**Case C-604/20**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

16 November 2020

**Referring court or tribunal:**

Bundesarbeitsgericht (Germany)

**Date of the decision to refer:**

24 June 2020

**Defendant, respondent in first appeal and appellant in the appeal on a point of law:**

ROI Land Investments Ltd.

**Applicant, appellant in first appeal and respondent in the appeal on a point of law:**

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**Subject matter of the main proceedings**

International jurisdiction, determination of the applicable national law

**Subject matter and legal basis of the request**

Interpretation of EU law, Article 267 TFEU

**Questions referred**

1. Is Article 6(1) read in conjunction with Article 21(2) and Article 21(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 (‘Brussels I Regulation’) to be interpreted as meaning that an employee can sue a legal person – which is not his employer and which is not domiciled in a Member

State within the meaning of Article 63(1) of the Brussels I Regulation but which, by virtue of a letter of comfort, is directly liable to the employee for claims arising from an individual contract of employment with a third party – in the courts for the place where or from where the employee habitually carries out his work in the employment relationship with the third party or in the courts for the last place where he did so, if the contract of employment with the third party would not have come into being in the absence of the letter of comfort?

2. Is Article 6(1) of the Brussels I Regulation to be interpreted as meaning that the reservation in respect of Article 21(2) of the Brussels I Regulation precludes the application of a rule of jurisdiction existing under the national law of the Member State which allows an employee to sue a legal person, which, in circumstances such as those described in the first question, is directly liable to him for claims arising from an individual contract of employment with a third party, as the 'successor in title' of the employer in the courts for the place where the employee habitually carries out his work, if no such jurisdiction exists under Article 21(2) read in conjunction with Article 21(1)(b)(i) of the Brussels I Regulation?

3. If the first question is answered in the negative and the second question in the affirmative:

   (a) Is Article 17(1) of the Brussels I Regulation to be interpreted as meaning that the concept of 'professional activities' includes paid employment in an employment relationship?

   (b) If so, is Article 17(1) of the Brussels I Regulation to be interpreted as meaning that a letter of comfort on the basis of which a legal person is directly liable for claims of an employee arising from an individual contract of employment with a third party constitutes a contract concluded by the employee for a purpose which can be regarded as being within the scope of his professional activities?

4. If, in answer to the above questions, the referring court is deemed to have international jurisdiction to rule on the dispute:

   (a) Is Article 6(1) 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) to be interpreted as meaning that the concept of 'professional activities' includes paid employment in an employment relationship?

   (b) If so, is Article 6(1) of the Rome I Regulation to be interpreted as meaning that a letter of comfort on the basis of which a legal person is directly liable to an employee for claims arising from an individual contract of employment with a third party constitutes a contract

concluded by the employee for a purpose which can be regarded as being within the scope of his professional activities?

**Provisions of EU law cited**

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; 'Brussels I Regulation'), in particular Articles 17, 18, 20 and 21

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) (OJ 2008 L 177, p. 6, 'Rome I Regulation'), in particular Article 6

**Provisions of national law cited**

Arbeitsgerichtsgesetz (Law on the labour courts, 'ArbGG'), in particular Paragraphs 3 and 48

**Brief summary of the facts and proceedings**

1 The defendant is a company that operates in the real estate sector. The seat of its central administration is located in Canada. The applicant, who is domiciled in Germany, had been working for the defendant as the 'Deputy Vice President Investors Relations' on the basis of a 'service agreement' since the end of September 2015 and was essentially engaged in acquiring investors for the defendant's real estate business. As the parties felt that there was uncertainty surrounding the applicant's employment status, they decided 'to transfer' the contractual relationship to a Swiss company that was to be newly established. In mid-November 2015, they agreed to terminate the 'service agreement' with retroactive effect. An accompanying letter from the applicant states that he signed the agreement subject to the condition that an equivalent agreement be concluded in relation to an executive management contract in respect of the Swiss company to be established.

2 On 14 January 2016, the defendant established a subsidiary, R Swiss AG, under Swiss law. On 12 February 2016, the applicant concluded a written contract of employment with R Swiss for a position as its director. Under that contract of employment, the applicant was to receive a starting bonus of 170 000 American dollars (USD) and a monthly salary of USD 42 500. The starting bonus was intended to cover the remuneration to which the applicant was entitled for 4 months.

