Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

20 October 2022*

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Regulation (EU) No 1215/2012 – Article 6 – Defendant not domiciled in a Member State – Article 17 – Jurisdiction over consumer contracts – Concept of 'trade or profession'/'professional activities' – Article 21 – Jurisdiction over individual contracts of employment – Concept of 'employer' – Relationship of subordination – Regulation (EC) No 593/2008 – Applicable law – Article 6 – Individual contract of employment – Letter of comfort between the employee and a third party company guaranteeing performance of the employer's obligations towards that employee)

In Case C-604/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 24 June 2020, received at the Court on 16 November 2020, in the proceedings

ROI Land Investments Ltd

v

FD,

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, M. Safjan (Rapporteur), N. Piçarra, N. Jääskinen and M. Gavalec, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– FD, by N. von Kirchbach, Rechtsanwältin,

– the European Commission, by M. Heller, M. Wilderspin and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 April 2022,

* Language of the case: German.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6(1), Article 17(1) and Article 21(1)(b)(i) and (2) 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 (OJ 2012 L 351, p. 1) and of 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) (OJ 2008 L 177, p. 6) ('the Rome I Regulation').

2 The request has been made in proceedings between ROI Land Investments Ltd ('ROI Land') and FD concerning the refusal by ROI Land, which, under a letter of comfort, is liable to FD for the obligations under a contract of employment between FD and a subsidiary of ROI Land, to pay claims arising from that contract.

Legal context

Regulation No 1215/2012

3 Recitals 4, 14, 15 and 18 of Regulation No 1215/2012 state:

'(4) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and enforcement of judgments given in a Member State, are essential.

…

(14) A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised.

However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile.

(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

…

(18) In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.'

4 Article 4 of that regulation provides as follows:

‘1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.’

5 Article 6 of that regulation provides:

‘1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, … in the same way as nationals of that Member State.’

6 Article 17(1)(c) of that regulation, which is in Section 4, on ‘Jurisdiction over consumer contracts’, of Chapter II of that regulation, provides:

‘In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:

…

(c) … the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.’

7 Article 18 of Regulation No 1215/2012, which is also in Section 4, states as follows in paragraph 1:

‘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.’

8 Section 5, entitled ‘Jurisdiction over individual contracts of employment’, of Chapter II of that regulation, includes Articles 20 and 21 of the regulation. Article 20 is worded as follows:

‘1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer, point 1 of Article 8.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.’

9 Article 21 of that regulation is worded as follows:

‘1. An employer domiciled in a Member State may be sued:

…

(b) in another Member State:
(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or
(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.’

10 Article 63(1) of that regulation provides:

‘For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat;

(b) central administration; or

(c) principal place of business.’

11 Article 80 of Regulation No 1215/2012 provides:

‘This Regulation shall repeal [Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1)]. References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table set out in Annex III.’

The Rome I Regulation

12 Recital 7 of the Rome I Regulation states:

‘The substantive scope and the provisions of this Regulation should be consistent with [Regulation No 44/2001] and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [(OJ 2007 L 199, p. 40)].’

13 Article 6 of that regulation, on 'Consumer contracts', provides in paragraph 1:

'Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 ROI Land, a company domiciled in Canada, is engaged in an activity in the property sector.

15 FD, who is domiciled in Germany, worked for ROI Land from September 2015 as 'deputy vice president investors relations'. FD and ROI Land decided to 'transfer' their contractual relationship to a Swiss company that was yet to be created, and therefore agreed, in November 2015, retroactively to terminate the contract of employment between them.

16 On 14 January 2016, the company R Swiss AG was created under Swiss law. ROI Land is the parent company of that new vehicle.

17 On 12 February 2016, FD entered into a written contract of employment with R Swiss ('the contract of employment at issue') under which FD was engaged as a director and which provided that he would be paid a starting bonus of 170 000 United States dollars (USD) (approximately EUR 153 000) and, in addition to other remuneration, a monthly salary of USD 42 500 (approximately EUR 38 000). A loan agreement backdated to 1 October 2015 was also agreed with ROI Land, for the grant of a loan of USD 170 000 (approximately EUR 153 000) to FD. That agreement is likely to have been intended to convert the remuneration payable to FD for a four-month period under the contract of employment into a loan to be repaid to ROI Land, the amount of which was to be paid to FD in the form of the starting bonus payable by R Swiss under Swiss tax law.

