Case C-393/22

Request for a preliminary ruling

Date lodged:

15 June 2022

Referring court:

Nejvyšší soud České republiky (Czech Republic)

Date of decision to refer:

5 May 2022

Applicant:

EXTÉRIA, s. r. o.

Defendant:

Spravíme, s. r. o.

[…]

ORDER

The Nejvyšší soud (the Supreme Court, Czech Republic) has ruled […] in the case of the applicant **EXTÉRIA, s. r. o.**, […], having its registered office at [Czech Republic] […] v the defendant **Spravíme, s. r. o.,** […], having its registered office at […] Slovak Republic, […] with respect to an application for the issuance of an European order for payment, conducted before the Okresní soud v Ostravě (Ostrava District Court, Czech Republic) […], concerning the defendant's appeal on a point of law against the order of the Krajský soud v Ostravě (Ostrava Regional Court, Czech Republic) of 16 February 2021, ref. no. 8 Co 40/2021-52, as follows:

I. Pursuant to Article 267 of the Treaty on the Functioning of the European Union, the Supreme Court hereby **submits** the following question to the Court of Justice of the European Union for a preliminary ruling:

Must Article 7(1)(b) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the

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recognition and enforcement of judgments in civil and commercial matters be interpreted as meaning that the concept 'contract for the provision of services' also includes a contract to enter into a future contract (pactum de contrahendo), in which the parties undertook to enter into a future contract that would be a contract for the provision of services, within the meaning of that provision?

[…]

Grounds:

I. Facts of the case and original proceedings

1 The applicant is a company based in Ostrava, Czech Republic, which provides consultancy in the field of occupational health and safety. The defendant is a company based in Ivanovice, Slovakia.

2 On 28 June 2018, the applicant and the defendant entered into a contract to enter into a future contract ('Future Master Franchise Agreement'), *pactum de contrahendo*. In that contract, the parties primarily committed themselves to a future legal act – the conclusion of a further contract – and agreed on certain aspects of that further contract. The subject of the future contract was for the applicant to grant the right to operate and manage the defendant's franchise branches in the Slovak Republic.

3 In addition to the obligation to enter into a future contract, Article III(A)(3) of the contract set out the obligation for the defendant to pay an advance payment in the total amount of EUR 20,400 + VAT. As stipulated in the provision in question, the advance payment served to secure the obligation of the obliged party (the defendant) to enter into a master franchise agreement with the entitled party (the applicant) in the future, within the agreed period, and to keep confidential all information obtained from the entitled party in connection with its franchise concept. The advance payment was to be paid by the defendant within 10 days of the signing of the contract to enter into a future contract, to the applicant's account at Raiffeissenbank, a. s., in the Czech Republic. In Article III(B)(3), the parties agreed that, should the obliged party fail to enter into a master franchise agreement for the Slovak Republic with the entitled party, and should it fail to do so even within a grace period subsequently granted by the entitled party, it would pay to the entitled party a contractual penalty of 100% of the advance payment. The possibility for the entitled party (the applicant) to withdraw from the contract in the event of non-payment of the agreed advance by the obliged party (the defendant) within the specified period was set out in Article IV(2). That same provision also provided for the right of the entitled party to withdraw from the contract in the event of a breach of the other contractual conditions. Furthermore, it was also agreed that, pursuant to Article V(3) of the contract, legal relations arising out of or in connection with the contract would be governed, unless otherwise provided for in the contract, by the laws of the Czech Republic. No

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agreement on jurisdiction within the meaning of Article 25 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 (hereinafter referred to as the 'Brussels I bis Regulation') had been agreed between the parties.

4 According to the applicant, the defendant breached its obligation to pay the advance payment. Consequently, the applicant exercised its right to withdraw from the contract and sought payment of EUR 24,684 plus interest and costs from the defendant, as a contractual penalty, by way of a European order for payment before the Czech courts.

5 In its first action in the case, the defendant objected that the courts of the Czech Republic lacked jurisdiction, in its submission of 7 August 2020.

6 By an order of 17 December 2020, the Ostrava District Court, as the court of first instance […] rejected the objection of lack of local jurisdiction and found that the Ostrava District Court did have jurisdiction to hear and decide the case. It based its jurisdiction on Article 7(1)(a) of the Brussels I bis Regulation, according to which a person domiciled in a Member State may be sued in another Member State if the subject of the dispute relates to a contract or a claim arising out of a contract, in the courts of the place where the obligation in question was or was to be performed. The court of first instance concluded that, in the light of the findings made, the applicant seeks performance which was to have been provided, within the meaning of that provision of the Brussels I bis Regulation, to the applicant based in the Czech Republic, in the circuit of the district court concerned. Furthermore, it stated that it had not been alleged or established that jurisdiction had been agreed between the parties, within the meaning of Article 25 of the Brussels I bis Regulation or otherwise established.

