

Case C-821/21

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:

24 December 2021

Referring court:

Juzgado de Primera Instancia de Fuengirola (Spain)

Date of the decision to refer:

3 December 2021

Applicant:

NM

Defendant:

Club La Costa (UK) PLC, sucursal en España

CLC Resort Management LTD

Midmark 2 LTD

CLC Resort Development LTD

European Resorts & Hotels, S. L.

Subject matter of the main proceedings

International jurisdiction of Spanish courts and law applicable to the subject matter of the dispute – Brussels I Regulation and Rome I Regulation – Timeshare contract – Consumer contracts

Subject matter and legal basis of the request for a preliminary ruling

Request for a preliminary ruling on interpretation – Article 267 TFEU – Interpretation of the Brussels I Regulation and the Rome I Regulation – Consumer contract

Questions referred for a preliminary ruling

In relation to Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012:

1. In the case of consumer contracts to which Article 18(1) of the Brussels I Regulation is applicable, *is it compatible with that regulation to interpret the term ‘the other party to a contract’ used in that provision as encompassing only a person who signed the contract, such that it cannot include natural or legal persons other than those who actually signed the contract?*

2. If the term ‘the other party to a contract’ is interpreted as encompassing only a person who actually signed the contract, in situations in which both the consumer and ‘the other party to a contract’ are domiciled outside Spain, *is it compatible with Article 18(1) of the Brussels I Regulation to conclude that the international jurisdiction of the Spanish courts cannot be determined by the fact that the group of undertakings to which ‘the other party to a contract’ belongs includes companies that are domiciled in Spain but did not sign the contract or signed different contracts other than that in respect of which a declaration of nullity is sought?*

3. If ‘the other party to a contract’, as referred to in Article 18(1) of the Brussels I Regulation, provides evidence that its domicile is established in the United Kingdom in accordance with Article 63(2) of the regulation, *is it compatible with that provision to conclude that a domicile so established delimits the option that can be exercised under Article 18(1)? And, in addition to that, is it compatible with that provision to conclude that it does not simply establish a mere ‘presumption of fact’, or that that presumption is overturned if ‘the other party to a contract’ carries on business outside the jurisdiction of its domicile, or that the onus is on ‘the other party to a contract’ to demonstrate that its domicile, as determined in accordance with the provision cited, is the same as the place where it carries on its business?*

In relation to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008:

4. In the case of consumer contracts to which the Rome I Regulation is applicable, *is it compatible with Article 3 of that regulation to conclude that clauses determining the applicable law, which are included in the ‘general conditions’ of the contract signed by the parties or which are included in a separate document which is expressly referred to in the contract and is shown to have been provided to the consumer, are valid and applicable?*

5. In the case of consumer contracts to which the Rome I Regulation is applicable, *is it compatible with Article 6(1) of that regulation to conclude that it can be relied on by a consumer and by the other party to a contract?*

6. In the case of consumer contracts to which the Rome I Regulation is applicable, *is it compatible with Article 6(1) of that regulation to conclude that, if the conditions laid down therein are satisfied, the law indicated in that provision will in all cases be applied in preference to that indicated in Article 6(3), even though the latter may be more favourable to the consumer in the particular case?*

Case-law and provisions of European Union law relied on

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):

Article 7, point 5 ('Special jurisdiction').

Article 17(1)(c) ('Jurisdiction over consumer contracts').

Article 18(1).

Article 19.

Article 24(1), first subparagraph ('Exclusive jurisdiction').

Article 25(1) ('Prorogation of jurisdiction').

Article 63(1) and (2) ('General provisions').

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):

Article 3(1) ('Freedom of choice').

Article 4(1) and (4) ('Applicable law in the absence of choice').

Article 6 ('Consumer contracts').

Article 10(1) ('Consent and material validity').

Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L29, p.7).

Article 66(a), Article 67(1)(a) and Article 126.

Treaty on the Functioning of the European Union. Article 81.

Judgment of the Court of Justice of 17 December 1970, *Handelsgesellschaft*, Case 11/70.

Provisions of national law relied on

Royal Legislative Decree 1/2007 approving the consolidated text of the General Law for the protection of consumers and users (Real Decreto Legislativo 1/2007 por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios) of 16 November 2007.

Article 67. ‘Provisions of private international law’.

Law 4/2012 on timeshare contracts (Ley 4/2012 de contratos de aprovechamiento por turno de bienes de uso turístico) of 6 July 2012.

