

Case C-317/20

Request for a preliminary ruling

Date lodged:

16 July 2020

Referring court:

Landgericht Mainz (Germany)

Date of the decision to refer:

10 June 2020

Applicant:

KX

Defendant:

PY GmbH

...

Landgericht

Mainz

Order

In the case of

KX

- Applicant -

...

v

PY GmbH

- Defendant -

...

concerning damages

the 3rd Civil Chamber of Landgericht Mainz (Regional Court of Mainz) ... ordered as follows on 10 June 2020:

1. The proceedings are stayed.
2. The following question on the interpretation of EU law is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to paragraph of Article 267(1)(a) and (3) TFEU:

Is Article 18(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 judgments in civil and commercial matters (Article 18(1) [Or. 2] of the Brussels I Regulation) to be interpreted as meaning that, in addition to regulating international jurisdiction, the provision also lays down a rule to be observed by the adjudicating court as to the territorial jurisdiction of the national courts in matters pertaining to travel contracts where both the consumer, as the traveller, and his contractual partner, the tour operator, are domiciled in the same Member State, however the destination is not in that Member State but is located abroad ('apparent domestic cases'), with the consequence that the consumer can bring contractual claims against the tour operator before the court for his place of residence as a supplement to national rules of jurisdiction?

Grounds:

A.

1. The case referred rests on the following facts:
2. The applicant seeks from the defendant, a tour operator domiciled in ..., Federal Republic of Germany, damages for pain and suffering as well as reimbursement for loss of profit and reimbursement for damage for loss of housekeeping capacity in the total amount of approximately EUR 43 000.00 due to an accident that occurred in the outdoor area of the hotel ..., Turkey, on 27 July 2015 while the applicant was on holiday. The applicant claims that there were some marble steps with a transparent smear of salt and moisture on top of them on the property of the defendant's contract hotel in Turkey. There were no warnings regarding the slipperiness of the steps or any protective measures against slipperiness on the steps, even though other guests had slipped on them before. The applicant fell on the steps as a result of the slipperiness and suffered inoperable fractures of the coccyx, pelvic ring and sacrum as well as multiple contusions, and she still suffers from some of those injuries today, including psychologically. Contractual claims and claims in tort come into consideration.

3. The applicant booked the holiday with the travel agency ... in ... Mainz, Federal Republic of Germany, by the use of means of distance communication, whereby the travel agency mediated the conclusion of the contract between the applicant as the traveller and the defendant as the tour operator, but was not a contracting party itself and is not a branch establishment of the defendant. The contract between **[Or. 3]** the parties related to a comprehensive package of travel services.
4. The applicant, who was herself living in Mainz, Federal Republic of Germany, when the contract was concluded and continues to live there, brought the action before the Regional Court in Mainz.
5. The applicant submits that the Regional Court of Mainz, before which the case was brought, has territorial jurisdiction and refers in that regard to Article 18 of Regulation (EU) No 1215/2012 ... [(‘]Brussels I Regulation[’]...). She asserts that the second alternative of Article 18(1) of the Brussels I Regulation regulates not only the international jurisdiction but also the territorial jurisdiction of courts in a Member State. The court of the domicile of the applicant, as a consumer, thus the Regional Court of Mainz, therefore had jurisdiction. Only in the alternative, the applicant requests that the matter be referred to the Landgericht Hannover (Regional Court of Hanover), where the defendant has its general place of jurisdiction under national law (Paragraphs 12 and 17(1) of the Zivilprozessordnung (Code of civil procedure, ‘the ZPO’).
6. The defendant contests the territorial jurisdiction of the Regional Court of Mainz and requests that the action be dismissed. It states that the jurisdiction of the Regional Court of Mainz did not follow from Article 18(1) of the Brussels I Regulation, since the dispute did not have the necessary cross-border implications. Such cross-border implications of the dispute to be ruled on were a prerequisite for the application of all the provisions of the Brussels I Regulation. This view was also supported by recital 4 of the regulation. According to the defendant, the regulation was limited to the minimum required to achieve its objective and did not go beyond what was necessary for that purpose. However, the fundamental idea behind the Brussels I Regulation was to lay down rules for international jurisdiction in order to ensure that parties to a dispute had a secure jurisdiction available to them and were not forced to seek legal protection in another Member State or a third country. The defendant stated that it followed from this that the regulation did not, in principle, seek to interfere with national rules of jurisdiction, provided that they ensured adequate legal protection in the State of which the party was a national
7. A sufficient international element did not result from the mere international nature of a package holiday or a travel destination located abroad. **[Or. 4]**

