Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 5 September 2024[1]

Case C-526/23

VariusSystems digital solutions GmbH
v
GR Inhaberin B & G

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Regulation (EU) No 1215/2012 – Jurisdiction and the recognition and enforcement of judgments – Special jurisdiction in matters relating to a contract – Article 7(1)(b) – Provision of services – Software developed and operated in one Member State, adapted to the individual needs of a user resident in another Member State – Place of performance)

I. Introduction

1. Both business professionals and individuals now use software[2] and the internet on a permanent basis. The service consisting in the development of software adapted to specific business needs is also very frequent in practice. The economic stakes in that area are high.

2. It is surprising, therefore, to find that the Court has not thus far been required to consider a question for a preliminary ruling relating to the choice of international jurisdiction in matters relating to a contract, provided for in Article 7(1)(b) of Regulation (EU) No 1215/2012,[3] in the context of international disputes having the provision of online IT services as their subject matter.

3. That is explained, in my view, by the existence of jurisdiction or choice of applicable law clauses, depending on the contractual practices in that sphere of activity.[4]

1 Original language: French.

2 According to the website https://www.culture.fr/franceterme, devoted to the terms recommended by the Commission d'enrichissement de la langue française and published in the *Journal officiel de la République française* ('the *JORF*'), the word 'logiciel' designates 'the set of programs, processes and rules, and any associated documentation, relating to the functioning of a data processing package' (free translation). That website states that the English equivalent of 'logiciel' is 'software'. See annex to *JORF* No 220 of 22 September 2000 (p. 42063).

3 Regulation 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).

4 See, in that regard, El Hage, Y., *Le droit international privé à l'épreuve de l'Internet*, Bibliothèque de droit privé, vol. 617, Librairie générale de droit et de jurisprudence, Paris, 2022, point 123, second paragraph (p. 102), also points 170 (p. 138) and 515 (p. 427). On the relative impact of the forthcoming decision then under consideration, see point 614, third paragraph (p. 500).

4. Consequently, the absence of any agreement in the case in the main proceedings provides the Court with the opportunity to clarify the connecting factors with the competent court and to overcome the following contradiction: how is the option of international jurisdiction based on the actual location of the provision of services to be interpreted when those services are provided via the internet? In other words, how is the material criterion decided on by the EU legislature to be defined in an immaterial context?

5. Admittedly, that problem is not a novel one for the Court, as may be seen from its case-law on the choice of jurisdiction in matters relating to tort. However, that case-law is based on approaches that cannot be transposed to matters relating to a contract. Thus, the discussion concerns the specific alternative, as proposed by the Oberster Gerichtshof (Supreme Court, Austria), the referring court, which is as follows: in the absence of contractual provisions, must the place of design of the software or the place of its use be accepted?

6. I am going to set out the reasons why, in the particular context of the provision of IT services over an open network such as the internet, I am of the view that the criterion chosen should be that of the place where the service materialises for the user. [5]

II. Legal framework

7. Recitals 15 and 16 of Regulation No 1215/2012 state:

'(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. …'

8. Article 4(1) of that regulation provides:

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

9. Article 7(1) of that regulation provides:

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

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

[5] It should be made clear at the outset that that position relies largely on the detailed analysis of the questions of private international law, as regards cyber contracts, set out by El Hage, Y., op. cit., and on the evidence which he provides of the relevance of the proposed solution, supported by numerous references in the literature and the case-law, in various language versions. See, in particular, point 616 (pp. 500 to 502).

(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.'

III. The facts of the main proceedings and the question referred for a preliminary ruling

10. VariusSystems digital solutions GmbH,[6] which has its registered office in Vienna (Austria), operates in the IT services sector. It developed software for GR, the owner of the company B & G, which is established in Germany, making it possible to evaluate Covid-19 tests in accordance with the requirements of the German legislature and for use in German test centres.[7] The subject matter of the contract was the development[8] and operation[9] of the software in Germany. The parties to the main proceedings did not conclude a written contract and did not designate either a place of jurisdiction or a place of performance in the event of a dispute.

11. VariusSystems claimed payment from GR of a total sum of EUR 101 587.68, plus interest, for the period from 1 January 2022 to 3 June 2022, corresponding to the invoicing for each Covid-19 test carried out. It based the jurisdiction of the Austrian courts on the second indent of Article 7(1)(b) of Regulation No 1215/2012, on the ground that, although the software was specially adapted and developed in accordance with the needs of GR's company for use in Germany, all the work was carried out in Vienna.

12. It is apparent from the documents in the file submitted by the referring court that the dispute between the parties has its origin in what are alleged by GR to be defects in the software provided, in particular as regards compliance with the requirements of the German legislature and of the Kassenärztliche Bundesvereinigung (Federal Association of Approved Medical Practitioners, Germany) relating to the invoicing of the screening tests and to the method of sending test certificates to the 'Corona-Warn-App' application.

