Anonymised version

Case C-526/23

Request for a preliminary ruling

Date lodged:

17 August 2023

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

13 July 2023

Applicant:

VariusSystems digital solutions GmbH

Defendant:

GR Inhaberin B & G

…

The Oberster Gerichtshof (Supreme Court, Austria) … in the case between the applicant VariusSystems digital Solutions GmbH, … Vienna 22, … and the defendant GR Inhaberin B & G, Germany, … concerning EUR 101.587.68 …, as a result of an appeal on a point of law brought by the applicant against the order of the Oberlandesgericht Wien (Higher Regional Court, Vienna), acting as a court of appeal, of 27 March 2023, file ref. 11 R 58/23i-16, by which the order of the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) of 13 February 2023, file ref. 16 Cg 131/22k-11, was upheld, made the following

Order:

I. The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

Must Article 7(1)(b) of Regulation No 1215/2012/EU on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters be interpreted as meaning that, in the case of an action relating to a contract, the place of performance for the development and ongoing operation of software designed to meet the individual needs of a customer established in Member State A (in this case Germany) is at the place where

(a) the intellectual creation ('programming') behind the software is performed by the undertaking established in Member State B (in this case Austria); or

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

II. … [stay of proceedings]

Grounds:

Point I.:

A. Facts of the case

1 The applicant company, which has its registered office in Vienna, operates in the IT services sector. The defendant is established in Germany. The applicant developed software for the defendant to make it possible to evaluate corona tests in accordance with the requirements of the German legislature and for use in German testing centres. The subject matter of the contract was the initial and ongoing development and the ongoing operation of the software in Germany. The parties did not conclude a written contract or agree on either a place of jurisdiction or a place of performance.

B. Arguments of the parties and proceedings thus far

2 The **applicant** is seeking payment from the defendant of an outstanding fee totalling EUR 101 587.68, plus interest, for the performance period from 1 January 2022 to 3 June 2022. It based the jurisdiction of the court seised on the second indent of Article 7(1)(b) of Regulation No 1215/2012/EU because the services within the meaning of the contract had been provided or should have been provided in Vienna. According to the applicant, the software had been specially adapted and further developed for the individual needs of the defendant. Invoicing per test had been agreed and thus a specific result had been promised. Although the software had been continuously adapted for use in Germany, all work had been carried out in Vienna.

3 The **defendant** raised an objection alleging that the court seised lacks international jurisdiction. Since the characteristic service was the use of the processing software in Germany for German test subjects in accordance with the

requirements of the German legislature, the relevant place of performance for all actions relating to a contract was the defendant's registered office.

4 The **court of first instance** dismissed the action on the ground of lack of international jurisdiction. It classified the contract concluded by the parties as a contract of sale, the place of performance of which was the defendant's registered office in Germany.

5 The **appeal court** upheld that decision, but on different grounds.

6 It considered that, in the present case, it had to be concluded that there was not a contract of sale of goods (first indent of Article 7(1)(b) of Regulation No 1215/2012/EU), but rather the 'provision of services' within the meaning of the second indent of Article 7(1)(b) thereof, especially since the software was to be specially adapted and further developed for the individual needs of the defendant and to comply with the requirements of the German legislature. Under the second indent of Article 7(1)(b) of Regulation No 1215/2012/EU, the place of performance, in the case of the provision of services, is the place where, under the contract, the services were provided or should have been provided. By contrast, the place where the service was to be successfully rendered was irrelevant for the purposes of jurisdiction. In the case of reciprocal contracts, the non-pecuniary benefit was the relevant service characterising the contract. If the service related to a specific place, such as, for example, all services directed to a specific building, the place of performance was the place to which the service related, even if a service was to be provided at another place. Non-location-based services are provided where they reach the … beneficiary of the service. The software to be individually adapted to German conditions as a characteristic service was accessible in Germany.

7 **The applicant has brought an extraordinary appeal on point of law against that decision**, seeking to have the decisions of the lower courts set aside and the court of first instance ordered to initiate proceedings, without applying the ground for dismissal used previously.

8 In its … **statement in reply**, the **defendant** requests that the appeal on a point of law brought the other party be dismissed or, in the alternative, that it not be acted upon.

C. Relevant provisions of law

9 Article 7(1) of Regulation (EU) No 1215/2012 is worded as follows:

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

1.

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

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;

(c) if point (b) does not apply then point (a) applies.'