B.

8. The provisions of German law relevant to the resolution of the dispute read as follows, in the version applicable in the case referred:

Code of Civil Procedure (ZPO)

9. Paragraph 12 – General place of jurisdiction; Concept

The court at which a person has his general place of jurisdiction shall have jurisdiction for all actions brought against him, unless exclusive jurisdiction has been established for an action.

10. Paragraph 17 – General place of jurisdiction of legal persons

(1) The general place of jurisdiction of the municipalities and corporations, as well as those companies, cooperatives or other associations and those foundations, institutions and pools of assets which may be sued as such shall be determined by their domicile. Unless otherwise specified, the place where the administration is carried out shall be deemed to be the domicile.

...

11. Paragraph 21 – Special place of jurisdiction for branch establishments

(1) Where, for the purpose of operating a factory or carrying on a trade or other business, a person has a branch establishment from which business is conducted directly, any action against him relating to the commercial operation of the branch establishment may be brought against him before the court of the place where the branch establishment is situated.

...

12. Paragraph 29 – Special place of jurisdiction for the place of performance [**Or. 5**]

(1) For disputes arising from a contractual relationship and relating to the existence of the latter, the court of the place where the obligation at issue is to be performed shall have jurisdiction.

...

13. [Provision on the staying of national proceedings] ...

...

14. Paragraph 281 – Referral in the event of lack of jurisdiction

(1) If it must be found that the court lacks jurisdiction on the basis of the provisions on the territorial or substantive jurisdiction of the courts, the court seised must declare, by order, at the request of the applicant, that it lacks jurisdiction and must refer the case to the court having jurisdiction, provided that the court having jurisdiction can be determined. Where several courts have jurisdiction, the matter shall be referred to the court chosen by the applicant.

(2) Applications and declarations concerning the jurisdiction of the court may be made before the registrar. The order shall not be open to appeal. The dispute shall be brought before the court designated in the order as soon as the case files are received. The order shall be binding on that court.

...

15. Paragraph 513 – Grounds of appeal

... [Or. 6]

(3) The appeal may not be based on the fact that the court at first instance wrongly assumed that it had jurisdiction.

Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany, ‘the GG’)

16. Article 101

(1) Exceptional courts are not permitted. No one may be removed from the jurisdiction of his lawful judge.

...

C.

17. The question of whether the Regional Court of Mainz is required to make a decision on the merits of the applicant’s claims raised in the action depends crucially on the question of whether the Regional Court of Mainz has territorial jurisdiction over the present dispute.

18. The Regional Court of Mainz does not have territorial jurisdiction under the national provisions of the Federal Republic of Germany.

19. According to the general rules of jurisdiction in Paragraphs 12 and 17 ZPO, even if the applicant is a consumer and the defendant is an undertaking taking the legal form of a limited liability company (GmbH), the court of the domicile of the company, as the defendant, has territorial jurisdiction. The defendant’s administration and thus its domicile is in Hanover, meaning that the Regional Court of Hanover would have territorial jurisdiction pursuant to Paragraphs 12 and 17 ZPO.

