

JUDGMENT OF THE COURT (Fourth Chamber)

3 May 2007\*

In Case C-386/05,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Oberster Gerichtshof (Austria), made by decision of 28 September 2005, received at the Court on 24 October 2005, in the proceedings

**Color Drack GmbH**

v

**Lexx International Vertriebs GmbH,**

THE COURT (Fourth Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, E. Juhász, R. Silva de Lapuerta, G. Arestis and T. von Danwitz, Judges,

\* Language of the case: German.

Advocate General: Y. Bot,  
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 23 November 2006,

after considering the observations submitted on behalf of:

- Lexx International Vertriebs, by H. Weben, Rechtsanwalt,
- the German Government, by A. Dittrich and M. Lumma, acting as Agents,
- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,
- the United Kingdom Government, by S. Nwaokolo, acting as Agent, and by A. Henshaw, Barrister,
- the Commission of the European Communities, by A.-M. Rouchaud-Joët and W. Bogensberger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 February 2007,

gives the following

### **Judgment**

- 1 This reference for a preliminary ruling concerns the interpretation of the first indent 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 (OJ 2001 L 12, p. 1).

### **Regulation No 44/2001**

- 2 According to recital 2 in the preamble to Regulation No 44/2001, '[p]rovisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential'.
- 3 Recital 11 in the preamble to Regulation No 44/2001 states: '[t]he rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor'.

4 The rules on jurisdiction laid down by Regulation No 44/2001 are set out in Chapter II thereof, consisting of Articles 2 to 31.

5 Article 2(1) of Regulation No 44/2001, which forms part of Chapter II, Section 1, entitled 'General provisions', states:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

6 Article 3(1) which appears in the same section, provides:

'Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.'

7 Article 5, which appears in Section 2, entitled 'Special jurisdiction', of Chapter II of Regulation No 44/2001, provides:

'A person domiciled in a Member State may, in another Member State, be sued:

(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

— in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if Article 5(b) does not apply then Article 5(a) applies;

...'

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

- 8 This reference for a preliminary ruling has been submitted in the context of proceedings between Color Drack GmbH ('Color Drack'), a company established in Schwarzach (Austria), and Lexx International Vertriebs GmbH ('Lexx'), a company established in Nuremberg (Germany), concerning the performance of a contract for

the sale of goods, under which Lexx undertook to deliver goods to various retailers of Color Drack in Austria, inter alia in the area of the registered office of Color Drack, which undertook to pay the price of those goods.

- 9 The dispute concerns in particular the non-performance of the obligation to which Lexx was subject under the contract to take back unsold goods and to reimburse the price to Color Drack.
  
- 10 By reason of that non-performance, on 10 May 2004 Color Drack brought an action for payment against Lexx before the Bezirksgericht St Johann im Pongau (Austria) within whose jurisdiction its registered office is located. That court accepted jurisdiction on the basis of the first indent of Article 5(1)(b) of Regulation No 44/2001.
  
- 11 Lexx appealed to the Landesgericht Salzburg (Austria), which set aside that judgment on the ground that the first instance court did not have jurisdiction. The appeal court took the view that a single linking place, as provided for in the first indent of Article 5(1)(b) of Regulation No 44/2001 for all claims arising from a contract for the sale of goods, could not be determined where there were several places of delivery.
  
- 12 Color Drack appealed against the decision of the Landesgericht Salzburg, to the Oberster Gerichtshof, which considers that an interpretation of the first indent of Article 5(1)(b) of Regulation No 44/2001 is necessary in order to resolve the question of the jurisdiction of the Austrian court first seised.

13 The Oberster Gerichtshof notes that that provision specifies a single linking place for all claims arising out of a contract for the sale of goods, that is to say the place of delivery, and that that provision, which lays down a rule of special jurisdiction, must in principle be given a restrictive interpretation. In those circumstances, the Oberster Gerichtshof asks whether the court first seised on the basis of that provision has jurisdiction since, in this case, the goods were delivered not only in the area of that court's jurisdiction but at different places in the Member State concerned.

