

Preliminary contract but not a ‘contract for the provision of services’ under Article 7(1)(b) of the Bru I bis Reg., CJEU in EXTÉRIA, C-393/22

Does a preliminary contract obliging the parties to conclude a future ‘contract for the provisions of services’ within the meaning of Article 7(1)(b) of the Brussels I bis Regulation borrow its characterisation from such a future contract and, as a consequence, the claims resulting from this preliminary contract can be brought before the courts for the place where the services were or should have been provided? This is the question that the Court of Justice answered in the negative in its judgment handed down this morning in the case EXTÉRIA, C-393/22.

Preliminary question and its context

A Czech company and a Slovak company conclude a contract under which they commit themselves to conclude a future contract. The subject of the future contract is for the Czech company to grant the Slovak company the right to operate and manage the former company’s franchise branches in Slovakia.

Under the preliminary contract concluded between the companies, the Slovak company is obliged to make an advance payment in the amount of over 20.000 EUR. The payment serves to secure the obligation of the Slovak company to enter into the future franchise contract and to keep confidential all the information obtained from the Czech company. Furthermore, if the Slovak company fails to enter into the franchise contract, it will pay the other party an amount corresponding to the advance payment.

It is also agreed that if the Slovak company fails to make the advance payment, the Czech company can withdraw from the contract.

The contract is governed by Czech law. By contrast, no choice of court clause is agreed between the parties.

Before a Czech court, the Czech company argues that the advance payment has not been made and that it exercised its right to withdraw from the contract and claims the amount of over 20.000 EUR as a contractual penalty.

The Slovak company, now the defendant, objects that the Czech courts lack jurisdiction.

First instance court rejects the objection and bases its jurisdiction on Article 7(1)(a) of the Brussels I bis Regulation. The decision is upheld by the appeal court.

In essence, those courts find that the applicant seeks a payment of contractual penalty. It is neither a question of goods nor services. Hence, Article 7(1)(b) is of no relevance; if it were otherwise, the courts for the place where the services were/should have been provided would have jurisdiction. By contrast, Article 7(1)(a) applies. Under Czech law, the place of the performance of a pecuniary obligation shall be the place of the registered office of the creditor in Czech Republic.

An appeal is brought by the Slovak defendant before the Czech Supreme Court.

In a nutshell, the defendant argues that the obligation secured by this contractual penalty, which admittedly had its source in the preliminary contract, was nevertheless linked to the future franchise contract.

Faced with this appeal, the Supreme Court referred to the Court of Justice a question for a preliminary ruling:

Must Article 7(1)(b) [of the Brussels I bis Regulation] be interpreted as meaning that the concept 'contract for the provision of services' also includes a contract to enter into a future contract (pactum de contrahendo), in which the parties undertook to enter into a future contract that would be a contract for the provision of services, within the meaning of that provision?

Judgment of the Court

The Court did not request an Opinion from its Advocate General in the case reported here.

In the judgment handed down this Thursday the Court starts its reasoning with a series of casual reminders: first, the notion of 'services' shall receive an autonomous interpretation (para 25), second, the special head of jurisdiction for contractual matters of Article 7(1) is based on the proximity between the contract in question and the court having jurisdiction (para. 29), third, the notion of 'contract for the provision of services' implies, at the least, that the party who provides the service carries out a particular activity in return for remuneration (para. 34).

Concerning the notion of 'contract for the provisions of services', the first requirement (ie. carrying out of a particular activity) demands the performance of positive acts, to the exclusion of mere abstentions (para. 35). The second requirement (ie. whether the particular activity is carried out in return for remuneration) cannot be understood in the strict sense of the payment of a sum of money, as the fact of benefiting from a set of advantages representing an economic value may be considered as constituting remuneration (para. 36).

Those two requirements for 'contract of the provision of services' are met by a franchise agreement. By contrast, this is not the case of a preliminary contract, whose purpose was to conclude a franchise agreement in the future and to preserve the confidentiality of the information contained therein. Furthermore, in the absence of any actual activity carried out by the co-contractor (here: the Czech company), the payment of the contractual penalty cannot be qualified as remuneration (para. 37).

Regardless of the link between the preliminary and future contract, the preliminary contract cannot borrow its characterisation from the future franchise agreement for the purposes of establishing jurisdiction because it would run counter not only to the requirement for a strict interpretation of the special jurisdiction rules laid down in the Brussels I bis Regulation but also to the objectives of foreseeability and legal certainty (para. 40).

Ultimately, those findings led the Court to conclude that a preliminary contract relating to the future conclusion of a franchise agreement, providing for an

obligation to pay a contractual penalty based on non-performance of that preliminary contract, a contractual obligation the breach of which serves as the basis for a claim, does not fall within the concept of a 'contract for the provision of services' within the meaning of Article 7(1)(b) Brussels I bis Regulation. In such a case, jurisdiction over a claim on which that obligation serves as a basis is determined, in accordance with Article 7(1)(a) of the Regulation, by reference to the place of performance of the said obligation.

Concluding thought

The most interesting lesson to be learned from the judgment ? Arguably, it is the lack of relevance under the scheme of Article 7(1) of the Brussels I bis Regulation of the link between the preliminary contract and the obligations resulting from it, on the one hand, and the future contract, on the other hand. By contrast, such a link could be of some significance in the context of the rules of the Rome I Regulation and in the determination of the applicable law (provided that there was no choice of law in the preliminary contract itself). A practical takeaway from the judgment? The parties might consider a choice of court clause also when concluding a preliminary contract.

The judgment can be consulted [here](#). The request for a preliminary ruling is available [here](#).