Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 12 October 2023[1]

Case C-566/22

Inkreal s. r. o.
v
Dúha reality s. r. o.

(Request for a preliminary ruling
from the Nejvyšší soud (Supreme Court, Czech Republic))

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – Regulation (EU) No 1215/2012 – Scope – Article 25 – Jurisdiction clause – Parties to a contract domiciled in the same Member State and agreeing on the jurisdiction of another Member State to settle disputes arising out of that contract – International element)

I. Introduction

1. This reference for a preliminary ruling concerns, in essence, the interpretation of Article 25(1) 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.[2]

2. The request has been made in proceedings between two companies domiciled in the same Member State concerning the designation of the court having territorial jurisdiction to hear an application for payment of claims arising from the non-performance of two loan agreements concluded in that Member State containing the designation of a court of another Member State in the event of a dispute.

3. The novel question referred to the Court is whether the existence of a jurisdiction clause constitutes, in itself, an international element sufficient to result in the application of Article 25(1) of Regulation No 1215/2012.

4. An analysis of the various arguments put forward in the legal literature and of those based on the case-law of various European courts lead me to propose to the Court an approach favouring a negative answer to that question and to clarify when the international nature of such a clause must be assessed.

1 Original language: French.

2 OJ 2012 L 351, p. 1.

II. Legal framework

A. European Union law

5. Recital 3 of Regulation No 1215/2012 states:

'The [European] Union has set itself the objective of maintaining and developing an area of freedom, security and justice, inter alia, by facilitating access to justice, in particular through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters. For the gradual establishment of such an area, *the Union is to adopt measures relating to judicial cooperation in civil matters having cross-border implications*, particularly when necessary for the proper functioning of the internal market.' [3]

6. Article 25(1) of that regulation [4] provides:

'If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. …'

B. Czech law

7. Article 11(3) of zákon č. 99/1963 Sb., občanský soudní řád (Law No 99/1963 establishing the Code of Civil Procedure; 'the Code of Civil Procedure') is worded as follows:

'If the matter falls within the jurisdiction of the courts of the Czech Republic but the conditions for the determination of territorial jurisdiction are lacking or they cannot be established, the Nejvyšší soud [Supreme Court, Czech Republic] shall rule which court shall deliberate on the matter and decide on it.'

III. Facts of the dispute in the main proceedings and the question referred for a preliminary ruling

8. FD, resident in Slovakia, as the assignor, and Dúha reality s. r. o., a company domiciled [5] in Slovakia, as the assignee, concluded two loan agreements on 29 June 2016 and 11 March 2017 respectively.

9. By means of a voluntary assignment agreement dated 8 December 2021, FD assigned the claims arising from those loan agreements to Inkreal, a company domiciled in Slovakia.

[3] Emphasis added.

[4] See, for a reminder of the provisions which preceded that article, footnotes 7, 11 and 12 of this Opinion.

[5] I assume that, according to the Nejvyšší soud (Supreme Court), the referring court, Dúha reality and Inkreal s. r. o. (see point 9 of this Opinion) are 'domiciled' within the meaning of Article 63(1) of Regulation No 1215/2012.

10. In each of those agreements, the parties agreed that 'any ambiguities or disputes arising from the agreement and in connection therewith shall be first resolved by negotiation aimed at reaching a solution acceptable for both parties. If the parties are unable to settle such a dispute, the dispute shall be settled by a court of the Czech Republic having substantive and territorial jurisdiction, in line with the [Code of Civil Procedure], as amended'.

11. Since Dúha reality did not repay the loans, on 30 December 2021 Inkreal brought an action before the Nejvyšší soud (Supreme Court) on the basis of that clause which, it maintains, is an agreement conferring jurisdiction on Czech courts to settle disputes arising from loan agreements. Inkreal seeks, first, to obtain payment, primarily, of its claims and, second, the designation of a Czech court having territorial jurisdiction to rule on the merits of the case pursuant to Paragraph 11(3) of the Code of Civil Procedure.

12. In support of the latter, Inkreal submits that it is acting in accordance with a valid jurisdiction clause in a private law relationship involving an international element, pursuant to Article 25(1) of Regulation No 1215/2012, in the knowledge that there is no special or exclusive jurisdiction of another court pursuant to that regulation.

13. In the light of the Court's case-law,[6] the referring court is unsure whether, in a situation when the only aspect that could be deemed international is the fact that the contracting parties residing in the same Member State agree on the jurisdiction of courts of another Member State, Regulation No 1215/2012, and hence also Article 25(1) thereof, is applicable.

14. The main arguments in favour of the applicability of that regulation are, in particular, emphasis on the contractual autonomy of the parties, the uniform interpretation and harmonised application of Article 25 of the regulation, and the illogical and unreasonable outcomes if that article could not be applied.

15. The main reason opposing the applicability of that regulation, on the other hand, is the absence of an international element and, hence, the characterisation of the case as entirely national. That conclusion is based primarily on the opinion that the mere will of the parties to grant jurisdiction to a court of another Member State cannot make the situation concerned 'international'.

16. In those circumstances and having regard to the differences in the legal literature and case-law resulting from consultation of certain supreme courts of other Member States, the Nejvyšší soud (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'From the perspective of the existence of an international element, which is required for [that regulation] to apply, [can] the application of [Regulation No 1215/2012] be based solely on the fact that two parties with their seat in the same Member State agree on the jurisdiction of courts of another EU Member State?'