18 The same day, FD and ROI Land entered into an agreement under which ROI Land was directly liable to FD for the obligations under the contract of employment entered into with R Swiss ('the letter of comfort'). That agreement included the following provisions:

'Clause 1

[ROI Land] has established a subsidiary, [R Swiss], for sales in Europe. The director is responsible for the executive management of that company. In accordance with that assumption, [ROI Land] declares the following:

Clause 2

[ROI Land] has full responsibility for the fulfilment of the obligations relating to the contracts of [R Swiss] based on the cooperation of its director with [R Swiss].'

19 On 11 July 2016, R Swiss dismissed FD. FD disputed his dismissal before the Arbeitsgericht Stuttgart (Labour Court, Stuttgart, Germany), whose area of jurisdiction covered the place where FD habitually carried out his work, that is to say, Stuttgart (Germany). By judgment of 2 November 2016, which has become definitive, that court found the dismissal to be ineffective. That court also ordered R Swiss to pay FD USD 255 000 (approximately EUR 230 000) as his starting bonus, and USD 212 500 (approximately EUR 191 000) as remuneration for April to August 2016. R Swiss disagreed with that judgment. At the beginning of March 2017, insolvency proceedings were brought against R Swiss under Swiss law, but were discontinued on the ground of a lack of assets.

20 FD then brought a further action before the German courts, which he considers to have jurisdiction at least on account of the special jurisdiction over consumer contracts. That action seeks an order that ROI Land, inter alia, pay the sums that R Swiss owed him under the judgment of the Arbeitsgericht Stuttgart (Labour Court, Stuttgart) of 2 November 2016 and pay USD 595 000 (approximately EUR 536 000) by way of the monthly remuneration that R Swiss should have paid him for the period from September 2016 to November 2017. FD relied on the letter of comfort in support of that action.

21 The Arbeitsgericht Stuttgart (Labour Court, Stuttgart) dismissed that action as inadmissible on the ground that it did not have international jurisdiction to hear the matter. On appeal by FD, the Landesarbeitsgericht Baden-Württemberg (Higher Labour Court, Baden-Württemberg, Germany) overturned the judgment of the Arbeitsgericht Stuttgart (Labour Court, Stuttgart) and upheld the appeal, this time confirming that the German courts did have jurisdiction. ROI Land brought an appeal on a point of law before the referring court, the Bundesarbeitsgericht (Federal Labour Court, Germany). That court is uncertain whether the German courts have jurisdiction to rule on FD's appeal and, if they do, which law is applicable to the legal relationship between the parties in the main proceedings.

22 The referring court notes in respect of that legal relationship that the letter of comfort is a unilateral undertaking on which FD could rely without any requirement for a prior finding that R Swiss was insolvent; that ROI Land has not been subrogated to the rights and obligations of R Swiss as the employer under the contract of employment at issue; and that no contract of employment would have been concluded between FD and R Swiss if the letter of comfort had not existed.

23 In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 6(1) read in conjunction with Article 21(2) and Article 21(1)(b) of [Regulation No 1215/2012] to be interpreted as meaning that an employee can sue a legal person – which is not his or her employer and which is not domiciled in a Member State within the meaning of Article 63(1) of [Regulation No 1215/2012] 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 or her work in the employment relationship with the

third party or in the courts for the last place where he or she 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 [Regulation No 1215/2012] to be interpreted as meaning that the reservation in respect of Article 21(2) of [Regulation No 1215/2012] 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 or her 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 or her work, if no such jurisdiction exists under Article 21(2) read in conjunction with Article 21(1)(b)(i) of [Regulation No 1215/2012]?

(3) If the first question is answered in the negative and the second question in the affirmative:
(a) Is Article 17(1) of [Regulation No 1215/2012] 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 [Regulation No 1215/2012] 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 or her 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 [the Rome 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 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 or her professional activities?'

The questions referred

The first question

24 By its first question, the referring court enquires, in essence, whether Article 21(1)(b)(i) and (2) of Regulation No 1215/2012 must be interpreted as meaning that an employee may bring proceedings before the courts for the last place where or from where he or she habitually carried out his or her work, against a person, whether or not domiciled in a Member State, with whom he or she does not have a formal contract of employment but who is, under a letter of comfort that was a prerequisite for conclusion of the contract of employment with a third party, directly liable to that employee for performance of the obligations of that third party.

25 In that regard, it should be borne in mind that, for disputes related to contracts of employment, the provisions of Section 5 of Chapter II of Regulation No 1215/2012, which contains Article 21 of that regulation, lay down a series of rules whose objective, as can be seen from recital 18 of that

regulation, is to protect the weaker party to the contract by means of rules of jurisdiction that are more favourable to his interests (see, to that effect, judgment of 21 June 2018, *Petronas Lubricants Italy*, C-1/17, EU:C:2018:478, paragraph 23 and the case-law cited).

