Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 2 July 2015 [1]

Case C-245/14

Thomas Cook Belgium NV
v
Thurner Hotel GmbH

(Request for a preliminary ruling from the Handelsgericht Wien (Austria))

(Area of freedom, security and justice — Cooperation in civil matters — Regulation (EC) No 1896/2006 — European order for payment procedure — Article 20(2) — Review of the European order for payment after expiry of the time-limit for lodging a statement of opposition — False or inaccurate information — Lack of jurisdiction of the court issuing the European order for payment — Concept of 'exceptional circumstances')

1. This case provides the Court of Justice with the opportunity to rule, virtually for the first time, on the concept of 'exceptional circumstances' in Article 20(2) of Regulation No 1896/2006. [2] Specifically, the question is whether, in the context of the European order for payment procedure, the fact that the court issuing the European order for payment may lack jurisdiction due to the possible existence of a jurisdiction clause agreed between the parties and not referred to in the application form for the order constitutes 'exceptional circumstances' and, as such, justifies a review of the order where the debtor appears to have had the opportunity to oppose the order within the time-limit and did not do so.

I – **Legal framework**

2. Recital 25 in the preamble to Regulation No 1896/2006 provides:

'After the expiry of the time-limit for submitting the statement of opposition, in certain exceptional cases the defendant should be entitled to apply for a review of the European order for payment. Review in exceptional cases should not mean that the defendant is given a second opportunity to oppose the claim. During the review procedure the merits of the claim should not be evaluated beyond the grounds resulting from the exceptional circumstances invoked by the defendant. The other exceptional circumstances could include a situation where the European order for payment was based on false information provided in the application form.'

1 — Original language: Spanish.

2 — 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). The Court has already held in its order in *Novontech-Zala*, C-324/12, EU:C:2013:205, that the failure to observe the time-limit for lodging a statement of opposition to a European order for payment, by reason of the negligence of the defendant's representative, does not justify a review of that order for payment, since such a failure to observe the time-limit does not constitute exceptional circumstances within the meaning of Article 20(2) of Regulation No 1896/2006. In the judgment in *eco cosmetics and Raiffeisenbank St. Georgen*, C-119/13 and C-120/13, EU:C:2014:2144, the Court held that the procedure laid down in Article 20 of that regulation is not applicable where a European order for payment has not been served in a manner consistent with the minimum standards laid down in Articles 13 to 15 of the regulation.

3. Article 16 of the regulation, headed ‘Opposition to the European order for payment’, provides:

‘1. The defendant may lodge a statement of opposition to the European order for payment with the court of origin using standard form F as set out in Annex VI, which shall be supplied to him together with the European order for payment.

2. The statement of opposition shall be sent within 30 days of service of the order on the defendant.

3. The defendant shall indicate in the statement of opposition that he contests the claim, without having to specify the reasons for this.

4. The statement of opposition shall be submitted in paper form or by any other means of communication, including electronic, accepted by the Member State of origin and available to the court of origin.

…’

4. Article 20 of the regulation, headed ‘Review in exceptional cases’, is worded as follows:

‘1. After the expiry of the time-limit laid down in Article 16(2) the defendant shall be entitled to apply for a review of the European order for payment before the competent court in the Member State of origin where:

(a) (i) the order for payment was served by one of the methods provided for in Article 14, and

(ii) service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part,

or

(b) the defendant was prevented from objecting to the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part,

provided in either case that he acts promptly.

2. After expiry of the time-limit laid down in Article 16(2) the defendant shall also be entitled to apply for a review of the European order for payment before the competent court in the Member State of origin where the order for payment was clearly wrongly issued, having regard to the requirements laid down in this Regulation, or due to other exceptional circumstances.

3. If the court rejects the defendant’s application on the basis that none of the grounds for review referred to in paragraphs 1 and 2 apply, the European order for payment shall remain in force.

If the court decides that the review is justified for one of the reasons laid down in paragraphs 1 and 2, the European order for payment shall be null and void.’