Succinct presentation of the facts and procedure in the main proceedings

- 1 Mr NM, a British national domiciled in the United Kingdom (UK), concluded in Spain, on 6 October 2018, a timeshare contract under Law 4/2012 of 6 July 2012. Mr NM’s wife, also a British national domiciled in the UK, was also a party to the contract, as was, through its Spanish branch, the entity Club La Costa (UK) PLC, a British company domiciled in the UK which directs its commercial activities to Spain and other countries, including the UK.
- 2 The timeshare contract contains the following clause (clause ‘S’): ‘*This contract shall be interpreted in accordance with English law and shall be subject to the exclusive jurisdiction of the English courts. The parties to this contract agree irrevocably to service by post at the addresses indicated overleaf or by any other method permitted under the laws of England and Wales.*’
- 3 Mr NM brought an action for a declaration of nullity of that contract before the referring court and a claim for a refund of payments made. The action has been brought against the other party to the contract, Club La Costa (UK) PLC, and also against another four companies, three of which are also of British nationality and the fourth of which is a Spanish company (European Resorts & Hotels, S.L.). Those four defendant companies did not participate in the conclusion of the contract at issue in the main proceedings but did so in the conclusion of other contracts in which Club La Costa (UK) PLC was not involved.
- 4 The disputed issue which must be resolved in the main proceedings is whether the Spanish courts have jurisdiction to hear a claim like that in the main proceedings. It is also necessary to determine what the applicable law is, in so far as, under Spanish procedural law, if a foreign law is applicable, the party which invokes that law must confirm the existence and content of that law. Spanish law also lays down rules on the admission of evidence under foreign law, in accordance with the principles of relevance and utility.

The essential arguments of the parties in the main proceedings

- 5 Having been invited by the referring court to state their views on whether a preliminary ruling should be sought from the Court of Justice of the European Union, the applicant was against such a reference whereas the defendant companies agreed that a reference should be made for a preliminary ruling.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 6 It is indisputable that the relevant provisions of European Union law for determining jurisdiction are contained in Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 ('the Brussels I Regulation') and in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, in accordance with which the provisions of the Brussels I Regulation are to apply in the UK in respect of legal proceedings instituted before the end of the transition period, which ended on 31 December 2020 (Articles 67(1)(a) and 126 of the Agreement).
- 7 It is also indisputable that the relevant provisions of EU law for determining the applicable law are contained in Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 (Rome I) and in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, in accordance with which the provisions of the Rome I Regulation are to apply in the UK in respect of contracts concluded before the end of the transition period, which ended on 31 December 2020 (Articles 66(a) and 126 of the Agreement).
- 8 To date, the Spanish courts, in particular the Audiencia Provincial de Málaga (Provincial Court, Malaga, Spain), have provided divergent and changing interpretations of the above provisions, such that, in disputes having the same subject matter, which dealt with the question of the international jurisdiction of the court to hear a claim of nullity of contract and a consequent claim for the refund of payments, those courts have sometimes ruled in favour of the jurisdiction of the Spanish courts and have sometimes rejected the jurisdiction of the Spanish courts.

Interpretation of Regulation No 1215/2012 (Brussels I)

- 9 It should be observed at the outset that it has been agreed without question in the case-law that the contract at issue in the main proceedings does not have as its object rights *in rem* in immovable property or a tenancy, from which it follows that the special jurisdiction rule under Article 24(1) of the Brussels I Regulation, in accordance with which, in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the

Member State in which the property is situated have exclusive jurisdiction, regardless of the domicile of the parties, is not applicable.

- 10 It has also been agreed that the contract at issue in the proceedings comes under the category of *consumer contracts*, as provided for in Article 17(1)(c) of the Brussels I Regulation, which are covered by the jurisdiction rule laid down in Article 18(1), pursuant to which ‘*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.*’ That jurisdiction rule may be departed from only by an agreement expressly conferring jurisdiction on a particular court, provided that, in accordance with Article 19 of the Brussels I Regulation, that agreement is *entered into after the dispute has arisen*.
- 11 At this stage, it should be noted that the dispute concerning interpretation has arisen in relation to the issue of identification of the domicile of *the other party to a contract*, as referred to in Article 18(1) of the Brussels I Regulation.
- 12 Article 62 of the Brussels I Regulation addresses that issue, in so far as it provides, in paragraph 1, that, in order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court must apply its internal law, and, in paragraph 2, that, *if a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court must apply the law of that Member State*. However, where *the other party to a contract* is a legal person, Article 63 of the Brussels I Regulation identifies as the place of domicile the place where the legal person has its: a) *statutory seat*; b) *central administration*, or c) *principal place of business*. More specifically, for the purposes of the United Kingdom (UK), ‘*statutory seat*’ means *the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place* (Article 63(2)).
- 13 That being so, Spanish case-law has held that the option provided to consumers under Article 18(1) of the Brussels I Regulation does not allow a consumer to customise territorial jurisdiction, thereby disregarding the domicile of the legal person, as defined in the provision. It is always the domicile of *the other party to the contract* which matters and not that of any other person who is not a party to the contract, and it is defined by Article 63 of the Brussels I Regulation, with its specific provision for the purposes of the UK. Based on that interpretation, where a consumer is not domiciled in Spain, the international jurisdiction of the Spanish courts is rejected, first, in cases in which the only legal persons sued are domiciled in the UK; second, in cases in which, in addition to the legal persons which concluded the contract – *the other party to a contract* – and which are domiciled in the UK, proceedings are also brought against other entities which are domiciled in Spain and which, although they are part of the same group of undertakings, are not parties to the contract; and third, in cases in which, in addition to the legal

persons which concluded the contract and which are domiciled in the UK, proceedings are also brought against other entities which are domiciled in Spain and which concluded other, ancillary contracts that are different from the contract at issue in the action for a declaration of nullity.