26 Article 21(2) of Regulation No 1215/2012 provides that an employer not domiciled in a Member State may be sued in a court of a Member State in accordance with Article 21(1)(b).

27 Article 21(1)(b)(i) provides that an employer may be sued in the courts of the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so.

28 It is clear from the Court's case-law on Article 19(2) of Regulation No 44/2001 that the legal concepts in that provision must be given an autonomous interpretation in order to ensure the uniform application of the rules of jurisdiction established by that regulation in all Member States (see, to that effect, judgment of 14 September 2017, *Nogueira and Others*, C-168/16 and C-169/16, EU:C:2017:688, paragraphs 47 and 48).

29 In that context it must be borne in mind that, in so far as, in accordance with Article 80 of Regulation No 1215/2012, that regulation repeals and replaces Regulation No 44/2001, the Court's interpretation of the provisions of the latter regulation also applies to Regulation No 1215/2012, whenever those provisions may be regarded as 'equivalent' (see, to that effect, judgment of 29 July 2019, *Tibor-Trans*, C-451/18, EU:C:2019:635, paragraph 23 and the case-law cited). This is so in particular since Article 80 specifies that 'references to [Regulation No 44/2001] shall be construed as references to [Regulation No 1215/2012] and shall be read in accordance with the correlation table set out in Annex III [to Regulation No 1215/2012]'. It can be seen from that annex that Article 21(1) of Regulation No 1215/2012 corresponds to Article 19(2) of Regulation No 44/2001. This means that, in the same way as Article 19(2) of Regulation No 44/2001, Article 21(1) of Regulation No 1215/2012 must be interpreted autonomously.

30 It should be clarified that, as can be seen from paragraphs 26 and 27 of this judgment, Article 21 of Regulation No 1215/2012 lays down the rules of jurisdiction for courts seised of disputes 'over individual contracts of employment' between an employee and his or her employer. For those rules to apply, therefore, there must be an employment relationship between the employee and the employer.

31 It emerges from the Court's case-law that the essential feature of an employment relationship, defined in accordance with objective criteria, is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration (see, to that effect, judgment of 11 April 2019, *Bosworth and Hurley*, C-603/17, EU:C:2019:310, paragraph 25 and the case-law cited).

32 It follows that, although the absence of any formal contract does not preclude the existence of an employment relationship, such a relationship nevertheless implies the existence of a hierarchical relationship between the worker and the employer, and that the issue of whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties (see, to that effect, judgment of 11 April 2019, *Bosworth and Hurley*, C-603/17, EU:C:2019:310, paragraphs 26 and 27 and the case-law cited).

33 In that context, the fact that a company, such as ROI Land in the case in the main proceedings, has merely concluded a letter of comfort with an employee is not sufficient to preclude out of hand any hierarchical relationship between that employee and that company.

34 The referring court, which is the only court with jurisdiction in that respect, must have regard to all those factors in order to make the relevant findings of fact and to determine whether, in the circumstances of this dispute, there was an employment relationship, characterised by the existence of a hierarchical relationship, between FD and ROI Land.

35 In that assessment the relevant factors include the circumstances surrounding the conclusion of the letter of comfort between FD and ROI Land and of the contract of employment at issue between FD and R Swiss, such as the fact that, before concluding the contract of employment at issue, FD was party to a different contract of employment with ROI Land; the fact that the contract of employment at issue would not have existed unless ROI Land had given FD an undertaking in the form of the letter of comfort; and the fact that the letter of comfort was intended precisely to guarantee payment of salary owed to FD. The same is true of the circumstance that conclusion of those contracts did not affect the nature of the work that FD performed first for ROI Land and secondly for R Swiss, which is a wholly owned subsidiary of ROI Land.

36 On the foregoing grounds, the answer to the first question should be that Article 21(1)(b)(i) and (2) of Regulation No 1215/2012 must be interpreted as meaning that an employee may bring proceedings before the courts for the last place where or from where he or she habitually carried out his or her work, against a person, whether or not domiciled in a Member State, with whom he or she does not have a formal employment contract but who is, under a letter of comfort which was a prerequisite for conclusion of the contract of employment with a third party, directly liable to that employee for performance of the obligations of that third party, provided there is a hierarchical relationship between that person and the employee.

The second question

37 By its second question, the referring court is enquiring, in essence, whether Article 6(1) of Regulation No 1215/2012 must be interpreted as meaning that the reservation in respect of the application of Article 21(2) of that regulation precludes a court of a Member State from relying on the rules of jurisdiction of that State even where those rules would be more favourable to the employee.