II – **Main proceedings and questions referred for a preliminary ruling**

5. The appellant in the main proceedings, Thomas Cook Belgium NV (‘Thomas Cook’), is a travel agency established in Ghent (Belgium) which offers a range of services in the tourism sector. On 3 September 2009, Thomas Cook entered into a contract with Thurner Hotel GmbH (‘Thurner Hotel’), an Austrian company established in Sölden (Austria), which set out new conditions for their cooperation over the summer 2010 season. Subsequently, Thomas Cook defaulted in its payment

obligations and Thurner Hotel — which had provided tourist accommodation in Sölden on the terms set out in the contract — applied to the Bezirksgericht für Handelssachen Wien (District Court for Commercial Matters, Vienna) for a European order for payment to be issued against the Belgian travel agency in an amount in excess of EUR 15 000. The grounds stated for the jurisdiction of the Bezirksgericht für Handelssachen Wien were that the place of performance of the obligations was Austria.

6. On 26 June 2013, the European order for payment was effectively served on Thomas Cook. Thomas Cook did not lodge a statement of opposition within the 30-day period laid down in Article 16(2) of Regulation No 1896/2006 because it claimed that it was busy researching in its records in order to ascertain whether or not the order for payment in question was well founded.

7. On 25 September 2013, Thomas Cook applied to the Bezirksgericht für Handelssachen Wien for a review of the European order for payment in accordance with Article 20(2) of Regulation No 1896/2006. In essence, the argument put forward by Thomas Cook was that the order had been issued by a court which lacked jurisdiction, given that the general terms and conditions agreed by the parties included a choice-of-court agreement in favour of the courts of Ghent, Belgium. According to Thomas Cook, the incorrectly issued European order for payment should be declared void pursuant to Article 20(3) of Regulation No 1896/2006 since the court's lack of jurisdiction constituted grounds for review under Article 20(2) of the regulation in question.

8. By decision of 28 October 2013, the Bezirksgericht für Handelssachen Wien dismissed Thomas Cook's application for review of the European order for payment. Thomas Cook appealed against this decision to the referring court within the applicable time-limit. In its grounds of appeal, Thomas Cook relied on recital 25 in the preamble to Regulation No 1896/2006, which explicitly states that a situation where the application for a European order for payment was based on false information provided in the application form constitutes 'exceptional circumstances' for the purposes of Article 20(2) of the regulation. Thomas Cook contends that in this case the Bezirksgericht für Handelssachen Wien failed to find that the courts of Ghent, Belgium rather than the Austrian courts had jurisdiction by virtue of the general terms and conditions agreed by the parties. It argues that that court should have held that the European order for payment had clearly been wrongly issued within the meaning of Article 20(2) of the regulation.

9. The Handelsgericht Wien (Commercial Court, Vienna) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure to be interpreted as meaning that a defendant may apply for a review by the competent court of the European order for payment in accordance with Article 20(2) of Regulation No 1896/2006 also where the order for payment was effectively served on him but was issued by a court which lacks jurisdiction on the basis of the information relating to jurisdiction provided in the application form?

(2) If the answer to Question 1 is in the affirmative, do exceptional circumstances within the meaning of Article 20(2) of Regulation No 1896/2006 already exist in accordance with recital 25 in the preamble to European Commission Notice 2004/0055 of 7 February [2006] where the European order for payment was issued on the basis of information provided in the application form which may subsequently prove to be inaccurate, particularly where the jurisdiction of the court depends on that information?'

10. Thurner Hotel, the Austrian Government, the Portuguese Government, the European Commission and the German Government have submitted written observations in this case. Those of Thomas Cook were lodged after the deadline and were excluded for that reason. Only the Commission appeared at the hearing, which was held on 16 April 2015 at the request of Thomas Cook.

III – **Summary of the positions of the parties**

11. First, Thurner Hotel refutes Thomas Cook's arguments in the main proceedings concerning its claimed ignorance of the default, owing to the fact that it was not sent the relevant invoices (or, at least, was not sent them in good time), which Thomas Cook maintains meant that it was unable to lodge a statement of opposition within the time-limit. Secondly, it also rejects the argument that the parties had agreed to confer jurisdiction on the courts of Ghent. In any event, it was evident from its application for a European order for payment that Thurner Hotel was using the place of performance of the contractual obligations (pursuant to Article 5(1) of Regulation No 44/2001) as the basis for the jurisdiction of the court to which it was submitting the application, which meant that Thomas Cook could have lodged a statement of opposition within the 30-day time-limit.

