Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

21 May 2015 *

(Judicial cooperation in civil matters — Jurisdiction and the enforcement of judgments in civil and commercial matters — Regulation (EC) No 44/2001 — Article 23 — Agreement conferring jurisdiction — Formal requirements — Communication by electronic means which provides a durable record of the agreement — Definition — General terms and conditions of sale which can be consulted and printed from a link which enables them to be displayed in a new window — Click-wrapping)

In Case C-322/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Krefeld (Germany), made by decision of 5 June 2014, received at the Court on 4 July 2014, in the proceedings between

Jaouad El Majdoub

v

CarsOnTheWeb.Deutschland GmbH,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, A. Ó Caoimh, C. Toader (Rapporteur), E. Jarašiūnas and C.G. Fernlund, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the German Government, by T. Henze and J. Kemper, acting as Agents,

— the European Commission, by A.-M. Rouchaud-Joët and W. Bogensberger, acting as Agents,

— the Swiss Government, by M. Jametti, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 23(2) 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) ('the Brussels I Regulation').

2 The request has been made in proceedings between Mr El Majdoub, a car dealer, and CarsOnTheWeb.Deutschland GmbH, concerning the sale on the latter's website of a motor vehicle to the applicant in the main proceedings.

Legal background

3 Article 17, first paragraph, of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968 (OJ 1978 L 301, p. 77), as amended by the successive conventions on the accession of new Member States thereto ('the Brussels Convention'), is worded as follows:

'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. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.'

4 According to recital 2 to the Brussels I Regulation, the latter aims to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by that regulation.

5 Recitals 11 and 12 to that regulation, which set out the relationship between the various rules of jurisdiction and their purpose, state as follows:

'(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking 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.

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.'

6 Recital 19 in the preamble to that regulation states that it is necessary to ensure the continuity between the Brussels Convention and Regulation No 44/2001.

7 Article 2(1) of the Brussels I Regulation lays down the principle according to which persons domiciled in the territory of a Member State are, whatever their nationality, to be sued in the courts of that Member State.

8 Article 3(1) of that regulation, in Chapter II thereof, provides:

'Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.'

9 Chapter II of the regulation contains Section 7, entitled 'Prorogation of jurisdiction'. Article 23(1) and (2) which appears in that section, provides:

'1. 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. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".'

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

10 The applicant in the main proceedings, a car dealer established in Cologne (Germany), purchased from the website of the defendant in the main proceedings, whose registered office is in Amberg (Germany), an electric car for a very good price. However, the sale was cancelled by the seller on account of damage allegedly sustained by that vehicle which was noted during preparations for its transport to the purchaser.

11 Taking the view that the reason given was only a pretext for the cancellation of that sale, which was disadvantageous to the seller on account of the low sale price, the applicant in the main proceedings brought an action before the Landgericht Krefeld seeking an order that the defendant transfer of ownership of that vehicle.

12 The applicant in the main proceedings claims that his contracting partner is the defendant in the main proceedings, established in Germany, and not its parent company, established in Belgium, and, therefore, that the referring court has jurisdiction to deal with the case concerned.

13 By contrast, the defendant in the main proceedings contends that the German courts do not have jurisdiction in the case. Article 7 of the general terms and conditions for internet sales transactions, accessible on its website, contains an agreement conferring jurisdiction on a court in Leuven (Belgium). In addition, it claims that it is not the contracting partner of the applicant in the main proceedings, its parent company having that status. The applicant in the main proceedings cannot be

unaware of that, as he requested the Belgian parent company to issue an invoice without VAT, which was sent to him mentioning the parent company's contact details, and he paid the price of the motor vehicle at issue into a Belgian bank account.

14 While not disputing that method of payment, the applicant in the main proceedings takes the view that the agreement conferring jurisdiction in Article 7 has not been validly incorporated into the sale agreement, as it is not in writing in accordance with the requirements in Article 23(1)(a) of the Brussels I Regulation. He submits that the webpage containing the general terms and conditions of sale of the defendant in the main proceedings does not open automatically upon registration and upon every individual sale. Instead, a box with the indication 'click here to open the conditions of delivery and payment in a new window' must be clicked on (known as 'click wrapping'). The requirements of Article 23(2) of the Brussels I Regulation are met only if the window containing those general conditions opens automatically. Moreover, the agreement conferring jurisdiction is also invalid because it is arbitrary and unexpected.

15 The referring court wishes to know whether 'click-wrapping', by which a purchaser agrees to the general terms and conditions of sale on a website by clicking on a hyperlink which opens a window, meets the requirements of Article 23(2) of the Brussels I Regulation. In so far as those conditions may be saved and printed separately, that court asks whether such a technique may be regarded as a communication by electronic means which provides a durable record of the sale agreement and, therefore, as being in writing, within the meaning of that provision. If that were the case, the agreement conferring jurisdiction on a Belgian court would be valid and the Landgericht Krefeld would not have jurisdiction to hear the dispute.