38 Article 6(1) of that regulation provides that, where the defendant is not domiciled in a Member State, jurisdiction in each Member State is governed by the law of that Member State, subject to Article 18(1), Article 21(2) and Articles 24 and 25 of that regulation.

39 As observed in paragraph 26 of this judgment, under Article 21(2) of Regulation No 1215/2012 an employer not domiciled in a Member State may be sued in the courts of a Member State in accordance with Article 21(1)(b) of Regulation No 1215/2012.

40 It should be noted that Article 21 of that regulation is contained in Chapter II, Section 5 of the regulation, on jurisdiction over individual contracts of employment, which, according to the Court's case-law, is not only specific but also exhaustive (see, to that effect, judgment of 22 May 2008, *Glaxosmithkline and Laboratoires Glaxosmithkline*, C-462/06, EU:C:2008:299, paragraph 18).

41 This means, first, that any dispute concerning an individual contract of employment must be brought before a court designated in accordance with the jurisdiction rules laid down in the provisions of Section 5 of Chapter II of that regulation and, secondly, that those jurisdiction rules cannot be amended or supplemented by other rules of jurisdiction laid down in that regulation unless they are expressly referred to by a provision contained in Section 5 (see, to that effect, judgment of 22 May 2008, *Glaxosmithkline and Laboratoires Glaxosmithkline*, C-462/06, EU:C:2008:299, paragraph 19).

42 As regards the interrelation between national law and the rules of jurisdiction laid down by Regulation No 1215/2012, as it can be discerned from Article 6(1) of that regulation, it must be noted that Article 6(1) provides in principle that the national rules of jurisdiction apply where the defendant is not domiciled in a Member State. However, use of the expression 'subject to' means that situations falling within the provisions listed are excluded from the application of national law. As Advocate General Richard de la Tour noted in point 83 of his Opinion, this constitutes an exhaustive list of exceptions to the principle that the national jurisdiction rules apply.

43 The purpose of Regulation No 1215/2012 corroborates that interpretation. As can be seen from the first paragraph of recital 14 of that regulation, in principle, where the defendant is not domiciled in a Member State, that person is subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised.

44 Nevertheless, according to the second paragraph of that recital, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction laid down in that regulation should apply regardless of the defendant's domicile. In relation to the rules intended to ensure the protection of employees, that is true of the provisions in Section 5 of Chapter II of that regulation that lay down rules of jurisdiction applicable where a defendant is not domiciled in a Member State.

45 It follows that, where the jurisdiction of the courts of a Member State is not derived from a specific provision of Regulation No 1215/2012 referred to in Article 6(1) of that regulation, such as Article 21 of the regulation, according to Article 6(1) of that regulation the Member States are at liberty to apply their national legislation in order to determine jurisdiction.

46 In contrast, wherever the jurisdiction of the courts of a Member State is derived from one of those specific provisions, that specific provision will apply, taking precedence over the national rules for determining jurisdiction, even where those rules are more favourable to employees (see, to that effect, judgment of 25 February 2021, *Markt24*, C-804/19, EU:C:2021:134, paragraph 34).

47 As Advocate General Richard de la Tour noted in point 86 of his Opinion, that interpretation accords both with the objective of unifying the rules on conflicts of jurisdiction set out in recital 4 of Regulation No 1215/2012, and with the requirement that rules of jurisdiction must be predictable, set out in recital 15 of that regulation.

48 On the foregoing grounds, the second question should be answered to the effect that Article 6(1) of Regulation No 1215/2012 must be interpreted as meaning that the reservation in respect of the application of Article 21(2) of that regulation precludes a court of a Member State from relying on the rules of jurisdiction of that State where the conditions for Article 21(2) of that regulation to apply are satisfied, even where those rules would be more favourable to the employee. In

contrast, where the conditions for either Article 21(2) or any other of the provisions set out in Article 6(1) of that regulation to apply are not satisfied, under Article 6(1) a court of a Member State is at liberty to apply those rules in order to determine jurisdiction.

The third and fourth questions

49 As a preliminary point, it should be noted that an answer to the third and fourth questions is only of use to the referring court in the event that it finds, as a result of the verifications it is called upon to make, that there is no employment relationship between FD and ROI Land, with the effect that FD's situation does not fall within the scope of Article 21 of Regulation No 1215/2012.

