

Defining times – art 5(1)(b)

It currently seems fashionable to refer to the European Court of Justice ('ECJ') questions relating to art 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 Regulation').

Wood Floor Solutions v Silva Trade SA

The latest judgment of the Court is that in *Wood Floor Solutions v Silva Trade SA* (Case C-19/09), handed down on 11 March 2010. The dispute between the parties arose out of the termination of a commercial agency contract that was performed in several member states. Wood Floor relied on art 5(1)(b) of the Regulation to found jurisdiction in Austria, where the company had established its seat. Silva Trade challenged the court's jurisdiction, arguing that more than three quarters of Wood Floor's turnover was generated in countries other than Austria, and that art 5(1) did not provide for such a case. Silva Trade argued that if the place of performance could not be established because the obligation in question was not subject to geographical limitations, art 5(1) was inapplicable and jurisdiction should instead be founded on art 2.

At first instance, the Landesgericht Sankt Pölten rejected the jurisdictional challenge holding that commercial agency contracts were covered by the definition of 'provision of services' in art 5(1)(b), and that where services were provided in a number of countries, jurisdiction should be founded at the service provider's centre of business. That decision was appealed before the Oberlandesgericht Wien, who referred the matter to the ECJ.

The ECJ confirmed that the second

indent of art 5(1)(b) was applicable to cases where services are provided in several member states. Referring to its judgment in *Color Drack* (Case C-386/05), the Court noted that regarding the sale of goods, where there are several places of delivery of the goods, the 'place of performance' must be understood as the place with the closest linking factor between the contract and the court having jurisdiction. Therefore, as a general rule, it will be the principal place of delivery, which shall be determined on the basis of economic criteria.

Unsurprisingly, the Court took the same approach in relation to the provision of services, vaguely identifying 'the place of the main provision of services.' The Court outlined that for commercial agency contracts, it is the commercial agent who characterises the contract and provides the services. Thus, the place of performance must mean the place of the main provision of services by the agent, which must be deduced from the contract itself.

Where the contract does not identify the place of the main provision of services, either because there are several places or because no specific place is expressly provided for, but the service has been carried out, the Court provided an alternative formula. In such a case, account should be taken of the place where the agent has for the most part carried out his activities in performance of the contract, provided that the provision of services in that place is not contrary to the parties' intentions as it appears from the contract. Factors to take into account include the time spent at the location and the importance of the activities carried out there.

In the alternative scenario, where the place of the main provision of services cannot be determined from the contract or from actual performance, the 'place of performance' shall be the agent's domicile. It is therefore irrelevant where the commercial agency has its registered office, even though it may be

coincidental to the actual place of performance or an agent's domicile.

Car Trim GmbH v KeySafety Systems Srl

Beforehand, on 25 February 2010, the ECJ handed down its judgment in *Car Trim GmbH v KeySafety Systems Srl* (Case C-381/08). Here, the preliminary reference to the Court considered the difference between contracts for the 'sale of goods' and contracts for the 'provision of services' under art 5(1)(b) of the Regulation, and how to determine the place of performance for contracts involving carriage of goods.

Car Trim supplied KeySafety with components used in the manufacture of airbag systems. A dispute arose regarding the termination of the supply contracts and an action for damages was brought before the German Regional Court of Chemnitz, being the place where the components were manufactured. The Regional Court held that it had no jurisdiction to rule upon the action, and the Higher Regional Court also dismissed the appeal. Car Trim subsequently brought an appeal before the German Federal Court of Justice, who referred the matter to the ECJ.

The first question essentially asked whether contracts for the supply of goods *to be produced or manufactured* were contracts for the sale of goods or contracts for the provision of services, in particular where the customer has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced.

The ECJ confirmed that the Regulation does not define nor provide any distinguishing features of the two types of contract. Instead, art 5(1) identifies as a connecting factor the obligation which characterises the contract in question. It was noted that European and international legislation generally deemed contracts for the supply of goods to be manufactured or

produced as contracts of sale, save for certain exceptions, where, for example, the customer undertakes to supply a substantial part of the materials necessary for their manufacture. The Court thus concluded that the fact that the goods need to be produced or manufactured does not alter the classification of the contract as one for the sale of goods. Conversely, where all or most of the materials from which the goods are manufactured are supplied by the purchaser, the Court tentatively surmised that the contract should be classified as one for the provision of services.