16 Furthermore, that court considers that the contracting party of the applicant in the main proceedings is the company established in Germany, not the Belgian parent company. Accordingly, failing an agreement conferring jurisdiction, the action for transfer of ownership before it should be brought in Germany. However, the applicant cannot regard that agreement as unexpected, since he was aware of the foreign element in the sale agreement he had concluded, and had requested the issue of an international invoice which mentioned the contact details of the parent company.

17 The referring court considers that Article 23(2) of the Brussels I Regulation does not require the agreement conferring jurisdiction to have actually been printed or saved by one of the contracting parties. The only condition laid down by that provision is that it should be 'possible' to provide a durable record of the agreement. Thus, the communication by electronic means should be able to provide such a durable record in order to meet the requirements laid down in Article 23(2).

18 The referring court takes the view that 'click-wrapping', the subject of the dispute before it, allowed the general terms and conditions containing the agreement conferring jurisdiction both to be printed and saved, given that the text of those general terms and conditions opened on a separate page after clicking and could be printed or saved by a contracting party. Whether the window containing those conditions opened automatically or not is irrelevant in that respect.

19 In those circumstances, the Landgericht Krefeld decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does so-called "click wrapping" fulfil the requirements relating to a communication by electronic means within the meaning of Article 23(2) of [the Brussels I Regulation]?'

Consideration of the question referred for a preliminary ruling

20 By its question, the referring court asks essentially whether Article 23(2) of the Brussels I Regulation must be interpreted as meaning that the method of accepting general terms and conditions of contract for sale by 'click-wrapping', such as that at issue in the main proceedings, concluded electronically, containing an agreement conferring jurisdiction, constitutes a communication by electronic means capable of providing a durable record of that agreement, within the meaning of that provision.

21 As is clear from the order for reference, it is an essential feature of the facts of the case in the main proceedings that a potential purchaser must expressly accept the seller's general terms of sale by clicking the relevant box before making a purchase. However, that operation does not automatically lead to the opening of the document containing the seller's general terms, as an extra click on a specific hyperlink for that purpose is still necessary.

22 In the case in the main proceedings, it is common ground that the general terms and conditions at issue contain a jurisdiction clause providing for the jurisdiction of a court in Leuven in disputes such as that at issue in the main proceedings. However, the applicant in the main proceedings takes the view that the click-wrapping method of accepting general terms and conditions does not fulfil the requirements laid down in Article 23(2) of the Brussels I Regulation, in that the window containing those conditions does not open automatically on registration on the site or during a transaction. Consequently, that jurisdiction clause cannot, in his view, be invoked against him.

23 It must be determined, therefore, whether, in such circumstances, the validity of a jurisdiction clause contained in a contract concluded by electronic means, within the meaning of Article 23(2) of the Brussels I Regulation, may be challenged if the click-wrapping technique is used.

24 In that connection, it must be recalled, as a preliminary point, that according to the terms of Article 23(1) of the Brussels I Regulation, the jurisdiction of a court or the courts of a Member State, agreed by the contracting parties in an agreement conferring jurisdiction is, in principle, exclusive. In order to be valid, that clause must be in writing or evidenced in writing, in a form which accords with practices which the parties have established between themselves or, in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware. Pursuant to Article 23(2) 'any communication by electronic means which provides a durable record of the agreement' must be regarded as 'equivalent to "writing"'.

25 It should be observed that the requirements laid down by Article 23 of the Brussels I Regulation must be strictly interpreted in so far as they exclude both jurisdiction as determined by the general principle of the courts of the State in which the defendant is domiciled laid down in Article 2 thereof, and the special jurisdiction provided for in Articles 5 to 7 of that regulation (see, by analogy, judgment in *MSG*, C-106/95, EU:C:1997:70, paragraph 14 and the case-law cited).

26 In the first place, it must be observed that the provisions of Article 23(1) of the Brussels I Regulation clearly indicate that its scope is limited to cases in which the parties have 'agreed' on a court. As appears from recital 11 in the preamble to that regulation, it is that consensus between the parties which justifies the primacy granted, in the name of the principle of the freedom of choice, to the choice of a court other than that which may have had jurisdiction under that regulation (judgment in *Refcomp*, C-543/10, EU:C:2013:62, paragraph 26).

27 In that connection, it is to be observed that, in so far as the Brussels I Regulation replaces the Brussels Convention in the relations between Member States, the interpretation provided by the Court in respect of the provisions of that convention is valid also for those of the regulation whenever the provisions of those instruments may be regarded as equivalent (see, inter alia, judgment in *Refcomp*, C-543/10, EU:C:2013:62, paragraph 18).