50 Furthermore, as recital 7 of the Rome I Regulation makes clear, the substantive scope and the provisions of that regulation should be consistent with Regulation No 44/2001. In so far as that regulation was repealed and replaced by Regulation No 1215/2012, that objective of ensuring consistency also applies to Regulation No 1215/2012 (judgment of 10 February 2022, *ShareWood Switzerland*, C-595/20, EU:C:2022:86, paragraph 34 and the case-law cited).

51 The third and fourth questions can therefore fittingly be examined together.

52 By those questions, the referring court is asking, in essence, whether Article 17(1) of Regulation No 1215/2012 and Article 6(1) of the Rome I Regulation must be interpreted as meaning that the concept of 'trade or profession' includes not only self-employed activities but also paid employment and, if the answer to that question is in the affirmative, whether, where in the context of that paid employment an agreement has been concluded between the employee and a third party other than the employer referred to in the contract of employment, under which that third party is directly liable to the employee for the obligations of that employer under the contract of employment, that agreement constitutes a contract concluded outside and independently of any trade or professional activity or purpose.

53 In respect of the first limb of the third and fourth questions, that is to say, the limb concerning whether paid employment is covered by the concept of 'trade or profession' within the meaning of Article 17(1) of Regulation No 1215/2012 and Article 6(1) of the Rome I Regulation, it should be noted that, according to the Court's settled case-law, only contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption, are covered by the special rules laid down by those regulations to protect the consumer as the party deemed to be the weaker party. Such protection is, however, unwarranted in the case of contracts for the purpose of a trade or professional activity (see, to that effect, judgment of 10 December 2020, *Personal Exchange International*, C-774/19, EU:C:2020:1015, paragraph 30 and the case-law cited).

54 It flows from the foregoing that no distinction depending on whether the trade or profession is a self-employed activity or paid employment can be inferred from that case-law, according to which it is only necessary to determine whether the contract has been concluded outside and independently of any trade or professional activity or purpose.

55 It should therefore be found that paid employment does fall within the concept of 'trade or profession' within the meaning of Article 17(1) of Regulation No 1215/2012 and Article 6(1) of the Rome I Regulation.

56 In respect of the second limb of those questions, concerning how a letter of comfort, such as that concluded between FD and ROI Land, is to be classified, it can be seen from the decision to refer that, in the present case, the letter of comfort is inextricably linked to the professional activities carried out by FD, since FD would not have concluded the contract of employment at issue without the letter of comfort.

57 Because the letter of comfort is inextricably linked to the contract of employment at issue it cannot be found, as Advocate General Richard de la Tour states in point 105 of his Opinion, that it was concluded outside and independently of any trade or professional activity or purpose.

58 In the light of the foregoing, the answer to the third and fourth questions should be that Article 17(1) of Regulation No 1215/2012 and Article 6(1) of the Rome I Regulation must be interpreted as meaning that the concept of 'trade or profession' includes not only self-employed activities but also paid employment. Furthermore, an agreement concluded between the employee and a third party other than the employer referred to in the contract of employment, under which that third party is directly liable to the employee for the obligations of that employer under the contract of employment, does not, for the purposes of applying those provisions, constitute a contract concluded outside and independently of any trade or professional activity or purpose.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 21(1)(b)(i) and (2) 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**

   must be interpreted as meaning that an employee may bring proceedings before the courts for the last place where or from where he or she habitually carried out his or her work, against a person, whether or not domiciled in a Member State, with whom he or she does not have a formal employment contract but who is, under a letter of comfort which was a prerequisite for conclusion of the contract of employment with a third party, directly liable to that employee for performance of the obligations of that third party, provided there is a hierarchical relationship between that person and the employee.

2. **Article 6(1) of Regulation No 1215/2012**

   must be interpreted as meaning that the reservation in respect of the application of Article 21(2) of that regulation precludes a court of a Member State from relying on the rules of jurisdiction of that State where the conditions for Article 21(2) of that regulation to apply are satisfied, even where those rules would be more favourable to the employee. In contrast, where the conditions for either Article 21(2) or any other of the provisions set out in Article 6(1) of that regulation to apply are not satisfied, under

Article 6(1) a court of a Member State is at liberty to apply those rules in order to determine jurisdiction.

3. **Article 17(1) of Regulation No 1215/2012 and 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')**

must be interpreted as meaning that the concept of 'trade or profession' includes not only self-employed activities but also paid employment. Furthermore, an agreement concluded between the employee and a third party other than the employer referred to in the contract of employment, under which that third party is directly liable to the employee for the obligations of that employer under the contract of employment, does not, for the purposes of applying those provisions, constitute a contract concluded outside and independently of any trade or professional activity or purpose.

[Signatures]