17. Written observations were submitted by Dúha reality, the Czech and Swiss Governments and the European Commission.

[6] The referring court refers to the judgments of 1 March 2005, *Owusu* (C-281/02, EU:C:2005:120, paragraphs 25 and 26), and of 7 May 2020, *Parking and Interplastics* (C-267/19 and C-323/19, EU:C:2020:351, paragraphs 30 to 35).

IV. Analysis

A. Preliminary observations

18. In the first place, it must be observed that the provisions of Article 25 of Regulation No 1215/2012 on prorogation of jurisdiction are, in part, equivalent to those contained in previous legal instruments.[7] Therefore, according to the Court's settled case-law, the interpretation that it has provided in respect of one of them also applies to the others.[8]

19. In the second place, since the dispute in the main proceedings involves an assignment of claims, it appears to me relevant to point out, first, that the Court recalled that Article 25(1) of Regulation No 1215/2012 does not state whether a jurisdiction clause can be assigned, beyond the circle of the parties to a contract, to a third party, which is a party to a subsequent contract and successor, in whole or in part, to the rights and obligations of one of the parties to the initial contract.[9] Second, it held that only where the third party had succeeded to an original contracting party's rights and obligations, in accordance with national substantive law, could that third party nevertheless be bound by a jurisdiction clause to which it had not agreed.[10] In the present case, it follows from the proceedings outlined by the referring court that Inkreal, a third party to the contract containing the jurisdiction clause, considers itself to be bound by that clause.

B. Substance

20. By its request for a preliminary ruling, the referring court seeks to ascertain, in essence, whether Article 25 of Regulation No 1215/2012 must be interpreted as meaning that, in a purely internal situation, it is applicable solely because the parties domiciled in the same Member State have designated a court or courts of another Member State as having jurisdiction to settle disputes which have arisen or may arise between them.

7 See Article 17 of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), signed in Brussels on 27 September 1968, as amended by the successive conventions relating to the accession of new Member States thereto (OJ 1998 C 27, p. 1) ('the Brussels Convention'), and Article 23 of 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).

8 See judgment of 24 November 2022, *Tilman* (C-358/21, EU:C:2022:923, paragraph 34, also regarding the consistency of interpretation with the identical provisions of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, whose conclusion was approved on behalf of the European Community by Council Decision 2009/430/EC of 27 November 2008 (OJ 2009 L 147, p. 1) ('the Lugano II Convention')).

9 See, in particular, judgment of 18 November 2020, *DelayFix* (C-519/19, EU:C:2020:933, paragraph 40).

10 See, in particular, judgment of 18 November 2020, *DelayFix* (C-519/19, EU:C:2020:933, paragraph 47 and the case-law cited).

21. That court rightly set out the two opposing arguments put forward in the legal literature and adopted by the courts of the Member States in view of the absence of an international element condition in Article 25(1) of Regulation No 1215/2012 without any change in relation to the previous articles applicable in respect of jurisdiction clauses since the entry into force of the Brussels Convention, [11] which was succeeded by Regulation No 44/2001. [12]

22. No argument can be based on the wording of those provisions. It can be merely noted that the condition that at least one of the parties is domiciled in the territory of a Member State for them to be able to designate one or more of the courts of another Member State is not contained in Article 25(1) of Regulation No 1215/2012. Moreover, the scope of the jurisdiction clause is limited to disputes which arise from the legal relationship in connection with which the agreement was entered into. [13]

23. Therefore, in order to be able to designate a court of a Member State as the competent court, the choice of the parties is subject to no other requirement such as, in particular, the existence of a connection between the designated court and the dispute. [14] It is sufficient that the clause state the objective factors on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen or which may arise between them. Those factors must be sufficiently precise to enable the court seised to ascertain whether it has jurisdiction. [15]

24. That flexibility is based, since the Brussels Convention, on the determination to give full effect to the independent will of the parties [16] in matters relating to prorogation of jurisdiction, without thereby constituting, in my view, an exception to the conditions for applying Regulation No 1215/2012, including the requirement of an international element. [17]

[11] See the first sentence of the first paragraph of Article 17 of the Brussels Convention, as amended by Article 11 of the Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland thereto (OJ 1978 L 304, p. 1), and by Article 7 of the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic thereto (OJ 1989 L 285, p. 1), according to which 'if the Parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction'.

[12] See Article 23(1) of that regulation which states: 'If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. …'

[13] See judgments of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 68 and the case-law cited), and of 8 March 2018, *Saey Home & Garden* (C-64/17, EU:C:2018:173, paragraph 30).

[14] See judgments of 17 January 1980, *Zelger* (56/79, EU:C:1980:15, paragraph 4), and of 16 March 1999, *Castelletti* (C-159/97, EU:C:1999:142, paragraph 50 and the case-law cited). See, however, the same general rule laid down in recitals 8 and 13 of Regulations No 44/2001 and No 1215/2012 respectively. By way of comparison, see Article 5 of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ 2012 L 201, p. 107). See, to that effect, Article 7 of Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ 2016 L 183, p. 1).

[15] See judgments of 9 November 2000, *Coreck* (C-387/98, EU:C:2000:606, paragraph 15), and of 7 July 2016, *Hőszig* (C-222/15, EU:C:2016:525, paragraph 43).

[16] See recitals 14 and 15 of Regulation No 1215/2012, and judgments of 7 July 2016, *Hőszig* (C-222/15, EU:C:2016:525, paragraph 44), and of 18 November 2020, *DelayFix* (C-519/19, EU:C:2020:933, paragraph 38).