13. GR disputed the international jurisdiction of the court before which the action was brought. It observes that the characteristic service in the contract in question was the use of operational software in accordance with the requirements of the German legislature for natural persons in Germany, and infers that the place of performance must be held to be its registered office.

6 'VariusSystems'.

7 It follows from the documents in the file submitted by the referring court that the software used by GR, via the internet, makes it possible to record and process screening tests. The referring court refers to 'remote services'. See point 19 of this Opinion.

8 According to IT vocabulary (see, by way of example, the definitions available at the following website address: https://vitrinelinguistique.oqlf.gouv.qc.ca/), 'development' covers, inter alia, the following activities: software design, programming, testing, deployment and maintenance. The development manager is called the 'editor'.

9 'Operation' covers the activity designed to ensure the proper functioning of the software, distinct from the development activity.

14. The Landesgericht Wien (Regional Court, Vienna, Austria), declined its international jurisdiction and dismissed the action. It classified the contract between the parties as a 'contract of sale' and considered that the place of performance is the registered office of GR's company in Germany.

15. The Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) upheld that decision, but classified the contract as a 'provision of services', within the meaning of the second indent of Article 7(1)(b) of Regulation No 1215/2012, on the ground, in particular, that the software was to be specially adapted and developed to meet the needs of GR's company, in accordance with the requirements of the German legislature. Taking the view that services which do not relate to a specific place are deemed to be provided in the place where the beneficiary receives those services, it considered that, in this instance, that place is in Germany, where the software that must be specifically adapted to the German situation is available, which constitutes the characteristic service of the contract.

16. VariusSystems then lodged an appeal on a point of law before the Oberster Gerichtshof (Supreme Court), which also considers that the second indent of Article 7(1)(b) of Regulation No 1215/2012 should be applied where the development of individual software is concerned.

17. According to the referring court, it is necessary to determine the place where the service is mainly provided,[10] which means that the place where the intellectual service is provided, and not the place where the software is accessed and used, should be deemed to be the place of performance of the software development contracts.

18. However, the referring court is uncertain as to the relevance of such a solution because of certain views expressed in the literature, according to which if a service does not relate to a particular place, it is deemed to be provided where the beneficiary of the service has access to it.

19. It emphasises that, in this case, the intellectual service provided in Austria would have no independent value in itself if it could not be accessed and used in Germany, particularly since VariusSystems claims that it was to be remunerated for each successful test carried out. The referring court adds that the courts of the place where the software is used would no doubt be better placed to decide on the substantive issues relating to the performance of the contract owing to the proximity of the facts and evidence. It therefore wonders whether, for the purpose of determining the place of performance in the case of remote services, as is the case here, it is the place where the service provider carried out the work, or rather the place in respect of which the service was provided and where the beneficiary was able to access it, that is decisive.

20. In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following question to the Court 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

[10] The referring court refers, in that regard, to the judgment of 11 March 2010, *Wood Floor Solutions Andreas Domberger* (C-19/09, 'the judgment in *Wood Floor*', EU:C:2010:137, paragraphs 38 and 40).

(b) the software reaches the customer, that is to say where it is accessed and used?'

21. VariusSystems, GR and the European Commission lodged written observations.

IV. Analysis

22. The Court has before it a novel question relating to the interpretation of Article 7(1)(b) of Regulation No 1215/2012 in the context of the provision of software developed and operated by an editor in one Member State to meet the specific needs of a user in another Member State.

23. As a preliminary point, it is necessary to determine the classification of the contract. Owing to the characteristics of the contractual obligations in question,[11] I share the view of the parties and the referring court that the contract in question is covered by the concept of 'provision of services'.

24. Reference should be made to the principles set out in the judgment of 14 September 2023, *EXTÉRIA*,[12] and to the criteria defined in the judgment of 25 February 2010, *Car Trim*.[13] They make it possible to decide between two classifications of the contract, that of 'sale of goods' or that of 'provision of services.[14] Thus, according to the Court's consistent case-law, it is necessary to ascertain the obligation that characterises the contract at issue and the consideration for its performance. In the present case, VariusSytems' activity consisted in editing software adapted to meet the needs of GR's company and ensuring the operation of that software. That activity constitutes the provision of services performed in consideration of remuneration payable by GR for each use of the service.[15] The criteria of the 'provision of services', within the meaning of the second indent of Article 7(1)(b) of Regulation No 1215/2012, are therefore satisfied.[16]

25. It is therefore appropriate to examine the answer to be given to the single question referred for a preliminary ruling, whereby the referring court asks the Court, in essence, whether 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 Regulation No 1215/2012, in the case of the online provision[17]

[11] See, on the obligation to identify a contractual obligation in the absence of a written contract, judgment of 14 July 2016, *Granarolo* (C-196/15, EU:C:2016:559, paragraph 24).