3 Also on 12 February 2016, the parties signed a ‘patron agreement’ (as per the terminology used by the parties, commonly referred to as a ‘letter of comfort’). The letter of comfort reads as follows:

> ‘Clause 1
>
> R has established a subsidiary, R Swiss AG[,] for sales in Europe. The director is responsible for the executive management of that company. In accordance with that assumption, R declares the following:
>
> Clause 2
>
> R has full responsibility for the fulfilment of the obligations relating to the contracts of R Swiss AG based on the cooperation of its director with R Swiss AG.’

4 On 1 April 2016, the applicant and R Swiss entered into a new contract of employment, which replaced the previous one and in which they agreed on the payment of a starting bonus of USD 255 000, whereby the contractual terms were essentially identical in all other respects. As was the case with the previous one, this contract of employment was to be subject to Swiss law.

5 On 11 July 2016, R Swiss notified the applicant that the contract of employment was to be terminated.

6 By judgment of 2 November 2016, the Arbeitsgericht Stuttgart (Stuttgart Labour Court, Germany) found that the termination was ineffective and ordered R Swiss to pay the applicant USD 255 000 as his starting bonus and USD 212 500 as his remuneration for April to August 2016. This judgment became final, but R Swiss did not discharge its payment obligation.

7 At the beginning of March 2017, bankruptcy proceedings were opened in respect of the assets of R Swiss under Swiss law. At the beginning of May 2017, those proceedings were discontinued owing to a lack of insolvency assets.

8 In the main proceedings, the applicant seeks, on the basis of the letter of comfort, payment from the defendant of the sums owed by R Swiss according to the aforementioned judgment of the Stuttgart Labour Court. Furthermore, he seeks payment for the failure to settle further remuneration claims to which he is entitled under his employment relationship with R Swiss for the period from September 2016 to November 2017, in the total amount of USD 595 000.

9 The action was dismissed at first instance on the ground that the German courts lack international jurisdiction. The Berufungsgericht (Court of Appeal), on the other hand, found that the German labour courts do have jurisdiction and upheld the action. By its appeal on a point of law brought before the referring court, the defendant seeks to have the decision at first instance restored.

**Brief summary of the grounds for the request**

10 The success of the defendant's appeal on a point of law depends crucially on whether the German courts have international jurisdiction. That jurisdiction could arise, first, from Article 21(2) read in conjunction with Article 21(1)(b)(i) of the Brussels I Regulation (question 1), second, from Paragraph 48(1a) read in conjunction with Paragraph 3 ArbGG, although the applicability of that national rule is unclear (question 2) and, third, from Article 18(1) of the Brussels I Regulation, if the applicant can be regarded as a 'consumer' within the meaning of that provision (question 3). If the German courts do in fact have jurisdiction, the question also arises as to which national law is applicable to the letter of comfort (question 4).

***Question 1***

11 Pursuant to Article 66(1) of the Brussels I Regulation, the latter is applicable ratione temporis, as the action was brought in March 2017 and thus after 10 January 2015. The regulation is also applicable ratione materiae pursuant to the first sentence of Article 1(1) thereof.

12 The foreign element that is always required for the applicability of the Brussels I Regulation exists because the defendant is a foreign company without a registered office in Germany. According to the findings of the Court of Appeal, its central administration within the meaning of Article 63(1)(b) of the Brussels I Regulation is located in Canada. In addition, the parties both consider that the company's statutory seat within the meaning of Article 63(1)(a) of the Brussels I Regulation is also located there.

13 As the defendant is not domiciled in a Member State, the international jurisdiction of the German courts is determined by Article 6(1) of the Brussels I Regulation, which refers to the law of the Member States but expressly leaves certain jurisdiction rules of the Brussels I Regulation unaffected. Paragraph 2 of that article has no relevance in the present case, because the German rules of jurisdiction do not differentiate according to nationality.

14 There is no exclusive jurisdiction by virtue of Articles 24 or 25 of the Brussels I Regulation. Nor is Article 26 of the Brussels I Regulation relevant, since the defendant has invoked the lack of jurisdiction of the German courts at all instances.

15 However, jurisdiction may exist under Article 21(2) read in conjunction with Article 21(1)(b)(i) of the Brussels I Regulation. In that regard, it is necessary to clarify whether those provisions are applicable even if – as in the present case – although the defendant is not the employer itself, it is liable, on the basis of a letter of comfort, for the claims against the employer arising from a contract of employment and the latter would not have come into being without the letter of comfort.