12. Thurner Hotel takes the view that the provision in question (Article 20(2) of Regulation No 1896/2006) must be interpreted restrictively. It argues that it would be contrary to the principle of legal certainty to use that provision to permit a party to avail itself of procedural defences which it could (and should) have relied on within the period stipulated for lodging a statement of opposition.

13. The Austrian Government is also in favour of Article 20(2) of Regulation No 1896/2006 being interpreted restrictively so that anything that could have been argued by the debtor at an earlier stage in a statement of opposition does not fall within 'exceptional circumstances', a view shared by the German Government. The Austrian Government takes the view that only European orders for payment which are manifestly unlawful or which have been fraudulently obtained should be the subject of review under Article 20(2) of the regulation.

14. The Portuguese Government points out that there are two scenarios in which a review of a European order for payments may be sought under Article 20(2) of the regulation after the expiry of the time-limit for lodging a statement of opposition: the first is where the order for payment was clearly wrongly issued, having regard to the requirements laid down in the regulation, meaning that the requirements laid down in the regulation for the validity of the order were not respected when it was issued; the second is where there are other exceptional circumstances. The Portuguese Government is of the view that the time-limit laid down in Article 16(2) of Regulation No 1896/2006 for lodging a statement of opposition is intended to cover the situation where the legitimacy or validity of the debt which it is sought to enforce is contested and the European order for payment meets the requirements for validity laid down in the regulation. Review under Article 20(2), on the other hand, is intended to prevent the enforcement of orders for payment that were issued in breach of the regulation. The Portuguese Government considers that where an order has been issued by a court which lacks jurisdiction this constitutes a breach of an essential requirement for validity and should be open to challenge for longer than the period provided for in Article 16.

15. The Commission proposes that the first question referred for a preliminary ruling should be answered in the affirmative, to the effect that if in fact the order was issued by a court which lacked international jurisdiction, then the order for payment was wrongly issued, having regard to the requirements laid down in Regulation No 1896/2006, which opens up the possibility of applying for a review under Article 20(2) of that regulation. The second question referred for a preliminary ruling should be answered by investigating whether the order was 'clearly' wrongly issued. Where matters of international jurisdiction are concerned, it is not usually 'clear' whether the court issuing the order does or does not have jurisdiction. It would, in the Commission's view, be contrary to the purposes of the regulation to require the court in every case to conduct an exhaustive investigation as to whether it had jurisdiction to issue the order.

16. The Commission's suggestion is that the scope of Article 20(2) of Regulation No 1896/2006 should be limited in order to accord with the provisions of Regulation No 1215/2012,[3] so that it would be possible to contest a European order for payment after expiry of the time-limit for lodging a statement of opposition only in cases of infringement of provisions conferring international jurisdiction which were specifically intended to protect the weaker party in a legal relationship or in the cases provided for in Article 24 of Regulation No 1215/2012 (exclusive jurisdiction), to which Article 45(1)(e)(ii) of that regulation refers. The potential breach of a choice-of-court agreement of the kind which seems to lie at the heart of this case does not fit within any of these cases so that it cannot be said that the order was 'clearly' wrongly issued.

