Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

28 November 2024*

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Jurisdiction and the recognition and enforcement of judgments – Regulation (EU) No 1215/2012 – Special jurisdiction – Claim in matters relating to a contract – Second indent of Article 7(1)(b) – Contract for the provision of services – Software developed in one Member State and adapted to the needs of a customer residing in another Member State – Place of performance)

In Case C-526/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 13 July 2023, received at the Court on 17 August 2023, in the proceedings

VariusSystems digital solutions GmbH

v

GR, owner of the undertaking B & G,

THE COURT (Second Chamber),

composed of F. Biltgen (Rapporteur), President of the First Chamber, acting as President of the Second Chamber, M.L. Arastey Sahún, President of the Fifth Chamber, and J. Passer, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– VariusSystems digital solutions GmbH, by S. Duschel, K. Hanten and C. Kurz, Rechtsanwälte,

– GR, owner of the undertaking B & G, by T. Börner and S. Scheed, Rechtsanwälte,

– the European Commission, by L. Hohenecker and S. Noë, acting as Agents,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 5 September 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the second indent of Article 7(1)(b) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

2 The request has been made in proceedings between VariusSystems digital solutions GmbH ('VariusSystems'), established in Austria, and GR, owner of the undertaking B & G, which has its registered office in Germany, concerning a claim for payment of fees for the development and operation of software submitted by VariusSystems.

Legal context

3 Recitals 15 and 16 of Regulation No 1215/2012 read as follows:

'(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject matter of the dispute or the autonomy of the parties warrants a different connecting factor. …

(16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. …'

4 Article 4 of that regulation provides, in paragraph 1 thereof:

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

5 Article 7 of that regulation provides:

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

(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 point (b) does not apply then point (a) applies;

…'

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

6 VariusSystems developed for GR software making it possible for COVID-19 screening tests to be analysed. VariusSystems and GR concluded an oral contract for the development and operation of that software for its use in Germany. VariusSystems was to be remunerated for each successful test carried out. The parties agreed neither a specific place of performance nor a court having jurisdiction in the event of a dispute.

7 It is apparent from the file before the Court that the parties disagree as to whether the software complies with all the applicable legal requirements.

8 VariusSystems submitted a claim for payment of the sum of EUR 101 587.68, basing the international jurisdiction of the Austrian courts on the fact that the provision of services in question took place in Austria. According to it, although the software had been continuously adapted for use in Germany, all of the work had been carried out in Vienna (Austria).

9 GR contested the international jurisdiction of the Austrian courts, claiming that, in the case at hand, the service provided consisted exclusively in the use of that software in Germany, in compliance with the requirements of German law in that area.

10 The court of first instance declined international jurisdiction, noting that the place of performance of the contract at issue was at the registered office of GR's undertaking.

11 The appeal court upheld that decision, taking the view, in essence, that services which are not provided at a fixed location are deemed to be provided in the place where the beneficiary of those services has access to them. Consequently, in this case, that place of performance is in Germany.

12 Hearing an appeal on a point of law (*Revision*) against that decision of the appeal court, the referring court asks whether, for the purpose of determining the place of performance in the case of remote services, the decisive place is the place where the service provider concerned – in this case, VariusSystems – carried out the creative work, or the place where that service was provided and where the beneficiary of that service – in this case, GR – had access to it.

13 In those circumstances, the Oberster Gerichtshof (Supreme Court, Austria) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 7(1)(b) of Regulation No [1215/2012] be interpreted as meaning that, in the case of an action relating to a contract, the place of performance for the development and ongoing operation of software designed to meet the individual needs of a customer established in Member State A (in this case Germany) is at the place where

(a) the intellectual creation ("programming") behind the software is performed by the undertaking established in Member State B (in this case Austria); or

(b) [the customer accesses the software], that is to say [consults and uses it]?'

Consideration of the question referred

14 By its question, the referring court wishes to know, in essence, whether the second indent of Article 7(1)(b) of Regulation No 1215/2012 must be interpreted as meaning that the 'place of performance' of a contract for the development and ongoing operation of software designed to meet the needs of a customer established in a Member State other than that in which the company that created, designed and programmed that software is established is the place in which the work of creating, designing and programming that software was carried out or as meaning that that place of performance is the place where that customer accesses that same software, that is to say, consults and uses it.

15 In that regard, it should be noted that Regulation No 1215/2012 seeks to unify the rules on conflict of jurisdiction in civil and commercial matters by way of rules of jurisdiction which are highly predictable and thus pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Union, by enabling both the applicant to identify easily the court before which he or she may bring proceedings, and the defendant reasonably to foresee the court before which he or she may be sued (judgment of 14 September 2023, *EXTÉRIA*, C-393/22, EU:C:2023:675, paragraph 26 and the case-law cited).