- 14 A totally divergent interpretation disregards the figure of *the other party to a contract* and that party's domicile, as defined in Article 63 of the Brussels I Regulation. According to that stance, Article 63 lays down a presumption of fact, such that *the other party to a contract* must prove that its registered office is the same as its place of business, since, otherwise, and if it is established that the group of undertakings to which that other party to the contract belongs carries on activities in Spain, the international jurisdiction of the Spanish courts is justified in accordance with such an interpretation of Articles 18(1) and 63 of the Brussels I Regulation.
- 15 In the referring court's view, that interpretation is not consistent with the spirit and the aim of the Brussels I Regulation, since it goes further than enabling a consumer to apply his own forum instead of the defendant's domicile, to the extent that the consumer is permitted to establish jurisdiction as that of the defendant's domicile irrespective of the legal definition, thereby practising a kind of forum shopping.

Interpretation of Regulation No 593/2008 (Rome I)

- 16 If the CJEU's reply to the questions referred for a preliminary ruling were to find that jurisdiction to hear the present dispute lies with the Spanish courts, it would still be necessary to determine the provision in accordance with which the validity or nullity of the contract must be established.
- 17 As indicated, the case-law agrees that the provisions governing the determination of the law applicable to the contract at issue in the main proceedings are the Rome I Regulation, in view of the date of the contract, and the relevant provisions of the Agreement on the withdrawal of the United Kingdom from the European Union, which were cited above. The provisions of the Rome I Regulation have received divergent interpretations in the case-law.
- 18 In accordance with Article 3(1) of the Rome I Regulation, *a contract is to be governed by the law chosen by the parties*. On a supplementary basis, the criteria laid down in Article 4 are to be applied, and these are completed by the closing clause of Article 4(4) which refers to *the law of the country with which it is most closely connected*. In addition to those general provisions, the regulation lays down special provisions, *inter alia*, for consumer contracts, in Article 6, headed 'Consumer contracts'. The rules laid down for this category of contract are as follows. The parties may choose the applicable law, provided that that choice does not result in the deprivation of the protection afforded by provisions that cannot be derogated from by agreement by virtue of the law applicable on a supplementary basis to consumer contracts (Article 6(2)). On a supplementary basis, that is, in the

absence of choice or where the choice made in the contract cannot be taken into consideration, the law of the country where the consumer has his habitual residence is to apply to consumer contracts, provided that the other party to the contract (the professional) satisfies one or other of these two conditions: a) he pursues his commercial or professional activities in the country where the consumer has his residence, or b) he directs his activities to that country or to several countries including that country (Article 6(1)). The general criteria laid down in Articles 3 and 4 will apply, on a further supplementary basis, only if those criteria are not satisfied (Article 6(3)).

- 19 It is common ground that Article 6 is applicable to the contract at issue in these proceedings, which appears to lead to the conclusion that the law applicable to the present case is UK law.
- 20 In accordance with a divergent judicial interpretation, in proceedings concerning contracts identical to that at issue in the main proceedings, English law is not applicable. According to such an interpretation, the clause conferring jurisdiction on English law is not valid because it was not freely agreed between the parties but was instead imposed by the other party to the contract as a general condition of the contract. In parallel, in accordance with the same interpretation, the provision in Article 6(1) of the Rome I Regulation cannot be relied on by the other party to the contract but only by the consumer, so that, if the consumer does not invoke such protection, the application of Article 6(3) of that regulation, which refers to Articles 3 and 4 of the regulation, is mandatory.
- 21 It should be noted, with regard to the above interpretation, that, first, neither the Rome I Regulation nor the case-law of the CJEU on consumer protection preclude the inclusion, in the general conditions of a contract, of clauses expressly conferring jurisdiction, where those conditions are set out in the contract signed by the parties or an indirect but clear reference is made to them. Second, it cannot be asserted that the provision in Article 6(1) may be relied on only by a consumer. The Rome I Regulation lays down no restriction of that kind. Rather, this appears to be an a priori and abstract view in accordance with which Spanish law, because it is more favourable, should be applied in preference to English law. That interpretation is based, moreover, on a provision of the Spanish Law on the protection of consumers and users, namely Article 67, concerning private international law, which governs the application of foreign law to consumers.
- 22 In that respect, the case-law of the CJEU has stipulated that the legal concepts included in European legislation are specific and autonomous concepts of European Union law which must be interpreted on the basis of the principles laid down in EU law but never on the basis of domestic principles, concepts or provisions (judgment of 17 December 1970, *Handelsgesellschaft*, 11/70).
- 23 The divergent interpretations that have been pointed out justify the need to clarify the meaning of the applicable provisions of both the Brussels I Regulation and the Rome I Regulation, as set out in the questions referred for a preliminary ruling.