[17] See also, as a reminder that the dispute must fall within the area of civil and commercial matters within the meaning of Regulation No 1215/2012, Nourissat, C., 'L'avenir des clauses attributives de juridiction d'après le règlement "Bruxelles I bis"', *Mélanges en l'honneur du professeur Bernard Audit: les relations privées internationales*, Librairie générale de droit et de jurisprudence, Issy-les-Moulineaux, 2014, pp. 567 to 579, in particular p. 570.

25. In that regard, it may be observed, first, that, unlike certain other regulations, [18] but like most of those relating to civil cooperation in family, maintenance or insolvency matters, Regulation No 1215/2012 contains no provision on the international nature of the situation at issue, which must exist in order for it to be applicable. [19]

26. Next, in that context, the Court has stated that 'for the jurisdiction rules of the Brussels Convention to apply at all the existence of an international element is required'. [20] That principle has been reaffirmed in a number of other judgments in connection with Regulations No 44/2001 [21] and No 1215/2012. [22]

27. Finally, such an interpretation is required, having regard to the legal bases of that regulation, [23] even though the aim of its recasting of Regulation No 44/2001 is to facilitate the circulation and recognition of judgments within the European judicial area without this being limited by the international nature of the dispute [24] and, regarding jurisdiction agreements, their universal application, which is a new element. [25]

28. Article 81 TFEU, which constitutes the legal basis of Regulation No 1215/2012, provides, in the first sentence of paragraph 1 thereof, that 'the Union shall develop judicial cooperation in *civil matters having cross-border implications*, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases'. [26]

[18] See Article 3(1) of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ 2006 L 399, p. 1) and of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ 2007 L 199, p. 1). See, on Regulation No 1896/2006, judgment of 7 May 2020, *Parking and Interplastics* (C-267/19 and C-323/19, EU:C:2020:351, paragraph 33). By way of comparison, see 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'); 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) ('the Rome II Regulation'), and Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ 2010 L 343, p. 10) ('the Rome III Regulation'). According to Article 1(1) of those regulations, the regulations are applicable in 'situations involving a conflict of laws'. In the German version of those articles, the concept of 'Verbindung zum Recht verschiedener Staaten', or of a connection with the law of more than one Member State, is used.

[19] See judgment of 7 May 2020, *Parking and Interplastics* (C-267/19 and C-323/19, EU:C:2020:351, paragraph 35).

[20] See judgment of 1 March 2005, *Owusu* (C-281/02, EU:C:2005:120, paragraph 25).

[21] See judgment of 17 November 2011, *Hypoteční banka* (C-327/10, EU:C:2011:745, paragraph 29).

[22] See judgments of 25 February 2021, *Markt24* (C-804/19, EU:C:2021:134, paragraph 32), and of 8 September 2022, *IRnova* (C-399/21, EU:C:2022:648, paragraph 27).

[23] See, on the objectives of that regulation, Article 3(2) TEU and Article 67 TFEU.

[24] According to recital 26 of Regulation No 1215/2012, 'a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed'.

[25] See point 22 of this Opinion.

[26] Emphasis added. See, also, recitals 3 and 5 of Regulation No 1215/2012.

29. Since that regulation seeks to unify the rules on conflict of jurisdiction and not to replace the internal rules of the Member States governing internal disputes, its applicability and hence that of Article 25 thereof assume that the situation at issue is international in nature within the limits of EU law. [27]

30. In those circumstances, what criteria are to be applied?

[27] See Audit, B. and d'Avout, L., *Droit international privé*, 9th ed., Librairie générale de droit et de jurisprudence, Paris, 2022, paragraph 625 (pp. 539 and 540) and paragraph 628 (p. 544). See, also, Gaudemet-Tallon, H. and Ancel, M.-E., *Compétence et exécution des jugements en Europe, Règlements 44/2001 et 1215/2012, Conventions de Bruxelles (1968) et de Lugano (1998 et 2007)*, 6th ed., Librairie générale de droit et de jurisprudence, collection 'Droit des affaires', Paris, 2018, paragraph 82 (p. 117) and paragraph 141 (p. 189). See, regarding the need to clarify that condition, the study prepared for the Commission by Milieu SRL, entitled 'Study to support the preparation of a report on the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation)' ('the study for the Commission'), January 2023, p. 14, pp. 54 to 59 and pp. 263 and 264. See, additionally, the analysis entitled 'Regulation Brussels Ia: a standard for free circulation of judgments and mutual trust in the European Union', which is a detailed analysis, of 31 July 2022, of national practices in all the current Member States and in the United Kingdom relating to the application of Article 25 of Regulation No 1215/2012, based on the same questions as those used in the study for the Commission (questions Nos 41 to 49) by the Internationaal Juridisch Instituut in the context of the JUDGTRUST project financed by the Commission, pp. 34 to 38 and pp. 163 to 176.

31. I am in favour of the argument developed by certain authors in German,[28] English[29] and French,[30] adopted by supreme courts of certain Member States,[31] which rules out the possibility that, at the mere will of the parties, the situation at issue in the dispute is international in nature, and for five main reasons.