20. Nor does the Regional Court of Mainz have special jurisdiction which would compete with the rules on general jurisdiction. The territorial jurisdiction of the Regional Court of Mainz does not arise from Paragraph 21(1) ZPO, since the travel agency ... in Mainz is not a branch establishment of the defendant. This is because a branch establishment within the meaning of Paragraph 21 ZPO is any place of business which is set up by the owner in a place other than that of his domicile for a certain period of time, is operated in his own name and for his own

account and is generally independent, that is to say authorised [Or. 7] to conclude transactions and act on its own initiative However, the owner of the travel agency is not the defendant, but ...; nor is the travel agency operated in the name of the defendant.

21. Finally, the territorial jurisdiction of the Regional Court of Mainz does not follow from Paragraph 29 ZPO either, since there is no indication whatsoever that the defendant's obligations under the comprehensive package of travel services contractually agreed with the applicant would have had to be provided within the area of jurisdiction of the Regional Court of Mainz. In particular, there is no airport within the area of jurisdiction of the Regional Court of Mainz from which the applicant could have flown to Turkey. Irrespective of this, in any event, the view taken in the national case-law – which appears to be the prevailing view – is that, in the case of a travel contract, the place of departure does not justify a place of jurisdiction for the place of performance under Paragraph 29 ZPO
22. Territorial jurisdiction on the part of the Regional Court of Mainz would result solely from the application of Article 18(1) of the Brussels I Regulation.

D.

23. The national case-law and literature contain differing views on the question of whether the rule in Article 18(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 judgments in civil and commercial matters (Brussels I Regulation) is to be interpreted as meaning that, in cases where a consumer domiciled in a Member State has concluded a contract for a trip to a foreign destination with a tour operator domiciled in the same Member State (so-called 'apparent domestic cases'), it opens the jurisdiction of the consumer's domicile. The question has not yet been clarified by the national courts at the highest judicial level.
 - 1.
24. According to what appears to be the prevailing view taken in the case-law ... [Or. 8] ..., the application of the Brussels I Regulation required a cross-border element in the sense that consumers and contracting parties must be domiciled in different Member States of the European Union. On the other hand, the international element required for the applicability of the Brussels I Regulation did not exist if the facts of the case had a different kind of international element, for example, both parties were domiciled in the same Member State and the international element existed only because the travel destination was located abroad. First, it was clear from the recitals of the regulation that the exception to the principle that jurisdiction was based on the defendant's domicile (recital 15) in the case of consumer contracts existed only in order to protect the consumer by rules of jurisdiction more favourable to his interests than the general rules (recital 18). It followed from this that such special protection was necessary only where, as a

result of inter-Community trade between Member States within the European Union, there were burdensome distances between the consumer's domicile and the court that actually had jurisdiction. However, if the international element resided solely in the travel destination, there was therefore also no need to apply the second alternative of Article 18(1) of the Brussels I Regulation. Second, it should be borne in mind that the provisions of the Brussels I Regulation – in so far as they derogate from the general principle of *actor sequitur forum rei* – must be interpreted restrictively.

25. Moreover, this was the view argued by the case-law of the Court of Justice of the European Union on Regulation (EC) No 44/2001 of 22 December 2000 (see ... [judgments of 19 December 2013, *Corman-Collins*, C-9/12, EU:C:2013:860, and of 17 November 2011, *Hypoteční banka*, C-327/10, EU:C:2011:745]). This must also apply to Regulation (EU) No 1215/2012 of 12 December 2012. This was supported not least by recital 4 in the preamble, according to which the regulation sought to confine itself to the minimum required to achieve its objective and not go beyond what was necessary for that purpose. However, the fundamental idea behind the Brussels I Regulation was to lay down rules for international jurisdiction in order to ensure that parties to a dispute had a secure jurisdiction available to them and were not forced to seek legal protection in another Member State or a third country. It followed from this that the regulation did not, in principle, seek to interfere with national rules of jurisdiction, provided that they ensured adequate legal protection in the State of which the party was a national. Accordingly, in the event that a consumer of a Member State brought an action against a contracting partner from the same Member State, the application of Articles 17 and 18 of the Brussels I Regulation was precluded by the fact [Or. 9] that both parties were domiciled in Germany and a cross-border element could not be established in any other significant way.
26. The purpose of Articles 15 and 16 of Regulation (EC) No 44/2001 of 22 December 2000 was to protect the consumer concerned from having to be subjected to an unknown legal system with a language with which he may not be familiar, but not to override the rules of German civil procedure in purely internal disputes without any link with Community law. Nor did the recasted Article 18(1) of the Brussels I Regulation intend to regulate German procedural law in purely internal disputes. The addition introduced by the recasted Article 18(1) of the Brussels I Regulation, pursuant to which a consumer may bring proceedings against the other party to a contract in the courts for the place where the consumer is domiciled 'regardless of the domicile of the other party', did not lead to a different assessment. The addition did not dispense with the required international element of the dispute, but must be interpreted as meaning that the addition became relevant only in legal disputes in which the defendant was not domiciled in a Member State, that is to say in which he was domiciled in a third country. The addition did not intend to create a new jurisdiction for consumer disputes, but only a special jurisdiction for situations in which the defendant was domiciled in a third country. Otherwise, the result would be that all the contracts referred to in Article 17 of the Brussels I Regulation to which a consumer was a party would