It was further held that the supplier's obligation under the contract could be a defining characteristic. Where the seller is responsible for the quality of the goods and their compliance with the contract, that responsibility will 'tip the balance' in favour of classification as a contract for the sale of goods. Equally, where the seller is responsible only for correct implementation in accordance with the purchaser's instructions, the contract should be classified as a provision of services.

The second question concerned the concept of 'delivered' in contracts involving carriage of goods. Firstly, the Court made it explicitly clear that parties enjoy a freedom to contract in defining the place of delivery of the goods. In shipment sales, for example, contracting on cif or fob terms will usually result in the place of delivery being the port of loading, when the goods are taken 'across the ship's rail'.

The court must therefore determine whether the place of delivery is 'apparent' from the provisions of the contract, without reference to its substantive law. If it is, then that place is to be regarded as the place of delivery for the purposes of art 5(1)(b). Where the contract is silent however, regardless of the substantive law of the contract, the place of delivery shall be the place where the goods were physically transferred or

should have been physically transferred to the purchaser *at their final destination*. Accordingly, it is the place where the purchaser obtained, or should have obtained, actual power of disposal over the goods.

Previous judgments and pending references

Other recent judgments include *Peter Rehder v Air Baltic Corporation* (Case C-204/08), and *Falco Privatstiftung & Thomas Rabitsch v Gisela Weller-Lindhorst* (Case C-533/07). In *Rehder*, the Court held that, in the case of air transport of passengers from one member state to another, the court having jurisdiction under art 5(1)(b) to deal with a claim for compensation based on the transport contract, is the court which, at the appellant's choice, has jurisdiction over the place of departure or the place of arrival of the aircraft, as agreed in the contract. In *Falco Privatstiftung*, the Court held that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for the 'provision of services' under art 5(1)(b). Such a contract however, would fall under art 5(1)(a), which, in accordance with art 5(1)(c), is applicable to contracts which are neither contracts for the sale of goods nor contracts for the provision of services. Consequently, use of the principles that developed from the Court's case law in relation to art 5(1) of the Brussels Convention, must still continue to be made as regards interpretation of art 5(1)(a) of the Regulation.

References still pending before the ECJ regarding art 5(1)(b) include that of *Electrosteel Europe SA v Edil Centro SpA* (Case C-87/10) and *Ronald Seunig v Maria Hölzel* (Case C-147/09). The former considers whether the place of delivery is the place of final destination of the goods covered by the contract, or the place in which the seller is

discharged of his obligation to deliver – this matter has seemingly been dealt with in *Car Trim*. The latter deals with the same questions as those outlined in *Wood Floor*. Both judgments should therefore be handed down presently, and it will be interesting to see if any differences in the judgments are apparent.

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P&I insurers' information duties

Under what circumstances may an injured third party claim directly from the insurer of its tortfeasor? The Third Parties (Rights Against Insurers) Act 2010 will enter into force upon decision by the Secretary of State, and when it does, P&I insurers will for the first time be subject to the information duties provided for by the Third Parties Act.

The Third Parties (Rights Against Insurers) Act 2010 which will replace the homonymous Act from 1930 received Royal Assent on 25 March 2010. Having passed through the House of Lords and the House of Commons in just over three months, it was nevertheless 10 years in the making, the Law Commissions having issued the underlying report as long ago as 2001 (LC272). The 2010 Act will, like its predecessor the 1930 Act, apply in cases of insolvency and in cases of company winding up and will allow injured third parties to claim directly against the insurer. Given the particular structure of the shipping business, with one-ship companies whose only asset may have been lost in connection with the very event that gave rise to the liability, that right is particularly pertinent. An injured person or widow cannot very well pursue a whole family of companies and its directors via Rule B attachments