32. In the first place, on the assumption that recourse to a provision of Regulation No 1215/2012 presupposes the existence of an international element, it would be illogical to accept that that condition is met a priori by the mere will of the parties in a purely internal situation. In other words, such an interpretation would mean renouncing any existence of an international element that would have to be established according to objective criteria.[32]

33. In the second place, in a cross-border situation, subject, by definition, to the special jurisdiction rules laid down in Regulation No 1215/2012, the prorogation of jurisdiction provided for in Article 25 thereof was conceived as a means for the parties to choose jointly to derogate from those binding rules.[33] In an internal situation, that prorogation of jurisdiction would then have as its object or effect to derogate from national rules on jurisdiction and choice of

[28] See Mankowski, P., 'Article 25 Brüssel Ia-VO', in Rauscher, T. and Leible, S., *Europäisches Zivilprozess- und Kollisionsrecht: EuZPR/EuIPR: Kommentar. Band I, Brüssel Ia-Verordnung*, 5th ed., Otto Schmidt, Cologne, 2021, in particular paragraphs 32 and 35; Hausmann, R., 'Gerichtsstands-und Schiedsvereinbarungen', in Reithmann, C. and Martiny, D., *Internationales Vertragsrecht*, 9th ed., Otto Schmidt, Cologne, 2022, paragraph 7.19 et seq.; Dörner, H., 'Artikel 25 [Zulässigkeit und Form von Gerichtsstandsvereinbarungen]', in Saenger, I., *Zivilprozessordnung: familienverfahren, gerichtsverfassung, europäisches verfahrensrecht: handkommentar*, 9th ed., Nomos, Baden-Baden, 2021, in particular paragraph 6. In favour of the opposite approach, see Staudinger, H., 'Gerichtsstands-und Schiedsvereinbarungen', *Internationale Zuständigkeit für Vertragsklagen; Gerichtsstands- und Schiedsvereinbarungen*, De Gruyter, Berlin, 2011, paragraph 241; Geimer, R., 'Artikel 25 EuGVVO', Zöller, R., *Zivilprozessordnung*, 33rd ed., Otto Schmidt, Cologne, 2020, paragraph 3.

[29] See Brosch, M. and Kahl, L.-M., 'Article 25', in Requejo Isidro, M., *Brussels I bis: A Commentary on Regulation (EU) No 1215/2012*, Edward Elgar Publishing, Cheltenham, 2022, pp. 344 to 374, in particular paragraph 25.03, and, for a contrary view, Magnus, U., 'Article 25', in Magnus, U. and Mankowski, P., *European Commentaries on Private International Law, Brussels Ibis Regulation*, 2nd ed., Otto Schmidt, Cologne, 2023, pp. 579 to 642, in particular paragraph 25 (p. 599).

[30] See Schlosser Report on the Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgements in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59, p. 71), paragraph 174; Gothot, P. and Holleaux, D., *La Convention de Bruxelles du 27 septembre 1968: compétence judiciaire et effets des jugements dans la CEE*, Jupiter, Paris, 1985, paragraph 167 (p. 99); Gaudemet-Tallon, H. and Ancel, M.-E., op. cit., paragraph 141 (p. 189); by extension, Sindres, D., 'Compétence judiciaire, Reconnaissance et Exécution des décisions en matière civile et Commerciale. – Compétence. – Règles ordinaires de compétence. – Dispositions générales. – Article 4 du règlement (UE) nº 1215/2012', *JurisClasseur Droit international*, LexisNexis, Paris, 2 November 2021, fascicle 584-125, paragraph 27; Audit, B. and d'Avout, L., op. cit., paragraph 675 (pp. 587 and 588). For a contrary view, see Report by Mr P. Jenard on the Brussels Convention (OJ 1979 C 59, p. 1), p. 38; Droz, G., *Compétence judiciaire et effets des jugements dans le Marché commun (Étude de la Convention de Bruxelles du 27 septembre 1968)*, Dalloz, Paris, 1972, paragraph 207 (pp. 129 and 130); Beraudo, J.-P. and Beraudo, M.-J., 'Convention de Bruxelles / Conventions de Lugano. Règlement (CE) nº 44/2001/Règlement (UE) nº 1215/2012. – Généralités et champs d'application', *JurisClasseur procédure civile*, LexisNexis, Paris, 24 March 2023, fascicle 2100-15, paragraph 46.

[31] To my knowledge, it is clear, inter alia, from the following judgments that various elements are taken into account in order to characterise the international situation: in *Germany*, in the context of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano on 16 September 1988 (OJ 1988 L 319, p. 9), judgment of the Bundesgerichtshof (Federal Court of Justice, Germany), of 23 July 1998 (II ZR 286/97); in *France*, judgments of the Cour de cassation (Court of Cassation, France), 1st Civil Chamber, of 4 October 2005 (No 02-12.959), and of 30 September 2020 (No 19-15.626); in *Italy*, judgments of the Corte suprema di cassazione (Supreme Court of Cassation, Italy), combined chambers, of 30 December 1998 (No 12907), of 14 February 2011 (No 3568, paragraph 5.2), and of 10 May 2019 (No 12585, paragraph 5); and in *Portugal*, judgments of the Supremo Tribunal de Justiça (Supreme Court, Portugal), of 26 January 2016 (540/14.4TVLSB.S1), and of 4 February 2016 (536/14.6TVLSB.L1.S1). For the contrary view, the following judgments have been delivered: in *Austria*, orders of the Oberster Gerichtshof (Supreme Court, Austria), of 5 June 2007 (10 Ob 40/07s), and of 29 June 2020 (2 Ob 104/19m, paragraph 2), and in the *Netherlands*, judgment of the Gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden, Netherlands), of 27 October 2015 (200.157.017/01, paragraphs 3.10 and 3.12), and judgment of the rechtbank Rotterdam (District Court, Rotterdam, Netherlands), of 1 April 2016 (4080627 CV EXPL 15-3441, paragraph 3.4). See, however, conflicting judgment of the rechtbank Amsterdam (District Court, Amsterdam, Netherlands), of 11 April 2019 (7342297 CV EXPL 18-25262, paragraphs 9 to 11). No judgment has been delivered by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

[32] See, in that regard, Stark, L., *L'internationalité en droit international privé*, doctoral thesis defended on 28 November 2020, pp. 27 and 28.