7 In its decision of 16 February 2021, the Ostrava Regional Court, as the first-instance appeal court […], upheld the decision of the court of first instance, stating that the court of first instance had correctly applied the Brussels I bis Regulation and correctly concluded that both the international jurisdiction of the courts of the Czech Republic and the local jurisdiction of the Ostrava District Court were established, since the subject of the action was performance based on a breach of contract to enter into a future master franchise agreement. As is apparent from the pleas stated in the action, according to Article III(A)(3) of the contract in question, the defendant was to have paid the agreed amount, at issue in the action, which it failed to do, and the applicant thus withdrew from the contract. Pursuant to Article III(B)(3), the applicant was entitled to a contractual penalty of EUR 24,684. Given that the subject of the action is a claim to the payment of a contractual penalty, due to the defendant's failure to comply with the conditions of the contract on the conclusion of a future master franchise agreement, it is evident that the subject of performance is not manufacture and delivery of goods and, hence, the place of performance cannot be applied, i.e., the place of the manufacture and delivery of goods, and it is therefore not a claim for the payment

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of a contractual penalty related to the manufacture and delivery of goods. Article 7(1)(b) of the Brussels I bis Regulation will therefore not apply, as argued by the defendant in its first-instance appeal. Furthermore, according to the first-instance appeal court, the defendant's objection cannot stand, to the effect that the performance of the future contract was to take place in Slovakia, which, according to the defendant, is based on the provision on contractual territory, which shows that the defendant was to use the territory of the Slovak Republic for the performance of the subject of the future contract. According to the first-instance appeal court, the decisive issue is that the contract for the conclusion of the future master franchise agreement itself was breached and that the advance payment relating to the one-off entry charge was to have been paid within 10 days of the signing of the contract to the applicant's account held at Raiffeissenbank, a.s. As the applicant correctly argues, according to the first-instance appeal court under Czech law, namely under Paragraph 1955 of Zákon č. 89/2012 Sb., občanský zákoník (Law 89/2012, the Civil Code), the place of the performance of a pecuniary obligation shall be the place of the registered office of the creditor, if the contract is governed by the laws of the Czech Republic. Hence, according to the court of appeal, the place of performance is the creditor's registered office, i.e., the registered office of the applicant, which is in Ostrava, Czech Republic. Consequently, pursuant to Article 7(1)(a) of the Brussels I bis Regulation, the court having local jurisdiction is the court in Ostrava, given that the applicant chose the Ostrava District Court to lodge its action.

8 The defendant filed an appeal on a point of law to the Supreme Court challenging the decision. According to its claims, the nature of the claim for payment of a contractual penalty in relation to Article 7(1) of the Brussels I bis Regulation was assessed incorrectly at an earlier stage of the proceedings, which therefore led to an erroneous conclusion as to the jurisdiction of the courts to rule on the claim to the payment of the penalty. According to the defendant, the Court of Appeal should have held that the contractual penalty, as a claim based on a contract, must be governed by the main contract, which in this case is the contract to enter into a future contract. The obligation whose fulfilment was to be secured by the contractual penalty was to be a non-pecuniary debt and the place of its fulfilment was to be determined according to national law, which, according to its argument, established the jurisdiction of the Slovak courts in the present case.

9 In its response to the appeal on a point of law, the applicant stated that it agreed with the conclusions of the national courts and, furthermore, pointed out that the primary breach of contract was the non-payment of the agreed advance payment. The breach of that obligation gave rise to the right to withdraw from the contract and, at the same time, the claim to the payment of a contractual penalty. The primary obligation secured was therefore, according to the applicant, the failure to pay the advance payment.

II. Applicable EU legislation

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10 The following provisions of the Brussels I bis Regulation are the main provisions relevant for an assessment of the preliminary reference: Article 7(1)(a), Article 7(1)(b), and Article 7(1)(c).

III. Applicable national legislation

11 Paragraphs 1954 and 1955 of Law 89/2012, the Civil Code, may be relevant for the assessment of the preliminary reference.

Paragraph 1954

A proper discharge requires that the debt be discharged at the place determined. If the place of performance cannot be ascertained from the contract, the nature of the obligation, or the purpose of performance, the performance shall take place at a place provided for by statute.