[12] C-393/22, EU:C:2023:675, paragraphs 23 to 25 and 34 and the case-law cited.

[13] C-381/08, 'the judgment in *Car Trim*', EU:C:2010:90, paragraphs 31 and 32 and the case-law cited.

[14] It should be borne in mind that the Court has considered that arguments concerning the concept of 'services' based on Article 57 TFEU, and the EU directives on VAT, or other instruments of secondary law other than Regulation No 1215/2012, applicable in matters relating to civil cooperation, must be rejected. See, to that effect, judgment of 23 April 2009, *Falco Privatstiftung and Rabitsch* (C-533/07, EU:C:2009:257, paragraphs 33 to 40). As regards the conflict of laws rules, see judgment of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685, paragraphs 62 and 63).

[15] See point 11 of this Opinion.

[16] Apart from the present case, in which the provision is services is not in doubt (see, to that effect, El Hage, Y., op. cit., point 56, p. 59), I am of the view that the personalisation of the software is not the decisive factor in every case. The provision of standard software may be accompanied by a maintenance or operation service, or by a service providing access via a network, such as the internet. Generally speaking, it is the making available of the software functionalities that characterises the service provided. See, on the subject of 'the provision of digital content via a material medium', El Hage, Y., op. cit., point 55 (p. 56). In that sense, my analysis is not inconsistent with the judgments of 3 July 2012, *UsedSoft* (C-128/11, EU:C:2012:407, paragraph 61), and of 16 September 2021, *The Software Incubator* (C-410/19, EU:C:2021:742, paragraph 38). Admittedly, in the latter judgment, the Court held, citing the former judgment, that, 'from an economic point of view, the sale of a computer program on CD-ROM or DVD and the sale of such a program by downloading from the internet are similar, since the online transmission method is the functional equivalent of the supply of a material medium'. However, apart from the fact that that analysis was made in the context of situations governed by secondary law relating, respectively, to the legal protection of computer programs and to self-employed commercial agents, it must to my mind be accepted that it refers solely to the subject matter of the sale, without taking into consideration any services essential to the use of that subject matter.

[17] I use this term in the light of the findings referred to in footnote 7 to this Opinion.

of software, is to be determined as being the place where the software was developed [18] by an IT services company or, on the contrary, as being the place where the software was used by its customer.

26. In the absence of information that can be derived from contractual provisions that would permit the place of performance of the contract to be determined, given that there is no contract or any other document, [19] the answer to that question must be based on the following two main considerations, recently referred to by the Court: [20]

– the rule of special jurisdiction in matters relating to a contract, laid down in Article 7(1) of Regulation No 1215/2012, based on the existence of a close link between the contract concerned and the court called upon to deal with the matter, supplements the general rule of the jurisdiction of the courts for the defendant's domicile, and

– the connecting factor in respect of that contract, defined autonomously as being the place in a Member State where, under that contract, the services were provided or should have been provided, was chosen in order to reinforce the objectives of unification and foreseeability of the rules of jurisdiction and, consequently, of legal certainty.

27. In other words, that rule of special jurisdiction, conceived in order to be distinguished from the general jurisdiction rule, is based on a purely factual test which leads to the designation of a court directly connected with the case in order to satisfy the requirements of the good administration of justice. [21]

28. That logic and that purpose lead me to consider, with respect to the provision of online services by an IT services company, and in the absence of any choice by the EU legislature in such an immaterial sphere, that the appropriate connecting factor is that of the place of actual performance of that contract, [22] namely the place from which the customer actually has access to the online service or, in other words, 'the place where the online activity has the greatest impact', [23] or again 'the place of the final provision of the services'. [24]

29. Four types of argument – based on the text, the case-law, practical considerations and the applicable law – favour the choice of the 'use of the service' criterion rather than the 'sending of the service' criterion.

[18] This term corresponds to the meaning of paragraph (a) of the referring court's question. See the definition set out in footnote 8 to this Opinion and, on the inferences to be drawn, point 44 of this Opinion.

[19] See, on that condition, judgments in *Car Trim* (paragraph 54) and *Wood Floor* (paragraph 38), and of 10 September 2015, *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:574, paragraphs 60 to 62).

[20] See judgment of 14 September 2023, *EXTÉRIA* (C-393/22, EU:C:2023:675, paragraphs 29 and 30 and the case-law cited).