now justify jurisdiction for the consumer's domicile. The provisions of German civil procedure on the determination of jurisdiction pursuant to Paragraph 12 et seq. ZPO would thus be deprived of a large part of their scope of application.

27. The mere international nature of a package tour or a travel destination located abroad did not create a relevant international element. A normative international element was required at the very least, and such an element could not be seen (in a case such as the present one). The relevant contractual relationship under a travel contract was established between two legal entities domiciled in Germany. It was only in terms of its subject matter that the travel contract concerned an international package tour. However, a possible disruption of the set of obligations abroad assumed by the defendant under the contract merely created an actual international element which influenced an already existing, originally domestic legal relationship and merely constituted a consequence of the contractual agreements. [Or. 10]

2.

28. On the other hand, an important voice amongst legal commentators ... inclines to the view that the applicant and defendant should not necessarily have to be domiciled in two different Member States in order for there to be a cross-border element. This could not be gathered from the wording of Article 18(1) of the Brussels I Regulation, in either the German or the English or French language versions. Instead, when recasting Article 18 of the Brussels I Regulation, the European legislature clarified – in contrast to Article 16 of Regulation (EC) No 44/2001 of 22 December 2000 – that the consumer could conduct the proceedings in the jurisdiction of his domicile, regardless of the trader's place of domicile.
29. Moreover, Article 6(1) of the Brussels I Regulation, to which Article 17 of the Brussels I Regulation referred, required only that the defendant was domiciled in a Member State. The enabling provision in Article 67(4) and Article 81(1), (2)(a), (c) and (e) TFEU did not contain such a requirement, nor did the first sentence of Article 1(1) of the Brussels I Regulation. Nor could a different result be inferred from Article 4(1) of the Brussels I Regulation. In this context, it should be noted that the Court of Justice of the European Union had already convincingly stated, in *Owusu* (... [judgment of 1 March 2005, C-281/02, EU:C:2005:120,] in respect of the predecessor provision in Article 2(1) of the European Jurisdiction and Enforcement Convention), that it was not detrimental to the applicability of that provision if the applicant and the defendant were domiciled in the same Member State. The meaning of that judgment was transferable to Article 2(1) of Regulation (EC) No 44/2001 of 22 December 2000 and therefore to Article 4(1) of the Brussels I Regulation, which was the successor to that regulation. This was clear from the second sentence of recital 34 of the Brussels I Regulation. Moreover, the fact that the circumstance of both parties to the proceedings having the same domicile did not preclude the secondary legislation from the outset was reinforced by the second sentence of Article 24(1) of the Brussels I Regulation. In that