28 That is the case as far as concerns the first paragraph of Article 17 of that convention and Article 23(1) of the Brussels I Regulation, which are drafted in almost identical terms (judgment in *Refcomp*, C-543/10, EU:C:2013:62, paragraph 19).

29 The Court has held with regard to Article 17, first sentence, of the Brussels Convention that, by making the validity of a jurisdiction clause subject to the existence of an 'agreement' between the parties, that provision imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated, and that the requirements as to form imposed by Article 17 ensure that consensus between the parties is in fact established (see judgment in *MSG*, C-106/95, EU:C:1997:70, paragraph 15 and the case-law cited).

30 It follows that, like the aim pursued by the first paragraph of Article 17 of the Brussels Convention, ensuring the real consent of the parties is one of the aims of Article 23(1) of the Brussels I Regulation (see judgment in *Refcomp*, C-543/10, EU:C:2013:62, paragraph 28 and the case-law cited).

31 In the present case, as is clear from the decision to refer, the purchaser expressly accepted the general terms and conditions at issue, by clicking the relevant box on the seller's website.

32 In the second place, according to Article 23(2) of the Brussels I Regulation, which constitutes a new provision as compared with Article 17 of the Brussels Convention, added in order to take account of the development of new methods of communication, the validity of an agreement conferring jurisdiction, such as that at issue in the main proceedings, may depend, inter alia, on the possibility of providing a durable record.

33 In that connection, it follows from a literal interpretation of that provision that it requires there to be the 'possibility' of providing a durable record of the agreement conferring jurisdiction, regardless of whether the text of the general terms and conditions has actually been durably recorded by the purchaser before or after he clicks the box indicating that he accepts those conditions.

34 Furthermore, it is clear from the Explanatory Report of Professor Pocar on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 (OJ 2009 C 319, p. 1, paragraph 109), that the test of whether the formal requirement in that provision is met is 'whether it is possible to create a durable record of an electronic communication by printing it out or saving it to a backup tape or disk or storing it in some other way', and that that is the case 'even if no such durable record has actually been made', meaning that 'the record is not required as a condition of the formal validity or existence of the clause'.

35 That finding is also confirmed by a historical and teleological interpretation of Article 23(2) of the Brussels I Regulation. According to the Explanatory Memorandum on the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, presented by the Commission in Brussels on 14 July 1999 (COM(1999) 348 final), the aim of that provision is that the need for an agreement 'in writing or evidenced in writing' should not invalidate a choice-of-forum clause concluded in a form that is not written on paper but accessible on screen.

36 The purpose of that provision is, therefore, to treat certain forms of electronic communications in the same way as written communications in order to simplify the conclusion of contracts by electronic means, since the information concerned is also communicated if it is accessible on screen. In order for electronic communication to offer the same guarantees, in particular as regards evidence, it is sufficient that it is 'possible' to save and print the information before the conclusion of the contract.

37 It is true that, interpreting Article 5(1) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19), pursuant to which the consumer must 'receive' 'written confirmation or confirmation in another durable medium', the Court held, in paragraph 51 of the judgment in *Content Services* (C-49/11, EU:C:2012:419), that a business practice consisting of making information accessible only via a hyperlink on a website does not meet the requirements of that provision, since that information is neither 'given' by that undertaking nor 'received' by the consumer, within the meaning of that provision, and a website cannot be regarded as a 'durable medium' within the meaning of Article 5(1).

38 However, it must be stated that that interpretation cannot be applied to Article 23(2) of the Brussels I Regulation, since both the wording of Article 5(1) of Directive 97/7, which expressly requires the communication of information to consumers in a durable medium, and the objective of that provision, which is specifically consumer protection, differ from those of Article 23(2).

39 In the case in the main proceedings, it is not disputed that click-wrapping makes printing and saving the text of the general terms and conditions in question possible before the conclusion of the contract. Therefore, the fact that the webpage containing that information does not open automatically on registration on the website and during each purchase cannot call into question the validity of the agreement conferring jurisdiction.

40 Having regard to the foregoing considerations, the answer to the question referred is that Article 23(2) of the Brussels I Regulation must be interpreted as meaning that the method of accepting the general terms and conditions of a contract for sale by 'click-wrapping', such as that at issue in the main proceedings, concluded by electronic means, which contains an agreement conferring jurisdiction, constitutes a communication by electronic means which provides a durable record of the agreement, within the meaning of that provision, where that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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:

Article 23(2) 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 must be interpreted as meaning that the method of accepting the general terms and conditions of a contract for sale by 'click-wrapping', such as that at issue in the main proceedings, concluded by electronic means, which contains an agreement conferring jurisdiction, constitutes a communication by electronic means which provides a durable record of the agreement, within the meaning of that provision, where that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract.

[Signatures]