[21] See, to that effect, judgment of 3 May 2007, *Color Drack* (C-386/05, 'the judgment in *Color Drack*', EU:C:2007:262, paragraph 40), and also the judgment in *Car Trim* (paragraphs 52 and 53, for an account of the drafting history of the provisions equivalent to those of Article 7 of Regulation No 1215/2012, and also the exclusion of the action, in particular, from the private international law rules of the Member State where the court is sitting).

[22] See, to that effect, judgment of 8 March 2018, *Saey Home & Garden*, (C-64/17, 'the judgment in *Saey Home & Garden*', EU:C:2018:173, paragraph 45).

[23] See El Hage, Y., op. cit., point 502 (p. 417). In point 517 (p. 428), that place is defined as the place 'from which the customer effectively profits from the result of the supply'. See also, for a summary of the approach that applies both to cyber contracts and to cybercrime, point 715 (p. 592) of that book.

[24] See Sindres, D., 'Compétence judiciaire, Reconnaissance et Exécution des décisions en matière civile et commerciale. – Compétence. – Règles ordinaires de compétence. – Option de compétence en matière contractuelle. – Article 7, [sect] 1, du règlement (UE) n° 1215/2012', *JurisClasseur Droit international*, LexisNexis, Paris, 1 January 2022, fascicule 584-130, point 71, first and second paragraphs, in which the expression 'final destination' of the services or the supply is also used.

30. The first of these arguments is a textual argument based on the expression 'the place … where, under the contract, the services were provided or should have been provided'. [25] The provision of a service [26] must therefore be distinguished from its conception.

31. The second argument relates to the situation not envisaged by Article 7(1)(b) of Regulation No 1215/2012, namely the absence of criteria derived from the contract, where the Court has chosen, for the remote sale of goods, the criterion of the 'final destination' of that operation. [27] For the provision of services, where there is more than one place of performance of the obligation that characterises such a contract and it is impossible to identify, on the basis of that contract, the place of the main provision of services, [28] the place where the activities have for the most part been carried out in the performance of the contract has been chosen, in the alternative. [29] The Court confirmed the choice of the criterion of the actual performance of the contract [30] in the judgment in *Saey Home & Garden*. [31] Thus, the choice of the final use of the online service is consistent with that case-law, [32] which to my mind must not be confined solely to cases where the provision of services is carried out in several Member States. [33]

32. However, I note that opinions to the contrary are also based on the Court's case-law.

33. First, as is apparent from the request for a preliminary ruling and from the documents on the file, the discussion centres on the criterion adopted in the judgment in *Wood Floor* as designating the place where the provider carries out the main part of its work, which in the present case would favour the place where the intellectual service was provided.

34. I myself consider that it follows from both the judgment in *Wood Floor* and the judgment in *Saey Home & Garden*, both based on the criterion of the actual performance of the contract, in the absence of contractual provisions, that it is necessary to ascertain the place where the provision of service materialises. Thus, in the relationship between a principal and a commercial agent, like that existing between a supplier and a distributor under a commercial franchise agreement, the chosen forum is that corresponding to the essential part of the activity, which consists, in the first case, in providing various services entailing the preparation, negotiation and, where appropriate, conclusion of commercial transactions by the agent on behalf of the principal [34] and, in the second case, in distributing the supplier's products. [35]

25 See Sindres, D., op. cit., point 71, third paragraph.

26 The word 'provision' is understood here in the following sense: the provision of something to someone, in the sense of delivering, procuring, giving or providing, and not, for example, 'making an effort'.

27 See the judgment in *Car Trim* (paragraph 62).

28 See the judgment in *Wood Floor* (paragraph 38).

29 See the judgment in *Wood Floor* (paragraph 40). See, in the same sense, judgment of 10 September 2015, *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:574, paragraph 64).

30 See, earlier, the judgment in *Wood Floor* (paragraph 41).

31 See the judgment in *Saey Home & Garden* (paragraph 45).

32 On that analogy, see Fawcett, J., Harris, J., and Bridge, M., *International Sale of Goods in the Conflict of Laws*, Oxford University Press, Oxford, 2005, cited by El Hage, Y., op. cit., point 528 (pp. 436 and 437).

33 See also, in the same sense, Sindres, D., op. cit., point 76, sixth paragraph.

34 See, to that effect, the judgment in *Wood Floor* (paragraphs 35 and 38).

35 See, to that effect, the judgment in *Saey Home & Garden* (paragraphs 43 and 45).

35. It should further be noted that those decisions were adopted in the light of particular circumstances, resulting from the fact that the activities took place in several Member States, and that they are therefore perfectly consistent with [36] the judgment in *Color Drack*, in a case involving the sale of goods delivered in different places in the same Member State, [37] and the judgment of 9 July 2009, *Rehder*, [38] in a case where services were provided in two Member States. [39]

36. The scope of that case-law would be too wide if it gave rise to the inference that the place of the provision of the service is *in every case* that of the recipient of the service performed. The Court identified a number of specific factors that would be of assistance in the identification of the place of performance of the service which it is for the national court to determine according to the situations which it is required to assess. [40]

37. To my mind, moreover, that case-law indicates that for the purpose of ascertaining the location of the activity it is preferable to take an economic approach, in order to better satisfy the requirements of proximity and foreseeability. That approach seems to me to be particularly suitable for the provision of IT services carried out online, owing their immaterial nature, as long as the beneficiary of the services has not had access to them.