[33] See judgments of 24 June 1986, *Anterist* (22/85, EU:C:1986:255, paragraph 13), and of 8 March 2018, *Saey Home & Garden* (C-64/17, EU:C:2018:173, paragraph 24).

court.[34] Even if that regulation forms part of a context of strengthening mutual trust and of unifying the conflict-of-law rules,[35] it cannot have the effect of eliminating any distinction between the national and international rules of jurisdiction governed by EU law.[36]

34. Accordingly, four arguments to the contrary of a textual or teleological nature based on Article 25 of Regulation No 1215/2012 must, in my view, be dismissed. First, in view of the conditions for applying that regulation,[37] it cannot be inferred from the fact that a jurisdiction agreement can be concluded, without the domicile of one of the parties establishing a connection with a Member State,[38] that the only international element required by the EU legislature is the choice of a court of a Member State.

35. Second, the independence of the will of the parties, which traditionally justifies the prorogation of the jurisdiction rule where the parties choose the court, can no longer be relied on so extensively that it would amount to allowing the parties to call into question the scope of that regulation, which is limited to international and not purely internal situations.

36. Third, the clarification regarding the law applicable to the substantive validity of the agreement conferring jurisdiction introduced in Article 25 of Regulation No 1215/2012, although of major interest, cannot, however, justify its applicability[39] if an interpretation is not to be adopted which is based on the result of its application.

37. Fourth, although it is undeniable that the EU legislature's objective when amending Article 23 of Regulation No 44/2001 by Regulation No 1215/2012 was to strengthen recourse to the choice of jurisdiction clauses[40] and their effectiveness in securing legal certainty for the parties,[41] it cannot, however, justify authorising the parties to derogate from national rules on jurisdiction without any limit or connecting factor.[42] It must be observed in that regard that, in the present case, although the situation at issue in the main proceedings may be compared with banking disputes,[43] the referring court has expressly noted the absence of any international element other than the choice of a court of another Member State.[44]

34 See, on that point, Stark, L., op. cit., p. 261, and, along those lines, Sindres, D., op. cit., paragraph 27.

35 See Rome I, II and III Regulations.

36 See, in that regard, Mailhé, F., 'Convention attributive de juridiction', *Espace judiciaire civil européen, Arrêts de la CJUE et commentaires*, Bruylant, Bruxelles, 2020, pp. 476 to 480, in particular paragraph 571 (p. 478), according to which 'the "interchangeability" of the courts of the Member States applies only in respect of legal relationships which, because of the presence of international elements, are no longer, in themselves, covered by the sole jurisdiction of the courts of one Member State'.

37 See point 29 of this Opinion.

38 See Magnus, U., op. cit., paragraph 25 (p. 599).

39 On the interest of a broad interpretation of Article 25 of Regulation No 1215/2012 in order to apply that uniform standard, relied on by the Commission, see Magnus, U., op. cit., paragraphs 25 and 26 (pp. 599 and 600). See, regarding the limited application of international law and of international conventions to the choice of jurisdiction agreements referring to courts of a third State, Mailhé, F., op. cit., paragraph 571 (p. 477), where that commentary assumes that the condition that the choice of a court agreement has an international element is fulfilled (see paragraph 571, p. 478). See, also, Gaudemet-Tallon, H. and Ancel, M.-E., op. cit., paragraph 139 (pp. 185 and 186). See also, for a reminder of the argument based on that interest, the study for the Commission, pp. 263 and 264.

40 See point 27 of this Opinion.

41 See point 36 of this Opinion.

42 See point 33 of this Opinion. See also, regarding the review of possible abuses of rights, Mankowski, P., op. cit., paragraph 35, and Stein, F. and Jonas, M., 'Artikel 25', *Kommentar zur Zivilprozessordnung*, Vol. 12 EuGVVO, 23rd ed., 2022, Mohr Siebeck, Tübingen, paragraph 23.

43 See, on the specific nature of banking clauses, Gaudemet-Tallon, H., 'Conflit de juridiction. – Contrat de prêt. – Clause attributive de juridiction. – Validité. – Conditions', *Journal du droit international (Clunet)*, LexisNexis, Paris, No 3, pp. 734 to 743, in particular pp. 739 and 740. See, also, Kleiner, C., 'L'élection du for en matière bancaire et financière: entre clauses asymétriques, clauses modèles et quasi-réglementaires', *Les clauses attributives de compétence internationale: de la prévisibilité au désordre*, actes du colloque du 21 novembre 2019 au Centre de recherche en droit international privé et du commerce international (CRDI), sous la direction de Laazouzi, M., éditions Panthéon-Assas, Paris, 2021, pp. 47 to 73, in particular pp. 48 to 55.