sentence, the EU legislature established, in the context of exclusive jurisdiction for certain tenancy procedures, an alternative jurisdiction for the situation in which the landlord and the tenant were domiciled in the same Member State. However, if the Brussels I Regulation were not relevant in cases where the applicant and the defendant had the same domicile, the second sentence of Article 24(1) would never be applicable. Accordingly, the European legislature must have therefore also considered ‘apparent [Or. 11] domestic cases’. That result could also be underscored by the recasted first sentence of Article 25(1) of the Brussels I Regulation. That sentence concerned agreements conferring jurisdiction between parties ‘regardless of their domicile’. The sweeping assumption that the Brussels I Regulation excluded *a priori* cases in which the applicant and defendant were domiciled in the same Member State from its scope of application was entirely unfounded. Rather, Article 4(1) of the Brussels I Regulation in fact provided evidence to the contrary, in the light of the transferable *Owusu* doctrine of the Court of Justice and, for example, the second sentence of Article 24(1) and the first sentence of Article 25(1) of the Brussels I Regulation.

E.

30. Courts of last instance are obliged to stay the proceedings and refer the matter to the Court of Justice of the European Union if a question relevant to the decision to be given in the case is raised on the interpretation of Community law (third paragraph of Article 267 TFEU). A court is deemed to be a court of last instance obliged to refer a matter if there is no right of appeal against its decision in the specific case
31. The Regional Court of Mainz has jurisdiction to decide in the last instance on its territorial jurisdiction or lack of territorial jurisdiction.
32. Before examining the merits and amount of the claim, the Regional Court seized must examine, of its own motion, its own functional, substantive, territorial and international jurisdiction
33. If the referring Regional Court of Mainz were to take the view that it had territorial jurisdiction and, after examining the merits and amount of the applicant’s claims, were to award her damages for pain and suffering and damages for harm suffered as a result of the fall, it would not be possible for the court dealing with the appeal on the merits to review that decision with regard to the determination of territorial jurisdiction pursuant to Paragraph 513(2) ZPO, with the consequence that, if Article 18(1) of the Brussels I Regulation had been interpreted as a rule on territorial jurisdiction in a manner that might not be in conformity with EU law, the applicant would have been irrevocably removed from the jurisdiction of her lawful judge in breach of the second sentence of Article 101(1) GG.

34. In the event that the Regional Court of Mainz were to take the view that it did not have territorial jurisdiction, [Or. 12] it would have to refer the matter to the Regional Court of Hanover by order in accordance with Paragraph 281(1) ZPO upon the referral request made in the alternative by the applicant in respect of this case. That order would not be open to appeal; the Regional Court of Hanover would be bound by the decision of the Regional Court of Mainz on its territorial jurisdiction pursuant to the second sentence of Paragraph 281(2) ZPO.
35. Furthermore, the correct application of EU law is not so obvious as to leave no scope for any reasonable doubt ('acte clair' within the meaning of the CILFIT case-law of the Court of Justice, ... judgment of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335).
36. The question referred for a preliminary ruling has not yet been answered in the case-law of the Court of Justice of the European Union either. The decision of the Court of Justice of the European Union ... [judgment of 14 November 2013, *Maletic*, C-478/12, EU:C:2013:735], which is cited in some of the national case-law, relates to Article 16 of Regulation (EC) No 44/2001 of 22 December 2000, the wording of which is not entirely identical to Article 18 of the Brussels I Regulation. In addition, that decision cannot be relied on to clarify the question referred, simply because the international element in the case to be ruled on in that decision arose from the fact that the travel agent was domiciled in a Member State other than that of the consumer and the travel operator, and the Court of Justice of the European Union therefore classified the legal relationship between the traveller and the travel operator not as 'purely' domestic, but as inseparably linked to the legal relationship between the traveller and the travel agent. There is no such international element in the case to be ruled on here, however; an international element can arise solely from the travel destination itself.
37. The Regional Court of Mainz is therefore obliged to refer the question set out in the operative part of the order to the Court of Justice for a preliminary ruling under Article 267(1)(a) and (3) TFEU of its own motion and to stay the case referred until the proceedings before the Court of Justice have been concluded.