38. Second, it may also be maintained, because of that immaterial nature, [41] that the Court has already been required to deal with a similar situation, namely that of a contract for credit agreed by a banking institution. [42] Taking the view that the characteristic obligation of that contract is the granting of the sum loaned, while the borrower's obligation to repay that loan is merely a consequence of the performance of the service by the lender, the Court held that the place where the services were provided, within the meaning of the second indent of Article 7(1)(b) of Regulation No 1215/2012, is, in the case of a credit institution granting a loan, the place where that institution has its registered office. [43]

39. I note, in that regard, that the Court took into consideration the characteristics of the provision of services by a bank which did not relate to a specific place and that it was not required to rule on a case of a bank transfer to an account in a Member State other than that of the bank's registered office. [44]

40. For those reasons, the solution adopted in the judgment in *Kareda* cannot in my view be applied by analogy to a case involving the online provision of software, particularly in a cross-border context.

41. The third argument, relating to the practical considerations that also constitute the basis for the discussion, leads me to reject the argument that, in essence, the obligation that characterises a contract for the provision of online services can only be the obligation for the provider to upload

36 See the judgment in *Wood Floor* (paragraph 22, and also paragraphs 25 and 26).

37 See judgment in *Color Drack* (paragraph 8).

38 C-204/08, EU:C:2009:439.

39 See the judgment of 9 July 2009, *Rehder* (C-204/08, EU:C:2009:439, paragraph 2).

40 See, to that effect, the judgment in *Wood Floor* (paragraph 40 and the case-law cited).

41 This aspect is underlined by Mailhé, F., in his commentary on the judgment of 15 June 2017, *Kareda* (C-249/16, 'the judgment in *Kareda*', EU:C:2017:472), in Payan, G., *Espace judiciaire civil européen: Arrêts de la CJUE et commentaires*, Collection 'Droit de l'Union européenne', Bruylant, Brussels, 2020, point 372 (p. 315).

42 See, for a reference to such a hypothesis, Sindres, D., op. cit., point 71, 11th paragraph.

43 See the judgment in *Kareda* (paragraph 42).

44 See the judgment in *Kareda* (paragraphs 18, 41 and 42).

the digital content, on the ground that the location of that supply cannot depend on the intervention of the customer.[45] In that situation, the place from which the provider actually deploys its activity should be chosen.

42. While I support the analysis on which that argument relies in part, namely that activities deployed online can always be connected with actual places,[46] I consider that the recommended solution does not take into consideration the diversity of those activities by reason of both their nature[47] and their potential location.[48]

43. The service provided by an IT services company may take place at different stages, in whole or in part: at the stage of the development of the software (or the creation stage), the stage of deployment (or the stage at which it is implemented for the customer) and the operation stage (or the stage at which its proper functioning is ensured). Those various activities do not necessarily take place at the registered office of the undertaking that provides the service or services in question.

44. I infer, first of all, as does the Commission, that the conception and programming of software do not constitute the obligation that characterises the contract for the provision of software, since, without deployment, the service would not be effective for the customer.[49] It is from that stage that the software can be used, after being tested, and that its quality can be monitored. That activity is carried out at the place where the user can access the software. I am thus of the view that that stage of the service must be distinguished from the operation stage. Since the latter stage does not require new IT developments, it is merely an ancillary obligation that cannot form the basis of a connecting factor.

45. Next, as the Commission correctly submits, the editor's activity may be located away from the undertaking's registered office.[50] The same applies to the activity of the deployment of the software. In addition, the latter activity may be carried out by the editor or by any other digital

[45] See, to that effect, Mankowski, P., 'Article 7', in Magnus, U. and Mankowski, P., *European Commentaries on Private International Law, Brussels Ibis Regulation*, 2nd ed., Otto Schmidt, Cologne, 2023, pp. 222 and 223, in particular point 184 (p. 222).