44 See point 13 of this Opinion.

38. In the third place, as regards the case-law of the Court holding that the international element can result from the subject matter of the proceedings where the situation at issue is such as to raise questions relating to the determination of international jurisdiction,[45] I do not share the view of the Czech Government or that of the Commission on the consequences that they draw from it. That case-law is based on objective criteria (for example, the occurrence of the events at issue in a third State[46] or the foreign nationality of the defendant who has no known place of domicile)[47] to which may be added the place of performance of the obligation.[48]

39. Therefore, it cannot be inferred from this that the main proceedings are covered by that case-law solely on the ground that its purpose is to determine which court has jurisdiction where a court of a Member State is chosen other than the Member State in which the parties are domiciled. In my view, the application before the referring court requires the court to ascertain whether Article 25 of Regulation No 1215/2012 is applicable. In other words, it is for the referring court to assess whether the situation at issue has an international element and not to examine the legality of the clause at issue in the light, in particular, of the protective jurisdiction rules laid down in Regulation No 1215/2012, in order to rule on its international jurisdiction.[49]

40. In the fourth place, as regards comparison with other legal instruments, first, I share the view expressed by certain authors according to which, for the purposes of interpreting Article 25 of Regulation No 1215/2012, Article 3(3) of the *Rome I Regulation*,[50] which deals with the choice of the law applicable in an internal situation, does not have to be used as a benchmark.[51]

41. Thus, (i) in the latter regulation, the criterion stated in Article 1(1) thereof is that of a situation 'involving a conflict of laws'[52] which is not necessarily international, as is evident from the purpose of Article 3(3) of that regulation[53] and (ii) that provision does not alter the nature of the purely internal situations in which a foreign law was chosen, since they remain subject to mandatory national provisions. Article 25 of Regulation No 1215/2012 does not guarantee a particular forum. In summary, a distinction should be drawn, in internal situations, between the Rome I Regulation, which deals with conflicts of laws resulting from the will of the parties, and Regulation No 1215/2012 which, owing to the conditions for its applicability, does not deal with conflicts of jurisdiction arising from the choice of the parties.

45 See judgments of 1 March 2005, *Owusu* (C-281/02, EU:C:2005:120, paragraph 26); of 17 November 2011, *Hypoteční banka* (C-327/10, EU:C:2011:745, paragraph 30); and of 8 September 2022, *IRnova* (C-399/21, EU:C:2022:648, paragraph 28).

46 See judgments of 1 March 2005, *Owusu* (C-281/02, EU:C:2005:120, paragraph 26), and of 8 September 2022, *IRnova* (C-399/21, EU:C:2022:648, paragraphs 26 and 31).

47 See judgment of 17 November 2011, *Hypoteční banka* (C-327/10, EU:C:2011:745, paragraph 34). Compare with judgments of 7 May 2020, *Parking and Interplastics* (C-267/19 and C-323/19, EU:C:2020:351, paragraph 33), and of 3 June 2021, *Generalno konsulstvo na Republika Bulgaria*, C-280/20, EU:C:2021:443, paragraphs 30 to 37), in which it is taken into account that at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised.

48 See Droz, G., 'Synthesis of the Discussions of 11 and 12 March 1991', *Civil jurisdiction and judgements in Europe*, Proceedings of the Colloquium on the Interpretation of the Brussels Convention by the Court of Justice Considered in the Context of the European Judicial Area, Luxembourg, 11 and 12 March 1991, Butterworths, London, 1992, pp. 253 to 271, in particular p. 263. See, also, Gaudemet-Tallon, H. and Ancel, M.-E., op cit., paragraph 142 (p. 190).

49 See, to that effect, judgment of 17 November 2011, *Hypoteční banka* (C-327/10, EU:C:2011:745, paragraph 31).

50 For a reminder of the legal commentary on that article, see Stark, L., op. cit., p. 137.

51 See Magnus, U., op. cit., paragraph 26 (p. 599) and paragraph 40 (p. 606), and Calvo Caravaca, A.-L. and Carrascosa González, J., *Tratado de derecho internacional privado*, Vol. II, Tirant lo Blanch, Valencia, 2020, p. 2538. To the contrary effect, see Francq, S., 'La refonte du Règlement Bruxelles I: champ d'application et compétence', *Revue de droit commercial belge*, 2013, pp. 307 to 333, in particular p. 319 and footnote 70.

52 See, on that point, analysis of Stark, L., op. cit., in particular pp. 47 to 49.

53 See, also, Article 14(2) of the Rome II Regulation.

42. Second, I support the idea that the Court's interpretation should take into account the choices made in the *Hague Convention concluded on 30 June 2005 on Choice of Court Agreements*.[54] In view of the reciprocal effect of that convention on Regulation No 1215/2012 referred to in recitals 4 and 5 of Decision 2014/887, an approach should be adopted which is consistent with the rule stated in Article 1(2) of that convention according to which 'a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State'[55].

43. In the fifth place, I would add that, in those circumstances, since the international element may result from various factors,[56] they should be assessed by the court seised on a case-by-case basis in a flexible manner or according to a broad conception.[57]

44. All of those arguments lead me to propose that the Court's answer to the referring court should be that the application of Article 25 of Regulation No 1215/2012 is subject to a condition that there is an international element which is not fulfilled solely by the choice of a court of a Member State.