14 The Oberster Gerichtshof therefore decided to stay the proceedings and to refer the following question to the Court:

'Is Article 5(1)(b) of [Regulation No 44/2001] to be interpreted as meaning that a seller of goods domiciled in one Member State who, as agreed, has delivered the goods to the purchaser, domiciled in another Member State, at various places within that other Member State, can be sued by the purchaser regarding a claim under the contract relating to all the (part) deliveries — if need be, at the plaintiff's choice — before the court of one of those places (of performance)?'

**The question referred for a preliminary ruling**

15 By its question, the national court is essentially asking whether the first indent of Article 5(1)(b) of Regulation No 44/2001 applies in the case of a sale of goods involving several places of delivery within a single Member State and, if so, whether, where the claim relates to all those deliveries, the plaintiff may sue the defendant in the court for the place of delivery of its choice.

- 16 As a preliminary point, it must be stated that the considerations that follow apply solely to the case where there are several places of delivery within a single Member State and are without prejudice to the answer to be given where there are several places of delivery in a number of Member States.
- 17 First of all, it should be noted that the wording of the first indent of Article 5(1)(b) of Regulation No 44/2001 does not by itself enable an answer to be given to the question referred since it does not refer expressly to a case such as that to which the question relates.
- 18 Consequently, the first indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted in the light of the origins, objectives and scheme of that regulation (see, to that effect, Case C-103/05 *Reisch Montage* [2006] ECR I-6827, paragraph 29, and Case C-283/05 *ASML* [2006] ECR I-12041, paragraph 22).
- 19 In that regard, it is clear from recitals 2 and 11 in its preamble that Regulation No 44/2001 seeks to unify the rules of conflict of jurisdiction in civil and commercial matters by way of rules of jurisdiction which are highly predictable.
- 20 In that context, the regulation seeks to strengthen the legal protection of persons established in the Community, by enabling the plaintiff to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued (see *Reisch Montage*, paragraphs 24 and 25).

- 21 To that end the rules of jurisdiction set out in Regulation No 44/2001 are founded on the principle that jurisdiction is generally based on the defendant's domicile, as provided for in Article 2 thereof, complemented by the rules of special jurisdiction (see *Reisch Montage*, paragraph 22).
- 22 Thus, the rule that jurisdiction is generally based on the defendant's domicile is complemented, in Article 5(1), by a rule of special jurisdiction in matters relating to a contract. The reason for that rule, which reflects an objective of proximity, is the existence of a close link between the contract and the court called upon to hear and determine the case.
- 23 Under that rule the defendant may also be sued in the court for the place of performance of the obligation in question, since that court is presumed to have a close link to the contract.
- 24 In order to reinforce the primary objective of unification of the rules of jurisdiction whilst ensuring their predictability, Regulation No 44/2001 defines that criterion of a link autonomously in the case of the sale of goods.
- 25 Pursuant to the first indent of Article 5(1)(b) of that regulation, the place of performance of the obligation in question is the place in a Member State where, under the contract, the goods were delivered or should have been delivered.
- 26 In the context of Regulation No 44/2001, contrary to Lexx's submissions, that rule of special jurisdiction in matters relating to a contract establishes the place of delivery as the autonomous linking factor to apply to all claims founded on one and the same contract for the sale of goods rather than merely to the claims founded on the obligation of delivery itself.

- 27 It is in the light of those considerations that it must be determined whether, where there are several places of delivery in a single Member State, the first indent of Article 5(1)(b) of Regulation No 44/2001 applies and, if so, whether, where the claim relates to all the deliveries, the plaintiff may sue the defendant in the courts for the place of delivery of its choice.
- 28 First of all, the first indent of Article 5(1)(b) of the regulation must be regarded as applying whether there is one place of delivery or several.
- 29 By providing for a single court to have jurisdiction and a single linking factor, the Community legislature did not intend generally to exclude cases where a number of courts may have jurisdiction nor those where the existence of that linking factor can be established in different places.
- 30 The first indent of Article 5(1)(b) of Regulation No 44/2001, determining both international and local jurisdiction, seeks to unify the rules of conflict of jurisdiction and, accordingly, to designate the court having jurisdiction directly, without reference to the domestic rules of the Member States.
- 31 In that regard, an answer in the affirmative to the question whether the provision under consideration applies where there are several places of delivery within a single Member State does not call into question the objectives of the rules on the international jurisdiction of the courts of the Member States set out in that regulation.
- 32 Firstly, the applicability of the first indent of Article 5(1)(b) of Regulation No 44/2001 where there are several places of delivery within a single Member State complies with the regulation's objective of predictability.