16 The referring court considers that the contract of employment concluded between the applicant and R Swiss constitutes an 'individual contract of employment' within the meaning of Section 5 of Chapter II ('Jurisdiction over individual contracts of employment') of the Brussels I Regulation. However, claims arising from that contract of employment are only indirectly the subject matter of the main proceedings. The applicant is claiming against the defendant on the basis of the letter of comfort of 12 February 2016.

17 According to Clause 2 of that document, the defendant assumed, by virtue of the letter of comfort, 'full responsibility for the fulfilment of the obligations relating to the contracts' that the applicant concludes with R Swiss by virtue of his activity as its director. The referring court understands that agreement to mean that the defendant assumed, in a legally binding manner, an obligation towards the applicant to provide R Swiss with financial resources in order that it can actually fulfil its financial obligations towards the applicant. Thus, in the present case, the letter of comfort is a unilaterally binding contract comparable to an assurance or guarantee. At least in the event of the insolvency of the company that is the subject of the letter of comfort – as demonstrated by the bankruptcy of R Swiss – it establishes an obligation on the part of the defendant to assume liability, from which the applicant can derive claims without the need for a prior, unsuccessful attempt to have recourse to R Swiss.

18 However, the defendant did not adopt R Swiss's legal status as an employer. Even though it was the parent company of R Swiss, it did not have the right to exert managerial authority over the applicant.

19 The Court of Justice has not yet addressed the question of whether Article 21(2) of the Brussels I Regulation is applicable in such a case. Nor is the answer to the question so clear as to leave no scope for any reasonable doubt.

20 Some authors in German legal writings take the view that the parties to a contract of employment are not subject to any jurisdiction other than that expressly provided for in Articles 20 to 23 of the Brussels I Regulation. Other authors argue that it cannot be ruled out from the outset that those provisions could also be applied where an action is brought against a third party in order to enforce claims arising from an employment relationship.

***Question 2***

21 The referring court assumes that the German courts have international jurisdiction under national law. The local jurisdiction of a labour court results from Paragraph 48(1a) read in conjunction with Paragraph 3 ArbGG, pursuant to which the court in the district of which the employee habitually carries out its work has jurisdiction, even if the action is not directed against the employer itself but against its legal successor. According to the referring court's case-law, the concept of 'successor in title' must be interpreted broadly and also covers cases in which liability arises from a letter of comfort comparable to a guarantee. Under

German law, the thus existing local jurisdiction indicates the existence of international jurisdiction; a court is thus generally also considered to have international jurisdiction.

22 However, it is unclear whether Paragraph 48(1a) ArbGG can be applied in addition to the jurisdiction rules provided for in Article 20 et seq. of the Brussels I Regulation.

23 According to the case-law of the Court of Justice, the provisions featuring under Section 5 of Chapter II of the Brussels I Regulation are not only specific but also exhaustive (judgment of 14 September 2017, *Nogueira and Others*, C-168/16 and C-169/16, EU:C:2017:688, paragraph 51, and of 21 June 2018, *Petronas Lubricants Italy*, C-1/17, EU:C:2018:478, paragraph 25). Accordingly, Articles 20 to 23 of the Brussels I Regulation definitively govern, within their scope of application, the possible jurisdictions in cases concerning a claim arising from an individual contract of employment. The fact that the interpretation of those provisions is a matter reserved for the Court of Justice ensures that they are applied uniformly in the Member States. This allows the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued (see judgment of 10 April 2003, *Pugliese*, C-437/00, EU:C:2003:219, paragraph 16).

24 Against this background, the referring court considers that there is a strong argument in favour of not applying national rules of jurisdiction in addition to Article 21(2) of the Brussels I Regulation, even if they favour the employee. However, this outcome is not so clear as to leave no scope for any reasonable doubt.

***Question 3***

25 If the Court of Justice answers question 1 in the negative and question 2 in the affirmative, the decisive factor is whether, with regard to the assertion of claims on the basis of the letter of comfort, the applicant is to be regarded as a ‘consumer’ within the meaning of Article 18(1) of the Brussels I Regulation (as assumed by the Court of Appeal). Pursuant to that provision – which is likewise left unaffected in Article 6(1) of the Brussels I Regulation – a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.

26 The scope ratione materiae of Article 18(1) of the Brussels I Regulation arises from Article 17 of the Brussels I Regulation. The letter of comfort of 12 February 2016 constitutes a ‘contract’ within the meaning of that provision. However, it is unclear whether the applicant is to be regarded as a ‘consumer’ in the present context. Pursuant to Article 17(1) of the Brussels I Regulation, this must be a person who has concluded the contract for a purpose which can be regarded as being outside his trade or profession.