[46] See Mankowski, P., op. cit., point 184, and, to the same effect, Sindres, D., op. cit., point 70. See, in that regard, for what in my view is a valid distinction between mere advice and a provision of services which relates to a specific place, Gottwald, P., 'Art. 7 [Besondere Gerichtsstände]', in Rauscher, T. and Krüger, W., *Münchener Kommentar zur Zivilprozessordnung*, 6th ed., C.H. Beck, Munich, 2022, point 31, to be compared with Simotta, D-A., 'Art 7 EuGVVO 2012', in Fasching, H.W., and Konecny, A., *Zivilprozessgesetze*, 2nd ed., Manz, Vienna, 2022, point 203, articles which are cited by the referring court. That distinction provides justification for not treating in the same way two types of provisions of services which have been the subject of precedents, namely the services of a lawyer and those of an architect, and therefore of a software editor. For *a contrario* reasoning in that area, see judgment 20 U 3515/09 of the Oberlandesgericht München (Higher Regional Court, Munich, Germany) of 23 December 2009, and commentary by Mankowski, P., 'Internationale Zuständigkeit am Erfüllungsort bei Softwareentwicklungsverträgen', *Computer und Recht*, Otto Schmidt, Cologne, 2010, No 137, also cited by the referring court.

[47] See, for a detailed account, El Hage, Y., op. cit., point 517 et seq. See also Reymond, M., 'Jurisdiction under Article 7 no. 1 of the Recast Brussels I Regulation: The Case of Contracts for the Supply of Software', *Yearbook of Private International Law*, vol. 16 (2014/2015), pp. 219 to 239, in particular pp. 220 to 224 for the technical explanations and p. 224 for this summary: 'the term "supply of software" does not identify a single, easily identified type of transaction; rather, it designates a series of different kinds of dealings which, while they share the common point of addressing the transfer of a software, are distinguished not only by their operational details, but also by the content of the rights and obligations granted to the party to whom the software is transferred'.

[48] See observations of Mankowski, P., 'Internationale Zuständigkeit am Erfüllungsort bei Softwareentwicklungsverträgen', op. cit., based on the assertion that services covered by a software development contract are generally supplied at the place where the software is developed and that that place is generally the contractual establishment of the software developer.

[49] See, to the same effect, El Hage, Y., op. cit., point 528, second paragraph (p. 435). In addition, the Court has pointed out, in a case concerning the interpretation of the concept of 'sale of goods' by a commercial agent, that, 'in the particular case of the sale of a copy of computer software, the Court [had] held that the downloading of a copy of a computer program and the conclusion of a user licence agreement for that copy form an indivisible whole. Downloading a copy of such a program is pointless if the copy cannot be used by its possessor'. See judgment of 16 September 2021, *The Software Incubator* (C-410/19, EU:C:2021:742, paragraph 41 and the case-law cited).

[50] On the outsourcing of services, see Le Tourneau, P., *Contrats du numérique: informatiques et électroniques*, 12th ed., Dalloz, Paris, 2022, point 342.11 (p. 550).

content provider, either directly online to the customer's devices or, by being made available on line, via the provider's website, through the internet, for example, or via an IT platform,[51] or under a cloud computing service contract.[52]

46. Accordingly, multiple criteria for the location of the software provision activity may be ascertained on the basis of Article 7(1)(b) of Regulation No 1215/2012, with the exception however of any connection based on the location of the server.[53] In that regard, the actual difficulties of location that the customer of an online service may face seem to me to emerge clearly from the factual circumstances described by the referring court and from its own questions. The following questions arise in the present case: must a distinction be drawn between the service consisting in the initial development (or conception) of the software and the maintenance (or monitoring) service, when they are closely linked because of the regular updating of the software? Are those services both implemented from the same place? How was the software deployed (or made available) by the editor (VariusSytems)? In the absence of detail in the order for reference or findings made in the earlier decisions adopted in the main proceedings, which were submitted to the Court, can it not be presumed, owing to the invoicing method, that software of the 'Software as a Service' type[54] was deployed on a platform and not installed on the devices of the customer who downloaded it? To my knowledge, in most cases over the last decade,[55] concerning online IT services, the customer has had access to the software via a network (the internet, for example), from the customer's own computer or any other device by means of a cloud computing service.[56]

[51] According to the definition given in Beelen, A., Charlier, C. and Vigneron, J., *Guide pratique des plateformes: 20 Legal designs commentés*, Larcier, Brussels, 2021, pp. 44 and 45, 'IT platforms offer "apps" of all types and allow users of those apps and third party developers to interact. … Apple iOS, Google Android, or Microsoft Windows are examples of IT platforms'.

[52] See definition and observations set out in footnote 56 to this Opinion. See also analysis by Marchadier, F., 'Internet et droit international privé', *JurisClasseur Droit international*, LexisNexis, Paris, 2 January 2023, vol. 544-60, point 23, concerning the fact that 'favouring the place from which the service provider's activity is deployed … assumes determining whether that place depends on the establishment of the service provider or on the hosting of the service provider's website'.