16 The rule of special jurisdiction in matters relating to a contract, laid down in Article 7(1) of Regulation No 1215/2012, reflects a concern for proximity and is motivated by the existence of a connecting factor between the contract concerned and the court called upon to hear and determine the case (see, to that effect, judgment of 14 September 2023, *EXTÉRIA*, C-393/22, EU:C:2023:675, paragraph 29 and the case-law cited).

17 In the present case, as the referring court has found, the subject matter of the contract at issue is the provision of services within the meaning of the second indent of Article 7(1)(b) of Regulation No 1215/2012, since it concerns a range of activities, namely the design, programming, maintenance and continuous adaptation of individualised software.

18 As regards the place of performance of the contractual obligations arising from such a contract, that second indent of Article 7(1)(b) of Regulation No 1215/2012 autonomously defines the connecting factor in respect of that contract as being the place in a Member State where, under that contract, the services were provided or should have been provided, in order to reinforce the objectives of unification and foreseeability of the rules of jurisdiction and, consequently, of legal certainty. That autonomous connecting factor is intended to apply to all claims based on the same contract for the provision of services (judgment of 14 September 2023, *EXTÉRIA*, C-393/22, EU:C:2023:675, paragraph 30 and the case-law cited).

19 Under the said second indent of Article 7(1)(b), the court with jurisdiction to hear claims based on a contract for the provision of services is the court of the Member State of the place of the main provision of services, as it follows from the provisions of that contract and, in the absence of such provision, of the actual performance of that contract (see, to that effect, judgment of 8 March 2018, *Saey Home & Garden*, C-64/17, EU:C:2018:173, paragraph 45).

20 If there are several contractual obligations, it is necessary to establish the obligation which characterises the contract concerned (see, to that effect, judgment of 15 June 2017, *Kareda*, C-249/16, EU:C:2017:472, paragraph 40).

21 With regard to a contract for the provision of software, such as that at issue in the main proceedings, it is necessary to find, in line with what has been set out by the European Commission in its written observations, that the design and programming of software do not constitute the obligation which characterises such a contract, since the service which is the subject of such a contract is not actually provided to the customer concerned until that software is operational. It is only from that moment, when the said software can be used and its quality can be inspected, that that service will actually be provided.

22 Given that the obligation which characterises a contract for the online provision of software such as that at issue in the main proceedings consists in making that software available to the customer concerned, the place of performance of that contract must be regarded as being the place where that customer accesses that software, namely the place where he or she consults and uses it.

23 Where that software is intended to be used in different places, it is necessary to state that that place is located at the domicile of that customer and, in the case of a company, at its registered office, since the said place is definite and identifiable, both for the applicant and for the defendant, and is therefore likely to facilitate the taking of evidence and the conduct of the proceedings (see, by analogy, judgment of 19 April 2012, *Wintersteiger*, C-523/10, EU:C:2012:220, paragraph 37).

24 That conclusion applies irrespective of whether, as GR claims, the specifications to which VariusSystems had to conform were those laid down by the legislation of the Member State of the customer's domicile, namely the Federal Republic of Germany. While it is true that such a material connecting factor to that Member State satisfies the objectives of predictability and proximity referred to, respectively, in recitals 15 and 16 of Regulation No 1215/2012, the fact remains that the parties to the dispute in the main proceedings disagree as to the scope of those specifications, the clarification of which is subject to substantive examination by the court having jurisdiction. However, the determination of the place of performance of a contract for the provision of services, within the meaning of the second indent of Article 7(1)(b) of that regulation, cannot depend on criteria which are specific to that examination of the substance (see, to that effect, judgment of 25 March 2021, *Obala i lučice*, C-307/19, EU:C:2021:236, paragraph 90).

25 In the light of the foregoing reasons, the answer to the question referred is that the second indent of Article 7(1)(b) of Regulation No 1215/2012 must be interpreted as meaning that the 'place of performance' of a contract for the development and ongoing operation of software designed to meet the needs of a customer established in a Member State other than that in which the company that created, designed and programmed that software is established is the place where that customer accesses the software, that is to say, consults and uses it.

Costs

26 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 (Second Chamber) hereby rules:

The second indent of Article 7(1)(b) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

must be interpreted as meaning that the 'place of performance' of a contract for the development and ongoing operation of software designed to meet the needs of a customer established in a Member State other than that in which the company that created, designed and programmed that software is established is the place where that customer accesses the software, that is to say, consults and uses it.

[Signatures]