33 In that case, the parties to the contract can easily and reasonably foresee before which Member State's courts they can bring their dispute.

34 Secondly, the applicability of the first indent of Article 5(1)(b) of Regulation No 44/2001 where there are several places of delivery within a single Member State also complies with the objective of proximity underlying the rules of special jurisdiction in matters relating to a contract.

35 Where there are several places of delivery within a single Member State, that objective of proximity is met since, in application of the provision under consideration, it will in any event be the courts of that Member State which will have jurisdiction to hear the case.

36 Consequently, the first indent of Article 5(1)(b) of Regulation No 44/2001 is applicable where there are several places of delivery within a single Member State.

37 However, it cannot be inferred from the applicability of the first indent of Article 5(1)(b) of Regulation No 44/2001 in circumstances such as those of the main proceedings that that provision necessarily confers concurrent jurisdiction on a court for any place where goods were or should have been delivered.

38 With regard, secondly, to the question whether, where there are several places of delivery within a single Member State and the claim relates to all those deliveries, the plaintiff may sue the defendant in the court for the place of delivery of its choice on the basis of the first indent of Article 5(1)(b) of Regulation No 44/2001, it is necessary to point out that one court must have jurisdiction to hear all the claims arising out of the contract.

39 In that regard, it is appropriate to take into consideration the origins of the provision under consideration. By that provision, the Community legislature intended, in respect of sales contracts, expressly to break with the earlier solution under which the place of performance was determined, for each of the obligations in question, in accordance with the private international rules of the court seised of the dispute. By designating autonomously as 'the place of performance' the place where the obligation which characterises the contract is to be performed, the Community legislature sought to centralise at its place of performance jurisdiction over disputes concerning all the contractual obligations and to determine sole jurisdiction for all claims arising out of the contract.

40 In that regard it is necessary to take account of the fact that the special jurisdiction under the first indent of Article 5(1)(b) of Regulation No 44/2001 is warranted, in principle, by the existence of a particularly close linking factor between the contract and the court called upon to hear the litigation, with a view to the efficient organisation of the proceedings. It follows that, where there are several places of delivery of the goods, 'place of performance' must be understood, for the purposes of application of the provision under consideration, as the place with the closest linking factor between the contract and the court having jurisdiction. In such a case, the closest linking factor will, as a general rule, be at the place of the principal delivery, which must be determined on the basis of economic criteria.

41 To that end, it is for the national court seised to determine whether it has jurisdiction in the light of the evidence submitted to it.

42 If it is not possible to determine the principal place of delivery, each of the places of delivery has a sufficiently close link of proximity to the material elements of the dispute and, accordingly, a significant link as regards jurisdiction. In such a case, the plaintiff may sue the defendant in the court for the place of delivery of its choice on the basis of the first indent of Article 5(1)(b) of Regulation No 44/2001.

43 Giving the plaintiff such a choice enables it easily to identify the courts in which it may sue and the defendant reasonably to foresee in which courts it may be sued.

44 That conclusion cannot be called into question by the fact that the defendant cannot foresee the particular court of that Member State in which it may be sued; it is sufficiently protected since it can only be sued, in application of the provision under consideration, where there are several places of performance in a single Member State, in the courts of that Member State for the place where a delivery has been made.

45 In the light of all the foregoing considerations, the answer to the question referred must be that the first indent of Article 5(1)(b) of Regulation No 44/2001 applies where there are several places of delivery within a single Member State. In such a case, the court having jurisdiction to hear all the claims based on the contract for the sale of goods is that for the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal place of delivery, the applicant may sue the plaintiff in the court for the place of delivery of its choice.

## **Costs**

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

**The first indent 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 must be interpreted as applying where there are several places of delivery within a single Member State. In such a case, the court having jurisdiction to hear all the claims based on the contract for the sale of goods is that for the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal place of delivery, the plaintiff may sue the defendant in the court for the place of delivery of its choice.**

[Signatures]