D. Reasoning for the reference

10 1. Both the court hearing the appeal on a point of law and the parties consider that the second indent of Article 7(1)(b) of Regulation No 1215/2012/EU is applicable. The Oberste Gerichtshof (Supreme Court) shares that view.

11 According to the case-law of the Court of Justice, the concept of 'service' within the meaning of Article 7(1)(b) of Regulation No 1215/2012/EU implies that the party who provides the service carries out a particular activity in return for remuneration (see, inter alia, C-533/07, *Falco Privatstiftung*; C-249/16, *Kareda*; and C-196/15, *Granarolo*).

12 The creation and supply of individual software, that is to say software that has been produced specifically to meet the particular needs and individual circumstances and wishes of a customer, is – unlike the permanent provision of standard software held on data carriers, which is classified as the purchase of a good (see … judgment of the Oberster Gerichtshof 5 Ob 504/96; RIS-Justiz RS0108702 [in each case on the classification in substantive law]) – to be regarded as such a service (judgment of the Oberster Gerichtshof 1 Ob 229/14d [on the classification in substantive law]). A software development contract, the subject-matter of which is the development of individual software, therefore falls within the scope of the concept of service contained in the second indent of Article 7(1)(b) of Regulation No 1215/2012/EU (see also judgment of the Oberlandesgericht München (Higher Regional Court, Munich), 20 U 3515/09, paragraphs 39 and 42; …).

13 2. The place of performance in the case of the provision of services within the meaning of the second indent of Article 7(1)(b) of Regulation No 1215/2012/EU is the place where, under the contract, the services were provided or should have been provided. The place to be determined is the place where the service provider was mainly to carry out his activity (judgment of the Court of Justice in C-19/09, *Wood Floor Solutions*, paragraph 38). Where – as in this case – there was no express agreement on the place of performance and the place of performance

cannot be determined from the contract, the place of the main provision of services is decisive (judgment of the Court of Justice in C-19/09, *Wood Floor Solutions*, paragraph 40). That suggests that the place of performance in the case of software development contracts should be deemed to be the place where the intellectual service is provided and not the place where the software is accessed and used (judgment of the Oberlandesgericht München, 20 U 3515/09, paragraphs 49, 51, and 52; …).

14 3. However, some academic legal writers take the view that if a service relates to a specific place, such as planning services for a building, the place of performance is the place to which the service relates, even if it is provided at another place (for example, in an architect's office); this applies accordingly to all fitting-out, servicing, after-sales and maintenance obligations relating to a building …. Non-location-based services are provided where they reach the beneficiary of the service …

15 As far as can be seen, the Court of Justice has not yet taken a position on those views; in its decision 4 Ob 140/18v, the Oberster Gerichtshof (Supreme Court) also left ultimately left unanswered the question of whether they should be accepted. If software were developed for use at a specific location, those views could support regarding that location as the place of performance.

16 4. In the present proceedings

– unlike in the case underlying decision of Oberlandesgericht München 20 U 3515/09 – no more detailed findings were made as to the time spent and the importance of the parts of the activity ('where which activities of what importance were performed …). However, it is common ground between the parties that the software was (further) developed and programmed at the applicant's registered office in Austria and in particular that the intellectual service was also provided in Austria.

17 That suggests that the place of performance should be considered to be the place where the applicant's employees provided the intellectual service, that is to say produced and further developed the software. That led to the jurisdiction of the court seised. However, it could be countered that the intellectual service was designed exclusively for the German market and the legal requirements in Germany, and also the individual needs of the defendant established there, and that the intellectual service has no independent value if it cannot be accessed and used, especially since the applicant also emphasises that it was to be remunerated per successful test carried out (in Germany).

18 It cannot be ruled out that those considerations may lead to the conclusion that the place of performance is in Germany. That would also be supported by the argument that in this instance the courts at the place where the software is used would probably be better placed to decide on substantive issues relating to the performance of the contract on the grounds of proximity to the facts and evidence,

which is the objective underlying the court of the place of performance (Advocate General Saugmandsgaard Øe, C-59/19, *Wikingerhof*, paragraph 32, with further references).

#31] 5. The question for the Oberster Gerichtshof (Supreme Court) in the present context is therefore whether, in order to determine the place of performance in the case of remote services, such as those in the present case, it is the place where the service provider (in this case the applicant) was operating or the place in respect of which the service was provided and where it reached the beneficiary (in this case the defendant) that is decisive.

Point II.:

19 … [national procedural law]

…

Vienna, 13 July 2023

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