45. Given the implications of such an interpretation in practice, that approach should, in my view, be supplemented in the statement of reasons for the Court's decision by a clarification as to when the international nature of the situation must be assessed,[58] in order to fully meet the objective of providing the referring court with a helpful answer.[59]

54 Convention in Annex I to Council Decision 2009/397/EC of 26 February 2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements (OJ 2009 L 133, p. 1), approved by Council Decision 2014/887/EU of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements (OJ 2014 L 353, p. 5) and which entered into force on 1 October 2015 in the Member States except for the Kingdom of Denmark (1 September 2018) ('the Hague Convention 2005'), available at the following internet address: https://www.hcch.net/en/instruments/conventions/full-text/?cid= 98. Article 1(1) of the Hague Convention 2005 states that that convention applies, in international situations, to exclusive choice of court agreements concluded in civil or commercial matters. See, regarding the link between Regulation No 1215/2012 and that convention, Magnus, U., op. cit., paragraph 10 (pp. 590 to 592).

55 See, on that coordination, judgment of 27 April 2023, *A1 and A2 (Insurance of a pleasure craft)* (C-352/21, EU:C:2023:344, paragraph 46).

56 See, in that regard, point 38 of this Opinion. See, for an overview of a number of conceivable criteria, Stark, L., op. cit., pp. 33 and 34. See, by way of illustration, international elements on which, by its third question for a preliminary ruling, the Supremo Tribunal de Justiça (Supreme Court) had asked the Court of Justice to rule in the case giving rise to the order of the President of the Court of 10 March 2017, *Sociedade Metropolitana de Desenvolvimento* (C-136/16, not published, EU:C:2017:237), removed from the Court's register, and analysis of Kleiner, C., op. cit., pp. 59 to 61. See also, on the harmonisations of interpretations of Regulations No 1896/2006 and No 1215/2012, judgment of 7 May 2020, *Parking and Interplastics* (C-267/19 and C-323/19, EU:C:2020:351, paragraphs 34 and 35).

57 See, to that effect, judgment of 14 November 2013, *Maletic* (C-478/12, EU:C:2013:735, paragraphs 25 to 29). See, also, analysis of that judgment by Stark, L., op. cit., in particular pp. 32 and 33. See, also, Audit, B. and d'Avout, L., op. cit., pp. 586 to 596, in particular paragraph 675 (p. 588) and footnote 258. See, further, summary of the criteria adopted by certain courts set out in the study for the Commission, pp. 58 and 59.

58 According to Stark, L., op. cit., p. 385, the determination of the time for assessing the international element is 'essential'. See, in that regard, clarifications contained in Article 3(3) of Regulations No 1896/2006 and No 861/2007.

59 I should add that it follows from Case C-136/16, cited in footnote 56 of this Opinion (removed from the Court's register), that a further question may arise in that regard, namely, whether it is possible to exclude the application of a jurisdiction clause. In its request for a preliminary ruling, the referring court had envisaged the case in which the choice of courts of a Member State other than the Member State of which the parties are nationals has serious drawbacks for one of them and no interest of the other parties justifies that choice.

46. The international nature of a situation may evolve over time. I have in mind here the case where the situation has an international element at the litigation stage. [60] I note that, on that point also, in the absence of clarification in Regulation No 1215/2012, [61] the analyses in the legal literature and the decisions of the courts of the Member States vary. [62]

47. I have noted that the vast majority of authors favour an assessment by the court being made when the jurisdiction agreement is concluded [63] rather than when the designated court is seised by the parties. [64] The arguments based on the contractual nature of the determination of jurisdiction [65] and on legal certainty [66] appear to me to be convincing, unlike the argument based on foreseeability. [67] I have also noted that the case-law of the Member States is divided on the matter. [68]

48. I exclude the criterion of assessing the international nature at the stage when the court is seised, which does not appear to me to meet the requirements of legal certainty and increases the risk of *forum shopping* even though, at the outset, the situation at issue was purely internal. [69]

60 See, by way of illustration, judgment of 30 September 2021, *Commerzbank* (C-296/20, EU:C:2021:784, paragraphs 39 and 59).

61 That is also the case for Regulation No 650/2012 (Article 5) and for Regulation 2016/1103 (Article 7), as well as for the Hague Convention 2005 (Article 1). See, on the absence of consensus when that convention was being negotiated, Ancel, M.-E., 'L'internationalité à la lumière de la convention d'electio fori', *Le monde du droit: écrits rédigés en l'honneur de Jacques Foyer*, Economica, Paris, 2008, pp. 21 to 47, in particular p. 36, and, on the absence of observations on that question, Van Loon, H., 'Quelques aspects de la mondialisation dans le domaine des conflits de juridictions', *Droit international privé: travaux du Comité français de droit international privé*, 17e année, 2004-2006, éditions A. Pedone, Paris, 2008, pp. 227 to 253. On the other hand, as regards Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009 L 7, p. 1), see the first and second subparagraphs of Article 4(1), which provide that the conditions for designating the competent court must be met when the choice of jurisdiction agreement is concluded or when the proceedings are brought.

62 The discussions are along the same lines as those relating to the residence requirement contained in the articles preceding Article 25 of Regulation No 1215/2012. See, in that regard, Droz, G., 'Synthesis of the Discussions of 11 and 12 March 1991', op. cit., in particular p. 262, and Gaudemet-Tallon, H. and Ancel, M.-E., op. cit., paragraph 136 (pp. 181 and 182).