Paragraph 1955

(1) A debtor performs a non-pecuniary debt at the place of his residence or registered office. A debtor shall perform a pecuniary debt at the place of residence or registered office of the creditor.

(2) If an obligation was created in the operation of an enterprise, the debt is performed at the place of the enterprise. This applies mutatis mutandis where the obligation was created in the operation of an establishment.

IV. Grounds for the preliminary reference and position of the Supreme Court

12 In this case, it is necessary to answer the question of whether courts of the Czech Republic have international jurisdiction. Hence, the Brussels I bis Regulation must be applied, since the dispute has an international element in civil and commercial matters and the proceedings were initiated after 10 January 2015.

13 In this context, it is necessary to assess whether the jurisdiction of the Czech courts can be established on the basis of special jurisdiction under Article 7(1) of the Brussels I bis Regulation, as the action is directed against a defendant with its registered office in a Member State other than the State of the forum.

14 Pursuant to Article 7(1)(a) of the Brussels I bis Regulation, in matters relating to a contract, a person domiciled in a Member State may be sued in another Member State in the courts for the place of performance of the obligation in question. Pursuant to Article 7(1)(b) of the Brussels I bis Regulation, in the case of the sale of goods, the place of the performance of the obligation is the place in a Member State where, under the contract, the goods were delivered or should have been delivered, and in the case of the provision of services, the place where, under the contract, the services were provided or should have been provided. As follows from Article 7(1)(c) of the Brussels I bis Regulation, if point (b) does not apply,

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then point (a) applies. Hence, the application of (a) constitutes a residual category that may be applied to a case only if the application of (b) is excluded.

15 The Supreme Court is aware of established case-law of the Court of Justice of the European Union ('the CJEU') in the context of the autonomous interpretation of the term 'matters relating to a contract', which is a concept common to Article 7(1)(a) and (b) of the Brussels I bis Regulation. According to that case-law, the essential characteristic of a contract is the existence of an obligation freely assumed by one party towards another (comp. CJEU judgment of 17 June 1992, *Jakob Handte & Co. GmbH* v *Traitements Mécano-chimiques des Surfaces SA*, in Case C-26/91, paragraph 15). Furthermore, it understands that the concept includes all obligations arising under a contract, where non-performance of that contract is relied upon to support a claimant's action, (comp. CJEU judgment of 15 June 2017, *Saale Kareda* v *Stefan Benkö*, in Case C-249/16, paragraph 30). A contract to enter into a future contract is itself, as in the present case, a binding instrument concluded voluntarily, and the terms contained therein represent the result of negotiations between the parties. According to the applicant, the dispute concerning the contractual penalty is based on the contract to enter into a future contract in question, since it was to have arisen as a result of the failure of the obliged party to pay down an advance, in breach of its obligations arising from the contract. Hence the Supreme Court considers that the right to the contractual penalty which is the issue in the present case is a claim 'relating to a contract' within the meaning Article 7(1) of the Brussels I bis Regulation.

16 In this situation, it is necessary to assess whether subparagraph (b) or (a) of the provision in question applies to this case. Given that the essential characteristics of a contract for the sale of goods include both the transfer of title and the exchange of goods for money, the present case does not involve a claim for the payment of a contractual penalty related to the manufacture and delivery of goods, within the meaning of the first bullet point of Article 7(1)(b) of the Brussels I bis Regulation; however, in order for the application of subparagraph (b) to be excluded and subparagraph (a) to apply, it is also necessary to assess whether the case does not involve a claim relating to the 'provision of services', within the meaning of the second bullet point of that provision. The assessment of this question is crucial, for if the case were to be assessed as the 'provision of services', the courts of the place where the services were to be provided under the contract would have jurisdiction over all related claims. If, however, the residual category under Article 7(1)(a) of the Brussels I bis Regulation were to be applied and the conditions for the application of the same provision were met, international and local jurisdiction would in principle be assessed separately for each obligation (comp. CJEU judgment of 6 October 1976, *Industrie Tessili Italiana Como* v *Dunlop AG*, in Case [C-]12/76).

