

ECJ: Distinction between “Sale of Goods” and “Provision of Services” in Terms of Art. 5 (1) (b) Brussels I (Car Trim)

On 25 February, the ECJ delivered its judgment in case C-381/08 (*Car Trim*).

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

(1) *Is Article 5(1)(b) of Council Regulation No 44/2001 to be interpreted as meaning that contracts for the supply of goods to be produced or manufactured are, notwithstanding specific requirements on the part of the customer with regard to the provision, fabrication and delivery of the components to be produced, including a guarantee of the quality of production, reliability of delivery and smooth administrative handling of the order, to be classified as a sale of goods (first indent), and not as provision of services (second indent)? What criteria are decisive for the distinction?*

(2) *If a sale of goods is to be presumed: in the case of sales contracts involving carriage of goods, is the place where under the contract the goods sold were delivered or should have been delivered to be determined according to the place of physical transfer to the purchaser, or according to the place at which the goods were handed over to the first carrier for transmission to the purchaser?*

Thus, the case concerns at a first level the distinction of contracts for the sale of goods and contracts for the provision of services within the meaning of Art. 5 (1) (b) Brussels I in the case of contracts for the supply of goods to be produced where the customer has specified certain requirements. On a second level the case raises the question whether, in case of a sales contract involving carriage of goods, the place where the goods sold were delivered or should have been delivered, is to be determined by reference to the place of physical transfer to the purchaser.

With regard to the **first question**, the ECJ starts from the presumption that it is necessary with regard to the classification of a contract, to determine its characteristic obligation (para. 32 et seq.). In this respect the Court refers to several provisions of European Union law and international law giving some indication that the fact that the goods to be delivered are to be manufactured does not alter the classification of the contract as a sales contract (para. 34 et seq.).

Further, in favour of a classification of the contract as a contract for the sale of goods, the Court takes into consideration that the raw materials were not supplied by the purchaser (para. 40 et seq.).

Consequently, the Court held that

Article 5(1)(b) [Brussels I] must be interpreted as meaning that where the purpose of contracts is the supply of goods to be manufactured or produced and, even though the purchaser has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced, the purchaser has not supplied the materials and the supplier is responsible for the quality of the goods and their compliance with the contract, those contracts must be classified as a 'sale of goods' within the meaning of the first indent of Article 5(1)(b) of that regulation.

With regard to the **second question**, i.e. the question whether in case of a sales contract involving carriage of goods, the place where the goods were delivered or should have been delivered is to be determined by reference to the place of physical transfer to the purchaser, the Court held that

the first indent of Article 5(1)(b) [Brussels I] must be interpreted as meaning that, in the case of a sale involving carriage of goods, the place where, under the contract, the goods sold were delivered or should have been delivered must be determined on the basis of the provisions of that contract. Where it is impossible to determine the place of delivery on that basis, without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final

destination of the sales transaction.

In its reasoning, the Court referred in particular to the aims and objectives of the Brussels I Regulation and held that the place where the goods were physically transferred (or should have been physically transferred) to the purchaser at their final destination was the most consistent with the Regulation since it met the criterion of predictability as well as proximity (para. 60 et seq.).

See with regard to the referring decision also our previous post which can be found here.

Many thanks to Dr. Martin Illmer and Jens Karsten for the tip-off.