17. It therefore remains to be determined, in the Commission's view, whether there are 'other exceptional circumstances' within the meaning of Article 20(2) of Regulation No 1896/2006. The Commission suggests that this provision should be interpreted restrictively to the effect that it applies only to cases of fraudulent abuse of the order for payment procedure, which must be proved in each case.[4]

18. The German Government takes the view that not all inaccurate or false information provided in the application form opens the way to a challenge under Article 20(2) of Regulation No 1896/2006. Review of a European order for payment is justified only where, having taken into consideration the interests of both parties, to enforce it would be intolerable ('unerträglich') to one of them. The German Government also cites the order in *Novontech-Zala*,[5] which concerns Article 20 of Regulation No 1896/2006, in which the Court of Justice held, in relation to the 30-day time-limit for lodging a statement of opposition, that 'where … the failure to comply with the time-limit is due to a lack of diligence by the defendant's representative, such a situation, since it could easily have been avoided, does not constitute extraordinary or exceptional circumstances within the meaning of [Article 20(1)(b) and (2)]'. The German Government believes that, by the same reasoning, anything that a party relies on that it could easily have avoided should not be regarded as 'exceptional circumstances'. Moreover, it would be contrary to the objectives of Regulation No 1896/2006 (particularly those relating to speed and cost-saving) to allow a party which could have lodged a statement of opposition within the time-limit to have a European order for payment reviewed (especially since Article 16(3) of the regulation does not even require that the statement of opposition should specify reasons).

19. The German Government does not see the fact that the applicant for the European order for payment and the other party are not in agreement on the question of international jurisdiction as in any way 'exceptional' and, in the present case, Thomas Cook could quite easily have asserted the lack of jurisdiction of the court issuing the order by lodging a statement of opposition. Finally, it is the view of the German Government that, in any event, even if the court which ultimately issued the order did not have international jurisdiction, it was an impartial and independent court of a Member State and there is no reason to suppose that its decision disregarded or was detrimental to the interests of Thomas Cook.

3 — 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).

4 — The Commission does not believe that this is the case here, as Thurner Hotel relied on the place of performance of the contractual obligations pursuant to Article 5 of Regulation No 44/2001 as the basis for the international jurisdiction of the Bezirksgericht für Handelssachen Wien.

5 — C-324/12, EU:C:2013:205, paragraph 21.

IV – **Analysis**

A – *Preliminary considerations*

20. The referring court has referred two questions for a preliminary ruling to the Court of Justice. The first asks whether it is possible to use Article 20(2) of Regulation No 1896/2006 to apply for a review of a European order for payment which was issued by a court which lacks jurisdiction on the basis of the information relating to jurisdiction provided in the application form; the second (which arises only if the first is answered in the affirmative) seeks to ascertain whether a situation where an order was issued on the basis of information concerning jurisdiction which subsequently proves to be inaccurate constitutes 'exceptional circumstances' within the meaning of that provision.

21. It seems to me that, as suggested by the German Government in its observations, the two questions can be recast into a single question, which would be rephrased thus:

'Is Article 20(2) of Regulation No 1896/2006, in conjunction with recital 25 in the preamble thereto, to be interpreted as meaning that a situation where a European order for payment was issued on the basis of information provided in the application form which subsequently proves to be inaccurate, particularly where the jurisdiction of the court depends on that information, constitutes 'exceptional circumstances' such that a defendant on whom the order for payment was effectively served can apply for a review of the order?'

B – *Consideration of the question*

22. Article 20(2) of Regulation No 1896/2006, headed 'Review in exceptional cases', provides that 'after expiry of the time-limit laid down in Article 16(2) the defendant shall also be entitled to apply for a review of the European order for payment before the competent court in the Member State of origin where the order for payment was clearly wrongly issued, having regard to the requirements laid down in this Regulation, or due to other exceptional circumstances'. According to recital 25 in the preamble to the regulation, to which the referring court specifically refers,[6] those circumstances could include a situation where 'the European order for payment was based on false information provided in the application form'.

23. It therefore seems to me that the requirement in Article 20(2) of Regulation No 1896/2006 itself that it be 'clear' that the order was 'wrongly issued' and the statement in recital 25 that 'review in exceptional cases should not mean that the defendant is given a second opportunity to oppose the claim' both support the proposition that 'review in exceptional cases' must be strictly applied. Consequently, I agree in principle with the German Government that not all false or inaccurate information provided in the application form can justify the review of a European order for payment under Article 20(2) of Regulation No 1896/2006.