[53] I would point out, as many writers have done, that that location is often uncertain and readily changeable. See, in particular, El Hage, Y., op. cit., points 87 and 88 (pp. 78 and 79), and point 528, last paragraph (p. 437); Mankowski, P., 'Article 7', op. cit., point 184; and Gottwald, P., op. cit., paragraph 31. See also Marchadier, F., op. cit., point 8, in particular on the Court's case-law on trade mark infringement. See also judgment 20 U 3515/09 of the Oberlandesgericht München (Higher Regional Court, Munich) of 23 December 2009, paragraph 48.

[54] See, for a detailed presentation, Le Tourneau, P., op. cit., point 342.14 (p. 552), and the article cited by that author written by Alterman, H. and Perbost, F., 'Les points essentiels du contrat Saas', *Revue de jurisprudence commerciale*, Thomson Reuters, 2010, No 1.

[55] See confirmation drawn from the 2015 analysis of Reymond, M., op. cit., p. 231.

[56] The expression '*infonuage*' [cloud computing] is sometimes used in everyday French. The service provided in this case allows the user to store data on interconnected remote servers, generally belonging to an outside service provider, to access those data on those servers and to use the servers' computing resources. See, on those characteristics, Opinion of Advocate General Szpunar in *VCAST* (C-265/16, EU:C:2017:649, points 1 and 2). Le Tourneau, P., op. cit., points 342.12 to 342.14 (pp. 550 to 552), emphasises that, in that context, 'IT is decentralised and … the apps' location is not known to the customer', that it is a question of 'on-demand IT', which has the advantage that undertakings, just like individuals, no longer need to invest in high-capacity computers in order to store their data. The price of the service varies 'depending on the customer's actual consumption, as in the case of electricity'. El Hage, Y., op. cit., point 520 (pp. 429 and 430), observes that, while the customer can access that digital content storage site 'from anywhere, by means of a simple internet connection', the implementation of the service is not concentrated in the place where the remote servers are located, since the customer must transfer his or her data in order to have access to them, which makes it possible to determine the country in which 'the actual effects of the contract are mainly felt'.

47. Last, the diversity of those methods of providing IT services, and their constant technological and economic development,[57] might in my view be sufficient to justify the only certain and therefore foreseeable place of performance of a contract for the online provision of services being the place where those services are actually enjoyed.[58]

48. That preference for the place where the service or services provided is or are received or used has the advantage that it does not cause the connecting factors to vary depending on the different stages in the provision of services and does not subject the user to the choice of location for carrying out those services, when, in addition, the economic tendency is to outsource them to third countries. Conversely, to consider that in all cases software is developed at the registered office of the editor might constitute a fiction, enshrining a *forum actoris*, contrary to the objectives of Article 7(1)(b) of Regulation No 1215/2012.[59]

49. Furthermore, such an adaption of the connecting factors to the complexity of the actual performance of the services would not be novel. It has already prevailed in matters relating to air transport, as the Court has favoured the place where the service is enjoyed, namely the departure of the first flight and the arrival of the last flight.[60]

50. Admittedly, choosing the criterion of the final destination of the service may present comparable difficulties, where access to a service deployed for a customer is used in different places. In the present case, that appears to be the situation in Germany, on a reading of the file submitted to the Court. According to the Court's consistent case-law, it is sufficient to ascertain the place of performance of the essential part of the activity in the Member State concerned.[61] The same would apply if the online service were to be used in several Member States.[62] Last, that place, to my mind, is foreseeable for the IT services provider. The specifications with which the provider must comply in the case of the development of software are generally subject to the law

[57] On the principle of technological neutrality that justifies the silence of the private international law texts on networks, including the internet, see the explanations of Azzi, T., 'Rapport général: droit international privé et immatériel', in *L'immatériel*, Journées internationales espagnoles de l'Association Henri Capitant des amis de la culture juridique française, 2014, cited by El Hage, Y., op. cit., p. 112, and the analysis by the latter, points 135 to 142 (pp. 113 to 119).

[58] See, in that regard, note on the website https://www.culture.fr/franceterme, stating that 'cloud computing is a particular form of IT management, where the location and the functioning of the cloud are not disclosed to customers' (free translation). See *JORF* No 129, of 6 June 2010 (p. 42).

[59] See, by way of comparison, the choice of alternative criteria, namely the place where the controller (or processor) has an establishment or the place where the data subject has his or her habitual residence, offered by the EU legislature in data protection matters in Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1), Article 79(2). See also, in practice, the choice in jurisdiction clauses of that of the Member State in whose territory the service provider is located, to be compared with the general conditions applicable to contracts for IT works and individual software maintenance contracts applicable in Switzerland, cited by Reymond, M., op. cit., p. 238, footnote 60. See, for the updated version of that work, https://backend.bkb.admin.ch/fileservice/sdweb-docs-prod-bkbadminch-files/files/2024/08/13/9d43df1a-4ff8-45fe-b530-1ea8d9716399.pdf.