17 In the present case, the parties negotiated a contract to enter into a future contract, which they called the 'Future Master Franchise Agreement'. The question therefore arises for the Supreme Court as to how to characterise, for the purpose of establishing international jurisdiction under Article 7(1) of the Brussels I bis

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Regulation, a contract to enter into a future contract in which the parties undertook to enter into a contract in the future. Two different solutions are possible. In the view of the Supreme Court, the CJEU has not yet provided clear guidance in this respect. In particular, one option is to consider whether the contract on a future contract as such is a contract for the provision of services. If not, the international jurisdiction of the courts could be established only on the basis of Article 7(1)(a) of the Brussels I bis Regulation. The second possible solution is to determine international jurisdiction for claims under the contract to enter into a future contract on the basis of the nature of the contract that is to be concluded in the future by the parties. It is the conclusion of the future contract that is the very essence of the contract to enter into a future contract. That would mean that, if the envisaged future contract were a contract for the purchase of goods or a contract for the provision of services, it would be appropriate to determine the international jurisdiction of courts in accordance with Article 7(1)(b) of the Brussels I bis Regulation on the basis of the place where the goods or services were to be provided in the future under the contract envisaged.

18 With a view to existing CJEU case-law, the Supreme Court leans towards the conclusion that the conclusion of the contract to enter into a future contract does not in itself constitute the provision of services within the autonomous meaning of EU law. In the opinion of the Supreme Court, the contract to enter into a future contract does not meet the requirement of the active performance of an activity for consideration for the benefit of the other party, as required by Article 7(1)(b) of the Brussels I bis Regulation (comp. CJEU judgment of 23 April 2009, *Falco Privatstiftung and Thomas Rabitsch* v *Gisele Weller-Lindhorst*, in Case C-533/07; of 14 July 2016, *Granarolo SpA* v *Ambrosi Emmi France SA*, in Case C-196/15; of 19 December 2013, *Corman-Collins SA* v *La Maison du Whisky SA*, in Case C-9/12; and of 25 March 2021, *Obala i lučice d.o.o.* v *NLB Leasing d.o.o.*, in Case C-307/19).

19 The contract to enter into a future contract contains several general elements that the parties have agreed will be incorporated in the future contract, including the generally defined subject of the future contract; however, the purpose of the contract is to conclude a further contract upon written invitation, and a failure to conclude the envisaged contract is sanctioned in the present case by a contractual penalty in the amount of the advance payment. This, in the Supreme Court's view, cannot be regarded as the active performance of an activity for the benefit of another party, since the conclusion of the future contract constitutes merely a legal act, not an actual active activity provided as a service to the other party. It is precisely in this fact that the Supreme Court sees the difference, for example, from a commercial agency contract (comp. CJEU judgment of 11 March 2010, *Wood Floor Solutions Andreas Domberger GmbH* v *Silva Trade SA*, in Case C-19/09), which also involves the conclusion of contracts, but, at the same, other factual activities take place on its basis, such as contacting other entities or presenting products or services.

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20 On the basis of the case-law available, the Supreme Court also holds that the requirement of consideration is not fulfilled in the case of the contract to enter into a future contract. Neither the obliged party nor the beneficiary is entitled to consideration under the contract to enter into a future contract, even in its broadest sense. The parties did agree on the future amount of the entry charge or recurring monthly fees, but the obligation to pay them arises only if and when the parties enter into the envisaged future contract. Thus, neither of the parties was entitled to remuneration under the contract which they actually concluded and from which the dispute originated, but merely undertook that, once they enter into a contract for services, the remuneration would be of a specific amount. Although in Article III(A)(3), under the heading 'Advance Payment', the contract to enter into a future contract does refer to an 'advance and advance payment', that is an advance for a future entry fee and also covers the amount of the contractual penalty. The Supreme Court is of the opinion that neither party benefits economically from this payment *ipso facto*, since its primary purpose is to secure future performance of the obligation, and it does not serve as a payment and a certain economic advantage in the sense of consideration. Under the terms of a contract such as the one at issue in this case, it therefore appears that the advance payment in question does not constitute an economic value which can be regarded as consideration in the sense described and that the obligation to pay the advance payment is primarily a means of securing the performance of a contractual obligation in the future (comp. CJEU judgment of 14 July 2016, *Granarolo SpA* v *Ambrosi Emmi France SA*, in Case C-196/15).