27 Whether the letter of comfort is a contract which can be regarded as being within the scope of the applicant's professional activities depends on whether the term 'professional' covers only activities carried out as a self-employed person or whether it also covers activities carried out as an employed person, in particular employment in an employment relationship. As far as can be seen, the Court of Justice has to date not ruled on this question of interpretation. There is controversy as to how it should be answered.

28 Some take the view that 'professional activities' within the meaning of Article 17(1) of the Brussels I Regulation refer only to self-employed (including freelance) professional activities. Therefore, contracts concluded by an employee for his profession may well constitute consumer contracts, according to that view. According to another view, an employee is not a consumer within the meaning of EU law, meaning that Article 17 of the Brussels I Regulation does not apply by analogy to actions brought by employees and employers.

29 The correct interpretation of Article 17(1) of the Brussels I Regulation with regard to the concept of 'professional activities' is not so obvious as to leave no room for reasonable doubt.

30 The wording of the provision does not specify a clear outcome. In German, the term 'beruflich' (professional) covers, both in the sense used in common parlance and in its legal meaning, any permanent activity intended to create and maintain a livelihood, and therefore covers activities carried out both as a self-employed person and as an employed person. The French and English language versions do not contain anything to indicate otherwise.

31 Furthermore, the referring court takes the view that the conditions laid down in Article 17(1)(c) of the Brussels I Regulation are satisfied. This is a case in which the consumer's contractual partner 'directs' his professional or commercial activity to the Member State of the consumer's domicile and the contract falls within the scope of such activity.

32 The concept of 'being directed' requires that the trader must have in some way manifested its intention to establish commercial relations with consumers from one or more Member States, including that of the consumer's domicile (see judgment of 7 December 2010, *Pammer und Hotel Alpenhof*, C-585/08 and C-144/09, EU:C:2010:740, paragraph 80 et seq.). According to the findings of the Court of Appeal, this is the case because the defendant engaged the applicant to acquire investors for its real estate projects on the European market, including Germany. The referring court takes the view that the fact that the letter of comfort does not constitute a real estate transaction is irrelevant. It is sufficient that the contract falls within the scope of business activity. In principle, this also includes the recruitment of staff to carry out business activities.

***Question 4***

33 If the German courts do have international jurisdiction, the resolution of the dispute will depend on whether German substantive law is applicable to the letter of comfort. This depends on whether the letter of comfort is a 'consumer contract' within the meaning of Article 6 of the Rome I Regulation, that is to say a contract concluded by the parties for a purpose which can be regarded as being outside the applicant's profession.

34 Pursuant to Article 28 of the Rome I Regulation, the latter is applicable ratione temporis, as the letter of comfort was entered into after 17 December 2009. The letter of comfort also gives rise to a situation involving a conflict of laws (Article 1(1) of the Rome I Regulation), since the applicant and the defendant are domiciled in different States. There is no choice of law within the meaning of Article 3 of the Rome I Regulation.

35 The applicable law in the absence of choice is determined in accordance with Article 4 of the Rome I Regulation, without prejudice to Articles 5 to 8 of that regulation. Of the provisions in Articles 5 to 8 of the Rome I Regulation, which take precedence over Article 4 in this respect, only the existence of a 'consumer contract' within the meaning of Article 6(1) of that regulation comes into consideration. Article 8 of the regulation is not relevant, since the letter of comfort is a legal transaction that has an intrinsic value and is separate from the contract of employment.

36 Pursuant to Article 6(1)(b) of the Rome I Regulation, a contract concluded by a natural person for a purpose which can be regarded as being outside his profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) is to be governed by the law of the country where the consumer has his habitual residence, provided that the professional directs, by any means, his commercial or professional activities to that country or to several countries including that country, and the contract falls within the scope of such activities. In that respect, the referring court considers – as already stated in relation to question 3 – that the defendant directed its commercial activities towards, inter alia, Germany and that the letter of comfort falls within the scope of those activities. However, the referring court is unable to determine, without prior clarification by the Court of Justice, whether the concept of 'professional activities' covers activities carried out as an employed person in an employment relationship and, if so, whether a letter of comfort that serves to secure claims arising from the paid employment can be regarded as being within the scope of professional activities. In this respect, even if the content of the provisions is not entirely identical, the same applies as that which applies within the framework of the provision of Article 17(1) of the Brussels I Regulation relevant to international jurisdiction.