[60] See judgments of 9 July 2009, *Rehder* (C-204/08, EU:C:2009:439, paragraphs 42 and 43), and of 7 March 2018, *flightright and Others* (C-274/16, C-447/16 and C-448/16, EU:C:2018:160, paragraph 73).

[61] See, by analogy, the judgment in *Color Drack* (paragraph 40).

[62] See, in particular, the judgment in *Wood Floor* (paragraph 36). See also, to that effect, El Hage, Y., op. cit., point 549 (p. 447) and point 617 (p. 502). See, moreover, for the adoption of a solution consisting in ascertaining the Member State in which the greatest part of the service is provided in the European Union, even though the service is mainly provided in a third State, Gaudemet-Tallon, H. and Ancel, M.-E., *Compétence et exécution des jugements en Europe, Règlements 44/2001 et 1215/2012, Conventions de Bruxelles (1968) et de Lugano (1998 et 2007)*, 7th ed., Librairie générale de droit et de jurisprudence, collection 'Droit des affaires', Paris, 2024, point 221 (p. 340).

of the State in which it will be deployed.[63] In those circumstances, in the case of equivalent use in different places, it seems pointless to me to apply the jurisdiction rule laid down in Article 7(1)(b) of Regulation No 1215/2012, as the objective of proximity does not warrant it.[64]

51. The fourth argument leads me to address a final supplementary element of the analysis, relating to the law applicable to the contract. In the absence of a choice of law, which is the position here, Article 4(1)(b) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I),[65] provides that 'a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence'.[66] Thus, the choice of such a connecting factor with the competent court would be confirmed.[67] To my mind, that argument is not decisive. First, there is a legislative discordance between the objective of proximity which results from the choice of a special jurisdiction criterion in matters relating to a contract[68] and the objectives relating to the determination of the law applicable to the contract. Second, where a criterion of jurisdiction according to the place of actual performance of the contract for its beneficiary is chosen, the solution consisting in applying Article 4(3) of the Rome I Regulation[69] is in my view well founded.[70]

52. Consequently, it follows from an examination of the grounds that would justify favouring as a jurisdiction criterion that of the place of the registered office of the company which developed the software that they are not of such a kind as to call in question those which I have set out to support the conclusion that, in the field of the provision of software, whether standard or personalised, where the use of the software is subject to the provision of a service, such as online access, it is particularly appropriate to choose as a criterion of jurisdiction, based on Article 7(1)(b) of Regulation No 1215/2012, that of the place where the person for whom that service is provided actually benefits from it.

63 See, to that effect, El Hage, Y., op. cit., point 550 (p. 447), in which the example is also given, by way of illustration, of a company supplying accounting software to a foreign undertaking, to be compared with the case in the main proceedings, in which the German legislation was to be complied with.

64 See, on that objective, El Hage, Y., op. cit., point 617 (pp. 502 and 503), and also, on the solution, Gaudemet-Tallon, H. and Ancel, M.-E., op. cit., footnote 257 (p. 340) and, where it is difficult or impossible to determine the place of performance, point 222 (p. 341).

65 OJ 2008 L 177, p. 6; 'the Rome I Regulation'.

66 See, on the compatibility of that rule with the internet, opinion of Cachard, O., *La régulation internationale du marché électronique*, Bibliothèque de droit privé, vol. 365, Librairie générale de droit et de jurisprudence, Paris, 2002, and de Usunier, L., 'La loi applicable aux contrats électroniques', in Rochfeld, J., *L'acquis communautaire – Le contrat électronique*, Economica, Paris, 2010, cited by El Hage, Y., op. cit., point 132 (p. 111).

67 See, to that effect, Mankowski, P., 'Article 7', op. cit., point 184, which refers to Article 4(2) of the Rome I Regulation.

68 See footnote 21 to this Opinion.

69 In the words of that provision, 'where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraph 1 or 2, the law of that other country shall apply'.

70 See El Hage, Y., op. cit., point 616 (p. 501). As regards the reasons for the application in particular of Article 4(3) of the Rome I Regulation, called the 'exception clause', see points 592 (p. 480) and 598 (p. 486). See also the illustrations provided in points 594 to 596 (pp. 484 to 486).

V. Conclusion

53. In the light of all of the foregoing considerations, I propose that the Court should answer the question for a preliminary ruling referred by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

Article 7(1) 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 decisions in civil and commercial matters

must be interpreted as meaning that the place of performance of the online provision of software is, in the absence of contractual provisions permitting that place to be determined, the place in which the customer uses that software.