21 With a view to the above, the Supreme Court holds that Article 7(1)(b) of the Brussels I bis Regulation cannot be applied to a contract to enter into a future contract. The residual category set out in Article 7(1)(a) of the Brussels I bis Regulation must therefore be applied. The application of the provision in question has a significant impact on the assessment of the place of performance, as under subparagraph (a), the principle of characteristic performance is not to be used, and, in essence, each obligation has its own place of performance. With a view to the CJEU judgment of 23 April 2009 *Falco Privatstiftung and Thomas Rabitsch* v *Gisele Weller-Lindhorst*, in Case C-533/07, paragraphs 54-55, it can be noted that only in the case of contracts for the sale of goods, and contracts for the provision of services, did the Community legislator not intend to base the Brussels Convention on a specific, more narrowly defined obligation at issue (as the linguistic interpretation of the provision suggests, after all), but on an obligation which is characteristic of those contracts. At the same time, it intended to define autonomously in contractual matters the place of performance as a connecting factor for determining the competent court. As was found in connection with Article 5(1) of the Brussels Convention in the CJEU judgment of 6 October 1976, *A. De Bloos, SPRL* v *Société en commandite par actions Bouyer*, in Case 14/76, 'the obligation in question' corresponds to the right arising from an agreement which the applicant seeks to enforce in its action, and which constitutes the basis of its action. If, for example, an applicant sues for damages, the decisive contractual obligation is that whose breach led to the occurrence of the damage. Furthermore, where the defendant alleges a breach of duty by the applicant, but

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the claim is for payment, the 'obligation in question' will be the obligation to pay, not the obligation whose performance the defendant disputes. The place of performance of that obligation is then no longer an autonomous concept of that obligation (comp. CJEU Judgment of 6 October 1976, *Industrie Tessili Italiana Como* v *Dunlop AG*, in Case 12/76; and of 28 September 1999, *GIE Groupe Concorde and Others* v *Capitaine commandant le navire "Suhadiwarno Panjan" and Others*, in Case C-440/97; and others).

22 In the opinion of the Supreme Court, a different interpretation may be admitted, and hence, the conclusion that the contract to enter into a future contract is a contract for the provision of services may be reached only if that conclusion is derived from the nature of the contract whose conclusion is envisaged. The Master Franchise Agreement itself could meet the requirements of the provision of services, both in terms of active performance of an activity and in terms of consideration, and therefore, the place of the provision of the services would be based on the future contract. The case-law of the CJEU to date does not, however, suggest such a possibility.

23 The CJEU has not yet explicitly addressed the question of whether a *pactum de contrahendo* is a contract for services, if it envisages the conclusion of a contract for services, or whether it is necessary for the contract to be designated as such with a view to the intended outcome of the entire legal relationship. The contract to enter into a future contract in itself is a binding instrument and its formation, termination, and obligations arising therefrom are largely independent of the envisaged future contract. The contract concluded between the parties does set out in general some of the elements of the future contract, but it contains its own primary obligation or separate penalty mechanism and its own termination options. The termination options of the contract to enter into a future contract (by performance, by agreement of the parties, by withdrawal in the event of breach of the obligations arising from the contract) also imply that the conclusion of the future contract is not even a necessary consequence of the contract to enter into a future contract. Such an interpretation of Article 7(1) of the Brussels I bis Regulation, which would allow the nature of the intended future contract itself to be taken into account when qualifying the contract to enter into a future contract as a contract for the provision of services, is therefore not unequivocal.

24 Given the absence of relevant CJEU case-law on this matter, there is, in the Supreme Court's view, a reasonable doubt as to the correctness of the interpretation of EU law. In a situation when the application of Article 7(1)(b) of the Brussels I bis Regulation must be ruled out before the application of Article 7(1)(a) of the Regulation to the matter at hand, the Supreme Court therefore considers it necessary to discontinue the proceedings and to refer the question to the CJEU for a preliminary ruling.

25 It is also clear from the above that the application of the different provisions has a fundamental impact on the present case, as it may lead to a different conclusion on the jurisdiction of the Czech courts. At the same time, the establishment of special

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jurisdiction is a sort of exception to the general rule, which partly justifies a possible more restrictive interpretation by the CJEU, for the purposes of predictability, legal certainty, and guaranteeing a close connection between the forum and the dispute. Taking into account the wide use of contracts to enter into a future contract, *pactum de contrahendo*, in international trade, the uniform application of EU law becomes increasingly important, and a uniform interpretation of a given provision across Member States cannot be fully ensured without an interpretation by the CJEU.

26 In view of the above, the CILFIT criteria (comp. CJEU judgment of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA* v *Ministero della sanità*, in Case 283/81) were not met in the present case. Therefore, given the specific nature of a contract to enter into a future contract, as a binding pre-contractual instrument, and its distinction from contracts in the CJEU's case-law and the importance of the instrument in question in international trade between Member States, the Supreme Court, as the court whose decision cannot be appealed within the meaning of Article 267 of the Treaty on the Functioning of the European Union, deems it necessary to refer this question to the CJEU.

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