6 — In the second question referred for a preliminary ruling, as drafted, the Handelsgericht Wien refers to 'paragraph 25 of European Commission Notice 2004/0055 of 7 February [2006]'. It is my understanding that is a reference to the amended proposal for a Regulation of the European Parliament and of the Council creating a European order for payment procedure of 7 February 2006 (COM(2006) 57 final), which introduced recital 25 in the preamble to the regulation currently in force into the text.

24. Furthermore, the very structure of the European order for payment procedure militates against a relaxed interpretation of a route which is intended exclusively for exceptional cases, in that it generally offers the debtor only a single opportunity to react to the creditor's claim (by lodging a statement of opposition under Article 16 of Regulation No 1896/2006) but, precisely for that reason, makes it subject to very few formal requirements (it must be in the form of a written document and lodged within 30 days) and no substantive requirements (it is not necessary to give reasons). [7]

25. Accordingly, I am of the opinion that Article 20(2), in conjunction with recital 25 in the preamble to the regulation, must be strictly interpreted and in this all the interveners submitting observations, with the exception of the Portuguese Government, are in agreement.

26. In circumstances such as those in the present case, this means that, as far as the information provided by the applicant in the application form is concerned, the review option should not be available where the European order for payment was effectively served on the debtor and it would have been clear on the face of the order (especially where, as in this case, the debtor is a business) that the information relied on by the court issuing it (namely the information provided by the applicant) was inaccurate, incorrect or false. In other words, I agree with Thurner Hotel and the Austrian Government that false or inaccurate information to which the debtor was able to object by lodging an opposition should not constitute 'exceptional circumstances' justifying a review of the order. In short, I think that the 'false information' mentioned in recital 25 in the preamble to Regulation No 1896/2006 should be taken as referring only to information whose false nature or inaccuracy really only emerges or can be detected by the debtor at a later stage, after the time-limit referred to in Article 16(2) of the regulation has expired, which is a matter for the national court to decide in each case.

27. It is therefore my provisional conclusion that only a situation where a European order for payment is based on information provided in the application form which only really proves to be false or inaccurate at a later stage, after the time-limit for lodging a statement of opposition has expired, should be considered 'exceptional circumstances' such that the debtor would be entitled to apply for a review of the order under Article 20(2) of Regulation No 1896/2006 and this is something that the debtor will need to prove in each individual case. Another way of putting this is that if an order is based on information provided in the application form and the debtor could have detected that it was false or inaccurate within the time-limit laid down in Article 16(2) of the regulation for lodging a statement of opposition, which is a matter for the national court to determine, then there are no 'exceptional circumstances' which would justify a review.

28. For reasons which I shall explain, I do not think that the fact that the jurisdiction of the court issuing the order depends on the false or inaccurate information provided in the application form, which is the situation to which the Handelsgericht Wien specifically refers, points to a different conclusion.

29. Recital 16 in the preamble to Regulation No 1896/2006 provides that 'the court should examine the application [for a European order for payment], including the issue of jurisdiction …, on the basis of the information provided in the application form' and that the examination should not need to be carried out by a judge. [8] Under Article 8 of Regulation No 1896/2006, one of the requirements that the court seised of an application for a European order for payment must examine on the basis of the relevant form is international jurisdiction (Article 6 of the regulation). In this regard, the person examining the application for a European order for payment need only assess whether the numerical

7 — Article 17(1) of Regulation No 1896/2006 states that, in principle, the effect of lodging an opposition is that the proceedings will continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure. Within the framework of those proceedings, it will be possible to debate matters such as international jurisdiction, including, which is of particular relevance in this case, the validity and effects of a jurisdiction clause agreed between the parties.

8 — Moreover, Article 8 of Regulation No 1896/2006 even accepts that the examination may take the form of an automated procedure.

code for the grounds for the court's jurisdiction which the applicant has entered (from among the 13 possibilities) on standard form A, as set out in Annex I to Regulation No 1896/2006, appears plausible having regard to the provisions of Regulation No 44/2001,[9] to which Article 6(1) of Regulation No 1896/2006 refers in connection with jurisdiction.[10]

30. Furthermore, as the European order for payment is served on the debtor using standard form E, as set out in Annex V to Regulation No 1896/2006, the debtor is advised under paragraph (c), in a very visible way, not only that he is entitled to oppose the order within 30 days and of the consequences of not doing so, but also that 'this order has been issued solely on the basis of the information provided by the claimant. That information has not been verified by the court'.

