 5 (1) Brussels I, it referred the following **questions** to the ECJ for a preliminary ruling:

> *1. Is a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (a licence agreement) a contract regarding 'the provision of services' within the meaning 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 (the Brussels I Regulation)?*
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> *2. If Question 1 is answered in the affirmative:*
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> *2.1. Is the service provided at each place in a Member State where use of the right is allowed under the contract and also actually occurs?*
>
> *2.2. Or is the service provided where the licensor is domiciled or, as the case may be, at the place of the licensor's central administration?*
>
> *2.3. If Question 2.1 or Question 2.2 is answered in the affirmative, does the court which thereby has jurisdiction also have the power to rule on royalties which result from use of the right in another Member State or in a third country?*
>
> *3. If Question 1 or Questions 2.1 and 2.2 are answered in the negative: Is jurisdiction as regards payment of royalties under Article 5(1)(a) and (c) of the Brussels I Regulation still to be determined in accordance with the principles which result from the case-law of the Court of Justice on Article 5(1) of the*

Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Brussels Convention)?

III. Opinion

1. First Question

In her extensive opinion, AG *Trstenjak* first clarifies that the referring court basically aims to know with regard to the first question whether Art. 5 (1) (b) second indent Brussels I Regulation has to be interpreted to that effect that a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (a licence agreement) constitutes a contract regarding the "provision of services" within the meaning of this provision – and thus whether a licence agreement can be regarded as a contract on the provision of services in terms of Art. 5 (1) (b) second indent Brussels I Regulation (para. 46).

With regard to this question, the AG states in a first step, that "licence agreement" has to be understood in this context as a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (para. 48 et seq.).

In a second step, the AG turns to the notion of "services" in Art. 5 (1) (b) second indent Brussels I which does not provide for an explicit definition of this term (para. 53 et seq.). Here, the AG stresses that – due to the lack of an express definition and the fact that the ECJ has not interpreted the meaning of services in the context of the Brussels I Regulation so far – starting point for an interpretation has to be on the one side the general meaning of this term while on the other side, an analogy to other legal sources might be taken into consideration. With regard to an abstract definition of "services", the AG regards two elements to be of particular significance: First, the term of "services" requires some kind of activity or action by the one providing the services. Secondly, the AG regards it as crucial that the services are provided for remuneration (para. 57).

On the basis of this general definition, the AG holds that a licence agreement cannot be regarded as a contract having as its object the provision of services in terms of Art. 5 (1) (b) second indent Brussels I Regulation (para. 58) since the

licensor does not perform any activity by granting the licence. The lincensor's only activity constitutes the signing of the licence agreement and the ceding of the licence's object for use. This, however, cannot, in the AG's view, be regarded as "service" in terms of this provision.

In the following, the AG also turns to primary law in order to examine whether the term of "service" used in primary law can be transferred to the Brussels I Regulation (para. 60 et seq.). This, however, does not lead to a different assessment since, according to the AG, the definition of "services" cannot be transferred to the Brussels I Regulation without restrictions due to the fact that the objectives of the Regulation have to be taken into account – and they differ significantly from the purposes underlying the broad interpretation of "services" in terms of Art. 50 EC aiming at establishing a common market (para. 63).

Of particular interest is the AG's reference to Regulation (EC) No. 593/2008 (Rome I Regulation) (para. 67 et seq.) which is used as an additional argument supporting her opinion: She stresses that – by interpreting the notion of "services" – also the Rome I Regulation has to be taken into consideration in order to prevent an interpretation being contrary to the aims of Rome I since Recital No. 7 of the Rome I Regulation states: "The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 […]". Here, the AG shows with a view to the origin of the Rome I Regulation that an interpretation including licence agreements into the notion of "services" would run counter to the aims of Rome I (para. 69).

2. Third Question

Due to the fact that the AG answers the first question in the negative, she does not deal with the second question, but turns directly to the third question by which the Austrian court basically aims to know whether Art. 5 (1) (a) Brussels I *Regulation* has to be interpreted in continuity with Art. 5 (1) Brussels *Convention* (para. 78 et seq.).

With regard to this question, the AG argues – after explaining in detail the changes Art. 5 has passed through from the Convention to the Regulation (para. 80 et seq.) – that Art. 5 (1) (a) Brussels I Regulation has to be – in view of Recital No. 19 of the Brussels I Regulation according to which "[c]ontinuity between the

Brussels Convention and [the Brussels I] Regulation should be ensured […]" – interpreted in the same way as Art. 5 (1) Brussels Convention (para. 87). This approach is supported by the identical wording of both provisions as well as historical arguments (para. 94). Here, the AG pays particular attention to the fact that by means of Art. 5 (1) (b) Brussels I *Regulation* a special provision with regard to contracts concerning the sale of goods and the provision of services was established, while with regard to all other contracts the wording of the first part of Art. 5 (1) Brussels *Convention* was maintained in Art. 5 (1) (a) Brussels I *Regulation* (para. 85).

3. The Advocate General's Conclusion

Thus, AG *Trstenjak* suggests that the Court should answer the questions referred for a preliminary ruling as follows:

1. With regard to the first question, the AG suggests that Art. 5 (1) (b) second indent Brussels I Regulation has to be interpreted as meaning that a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (licence agreement) does not constitute a contract regarding 'the provision of services' in terms of this provision.

2. With regard to the third question, the AG suggests that Art. 5 (1) (a) and (c) Brussels I Regulation has to be interpreted to the effect that jurisdiction for proceedings related to licence agreements has to be determined in accordance with the principles which result from the ECJ's case law regarding Art. 5 (1) Brussels Convention.

(Approximate translation of the German version of the AG's opinion.)

AG Trstenjak's opinion can be found (in German, French, Italian and Slovene) at the ECJ's website. The referring decision of the Austrian Supreme Court of Justice of 13 November 2007 can be found here under 4Ob165/07d (in German).