63 See Gaudemet-Tallon, H. and Ancel, M.-E., op. cit., paragraph 143 (p. 191), Kleiner, C., op. cit., p. 61, and Henriques, S., *Os Pactos de Jurisdição, no Regulamento (CE) No 44 de 2001*, Coimbra Editora, Coimbra, 2006, pp. 60 and 61, and Ferreira Pinto, F. A., 'Contractos de *swap* concluídos entre entidades com sede em território nacional – jurisdição e lei aplicável', in Lobo Moutinho, J., Henrique, S., Vaz de Sequeira, E. and Garcia Marques, P., *Homenagem ao Professor Doutor Germano Marques da Silva*, Vol. I, Universidade Católica Editora, Lisbon, pp. 799 to 824, in particular p. 805.

64 See, in favour of that criterion, Hausmann, R., op. cit., paragraph 7.23 § 7, and Calvo Caravaca, A-L. and Carrascosa González, J., *Tratado de Derecho internacional privado*, Vol. I, op. cit., p. 122 et seq. (according to those authors, the disappearance of the 'international' element must be taken into account after the conclusion of the agreement).

65 See, to that effect, judgment of 24 June 1986, *Anterist* (22/85, EU:C:1986:255, paragraph 14).

66 See recital 3 of Regulation No 1215/2012 and judgment of 10 March 1992, *Powell Duffryn* (C-214/89, EU:C:1992:115, paragraph 20). Therefore, if an international situation has become internal at the time of the dispute, the clause will take effect.

67 See, to that effect, recital 15 of Regulation No 1215/2012 providing that 'the autonomy of the parties warrants a different connecting factor' from that of the defendant's domicile, and Treppoz, E., 'L'imprévisibilité du juge élu', *Les clauses attributives de compétence internationale: de la prévisibilité au désordre*, op. cit., pp. 91 to 105, in particular paragraph 1 and footnote 1. See, however, judgment of 24 October 2018, *Apple Sales International and Others* (C-595/17, EU:C:2018:854, paragraph 34).

68 My opinion is based on the following, most precise, decisions which have come to my notice: judgment of the Cour de cassation (Court of Cassation) of 4 October 2005 (No 02-12.959), and order of the Sąd Apelacyjny w Katowicach (Court of Appeal, Katowice, Poland), of 21 January 2016 (V ACz 52/16). However, the following courts have ruled in favour of an assessment at the stage when the action is brought: in *Germany*, order of the Oberlandesgericht München (Higher Regional Court, Munich, Germany), of 31 March 1987 (6 W 788/87); in *Austria*, order of the Oberster Gerichtshof (Supreme Court), of 5 June 2007 (10 Ob 40/07s), following which the *Rechtssatz* rule of law was established; in *Italy*, judgment of the Corte suprema di cassazione (Court of Cassation), combined chambers, of 4 March 2019 (No 6280), in accordance with the *perpetuatio jurisdictionis* rule in national law.

69 For a contrary view, see Stark, L., op. cit., p. 394. If the procedural aspect of the clause were to be favoured, any comparison with the judgment of 13 November 1979, *Sanicentral* (25/79, EU:C:1979:255, paragraphs 6 and 7, on the interpretation of the transitional provisions of the Brussels Convention), on which the analyses and decisions referred to in footnotes 64 and 68 of this Opinion are based, and with the judgment of 24 November 2022, *Tilman* (C-358/21, EU:C:2022:923, paragraph 30, on the application over time of the Lugano II Convention to the United Kingdom), would have to be examined. In view of the subject matter of those decisions, their scope may be limited to interpreting provisions on the application over time of EU law.

49. However, in view of the procedural subject matter of the clause, namely, the choice of a court in the context of a European regulation and its objectives, I consider an alternative approach to be feasible.[70] Thus, it might be accepted that, in an internal situation with a prospect of becoming international,[71] the parties agree, when concluding their agreement, to designate a court of a Member State in sufficiently precise terms which express their intention[72] and provide for the exclusive jurisdiction of national courts where there is doubt as to the existence of a criterion requiring an international element. It is only on those conditions that I consider legal certainty to be preserved.[73] It would then be for the designated court to assess the realisation of the parties' expectations when proceedings are brought before it.

V. Conclusion

50. In the light of all the foregoing considerations, I propose that the Court answer the question referred for a preliminary ruling by the Nejvyšší soud (Supreme Court, Czech Republic) as follows:

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

must be interpreted as meaning that in a purely internal situation, it is not applicable based solely on the fact that the parties domiciled in the same Member State have designated a court or courts of another Member State to settle any disputes between them which have arisen or which may arise.

70 See, regarding observations by legal authors to that effect, Ancel, M.-E., op. cit., in particular paragraph 18 in fine (p. 36), and Stark, L., op. cit., in particular pp. 393 to 396.

71 See Gaudemet-Tallon, H. and Ancel, M.-E., op. cit., paragraph 143 (p. 191) with a reference in footnote 67 to Gothot, P. and Holleaux, D., op. cit., paragraph 168 (p. 100).

72 See, regarding the precision requirement, judgment of 16 March 1999, *Castelletti* (C-159/97, EU:C:1999:142, paragraph 48), and the case-law cited in footnote 15 to this Opinion. See also, by way of illustration, Kleiner, C., op. cit., p. 61, according to which a future event such as the place of performance of an obligation which has not been performed may be a relevant criterion. See, for a critique of that approach, Stark, L., op. cit., p. 393.

73 Such an approach might allay the reservations expressed by Geimer, R., 'EuGVVO Art. 25', in Geimer, R. and Schütze, R.A., *Europäisches Zivilverfahrensrecht*, 4th ed., C. H. Beck, Munich, 2020, in particular paragraph 39.