31. So, in the present case, given that the referring court has stated that the order for payment was effectively served on Thomas Cook, we can assume that Thomas Cook was aware, from the time of service (which was when the time-limit for lodging a statement of opposition started to run), that the order had been issued solely on the basis of information provided by Thurner Hotel in standard form A, as set out in Annex I to Regulation No 1896/2006. Consequently, even though the case-file does not indicate whether Thomas Cook actually received a copy of Form A, it could have assumed that Thurner Hotel had not stated in its application that there was a jurisdiction clause in the agreement between the parties (as the order came from an Austrian court and not a court in Ghent) and that, in principle, the person who had examined the application on the basis of the information appearing in the form was not necessarily aware of the existence of the clause.[11]

32. In this regard, in view of the fact that Article 24 of Regulation No 44/2001 provides for a general implied prorogation of jurisdiction where a defendant enters an appearance before a court other than the court initially agreed by the parties,[12] I am also of the opinion that it would not be right to regard a situation where the applicant for a European order for payment gives the place of performance of the obligations (Article 5(1) of Regulation No 44/2001) as the grounds for jurisdiction of the Austrian Court and awaits the reaction of the debtor, as automatically constituting 'false information' within the meaning of recital 25.[13] As the Court of Justice has already stated in connection with the equivalent provisions of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the Brussels Convention'),[14] 'neither the general scheme

9 — To be specific, the relevant part of Article 6(1) of Regulation No 1896/2006 for the purposes of this case (which does not involve a consumer) provides that 'for the purposes of applying this Regulation, jurisdiction shall be determined in accordance with the relevant rules of Community law, in particular Regulation (EC) No 44/2001'. With effect from 10 January 2015, 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) has been replaced by Regulation No 1215/2012, which was not applicable at the time of the events in this case.

10 — Kormann notes that 'plausibility should be examined only by reference to information relating to the principal debt' (Kormann, J.M., *Das neue Europäische Mahnverfahren im Vergleich zu den Mahnverfahren in Deutschland und Österreich*, Jenaer Wissenschaftliche Verlagsgesellschaft, Jena, 2007, p. 96).

11 — It should be borne in mind that under Article 7(2)(e) of Regulation No 1896/2006, at this stage the applicant for a European order for payment need only provide a *description* of evidence supporting the claim, so that it is more than likely that, at the time of the examination referred to in Article 8, the court seised of an application would not even have access to the contract concluded between the parties.

12 — Under Article 24 of that regulation, even if a jurisdiction clause has been agreed between the parties, the applicant can lodge the application in a court other than the agreed court and the defendant can implicitly accept the jurisdiction of that court by entering an appearance before it, thus validly depriving any prior choice-of-court agreement of its effects (except in cases where there is exclusive jurisdiction pursuant to Article 22 of Regulation No 44/2001). In this regard, the Court of Justice has already held in a case specifically relating to the European order for payment procedure that 'a statement of opposition to a European order for payment that does not contain any challenge to the jurisdiction of the court of the Member State of origin cannot be regarded as constituting the entering of an appearance within the meaning of Article 24 of Council Regulation (EC) No 44/2001' even where the defendant has, in the statement of opposition, put forward arguments relating to the substance of the case (judgment in *Goldbet Sportwetten*, C-144/12, EU:C:2013:393). On Article 24 in general, see also the judgment in *Cartier parfums — lunettes and Axa Corporate Solutions assurances*, C-1/13, EU:C:2014:109, paragraph 34 et seq.

13 — Bearing in mind also that Thurner Hotel disputes the existence of the jurisdiction clause referred to by Thomas Cook (see points 2 and 3 of Thurner Hotel's observations).

14 — OJ 1972 L 299, p. 32, as amended by the successive conventions relating to the accession of new Member States to that Convention.

nor the objectives of the Convention provide grounds for the view that the parties to an agreement conferring jurisdiction within the meaning of Article 17 [Article 23 of Regulation No 44/2001] are prevented from voluntarily submitting their dispute to a court other than that stipulated in the agreement'. [15]

33. It should also be noted that simply because the general terms and conditions of the contract between the parties include such a clause, it does not follow that the clause is valid under Article 23 of the regulation. [16] An assessment of its formal validity, where this is a matter of dispute between the parties, would require a more thorough examination by the court seised of the case than could be conducted in the context of Article 8 of Regulation No 1896/2006, even if the existence of such a clause were disclosed in the application form for a European order for payment. I therefore take the view that, where an applicant for a European order for payment has doubts concerning the validity or effectiveness of a jurisdiction clause contained in the general terms and conditions of a contract, there is no duty to state this in the application form for a European order for payment, since it will not be possible to debate such matters in the context of the European order for payment procedure in any event.

34. My view is therefore that, in these circumstances, only in a situation where a European order for payment is based on information provided in the application form which only really proves to be false or inaccurate at a later stage, after the time-limit for lodging a statement of opposition has expired, should be considered 'exceptional circumstances' such that the debtor would be entitled to apply for a review of the order under Article 20(2) of Regulation No 1896/2006, even where the jurisdiction of the court depends on that information and, in particular, where the applicant has failed to mention a jurisdiction clause which was supposedly agreed to by the parties.

35. Accordingly, the questions referred for a preliminary ruling by the Handelsgericht Wien should, in my view, be answered to the effect that, in the circumstances of this case, Article 20(2) of Regulation No 1896/2006, in conjunction with recital 25 in the preamble thereto, should be interpreted as meaning that a situation where a European order for payment was issued on the basis of false or inaccurate information provided in the application form, even where the jurisdiction of the court depends on that information and, in particular, where the applicant has failed to mention a jurisdiction clause which was supposedly agreed to by the parties, does not, of itself, constitute 'exceptional circumstances' such that a defendant on whom a European order for payment was effectively served could apply for a review of the order, unless the debtor is able to demonstrate before the national court that only once the time-limit stipulated in Article 16(2) of the regulation for lodging a statement of opposition had expired was it really possible for the debtor to ascertain that the information provided in the application form was false or inaccurate.

V – **Conclusion**

36. For these reasons I propose that the questions put by the Handelsgericht Wien be answered as follows:

In the circumstances of this case, Article 20(2) 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, in conjunction with recital 25 in the preamble thereto, should be interpreted as meaning

15 — Judgment in *Elefanten Schuh*, 150/80, EU:C:1981:148, paragraph 10. See also the judgment in *ČPP Vienna Insurance Group*, C-111/09, EU:C:2010:290, paragraph 21 et seq. It should also be noted in this regard that Article 35(1) of Regulation No 44/2001 does not state that judgments issued contrary to a jurisdiction clause as provided for in Article 23 will not be recognised. It merely provides that judgments contravening Sections 3 (jurisdiction in matters relating to insurance), 4 (jurisdiction over consumer contracts) and 6 (exclusive jurisdiction) of Chapter II of that regulation, or in a case provided for in Article 72, will not be recognised.

16 — In this regard, see Mankowski, P., 'Artikel 23 Brüssel I-VO', Rauscher, T. (ed.), *Europäisches Zivilprozess- und Kollisionsrecht — EuZPR/EuIPR*, Sellier, Munich, 2006, p. 411 et seq., particularly paragraph 16 et seq.

that a situation where a European order for payment was issued on the basis of false or inaccurate information provided in the application form, even where the jurisdiction of the court depends on that information and, in particular, where the applicant has failed to mention a jurisdiction clause which was supposedly agreed to by the parties, does not, of itself, constitute 'exceptional circumstances' such that a defendant on whom the order for payment was effectively served could apply for a review of the order, unless the debtor is able to demonstrate before the national court that only once the time-limit stipulated in Article 16(2) of the regulation for lodging a statement of opposition had expired was it really possible for the debtor to ascertain that the information provided in the application form was false or inaccurate.