



The European Court of Justice Rules on the Validity of Choice of Jurisdiction Clauses Accepted by “Click-Wrapping” in Business-to-Business On-Line Transactions

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I. Premise

On May 21, 2015 the Third Chamber of the Court of Justice of the European Union (“CJEU”) issued the decision in the *Jaouad El Majdoub v. CarsOnTheWeb.Deutschland GmbH* case (C-322/14) confirming that the general terms and conditions of a contract including a choice of jurisdiction clauses are validly accepted, in business-to-business (“B-to-B”) on-line transactions, by simply “click-wrapping” the relevant box, where this method allows to print and save the text of the general terms and conditions before the conclusion of the contract.

The decision is of substantial interest since the recourse to on-line transactions is not only extremely frequent in consumer transactions, which receive a specific regulation under EU law, but it is becoming common also in business transactions. In general, the ongoing digitalization process and the technology development are making the recourse to on-line transactions increasingly safe and convenient, and therefore appealing also in the business-to-business market. According to a recent research from Forrester,¹ by 2020, only in the US, business-to-business market is expected to be worth \$1 trillion, twice the size of the US business-to-consumer e-Commerce market. In that context, it is likely that new legal issues will arise and the decision of the CJEU testifies the effort of case law to prevent formalistic interpretations of law provisions that may undermine the validity of electronic agreements or the acceptance of general terms and conditions, often including choice of court clauses or arbitration clauses.

II. The Decision of the CJEU

The CJEU’s decision was issued in connection with a case pending in Germany, where a car dealer (*i.e.*, the claimant in the main proceeding) purchased from the website of the defendant an electric car for a very good price. The dispute arose when the seller cancelled such sale on account of damage allegedly sustained by that vehicle which was noted during preparations for its transport to the purchaser: the applicant—based on the opinion that the reason given by the seller was only a pretext for the cancellation of such sale which resulted to be disadvantageous to the seller for its low sale price—brought an action before the Landgericht Krefeld (*i.e.*, the District Court of Krefeld in Germany) seeking for a compulsory transfer of ownership of the vehicle.



The general terms and conditions of their agreement (published on the seller's website) included a clause conferring jurisdiction to the court of Leuven, in Belgium, and therefore the defendant objected the lack of jurisdiction of German courts (actually, the contractual party of the claimant was the Belgian parent company of the seller, as confirmed by the merits court). The car dealer argued that the jurisdiction clause was not validly incorporated into the sale agreement and thus not valid since (i) it was not made in writing, as required by Article 23(1)(a)² of (EU) Regulation 44/2001 ("Brussels I Regulation", now replaced by the Regulation (EU) 1215/2012, the so called "Recast Regulation") and (ii) it was not opening automatically upon registration and upon every individual sale, as the purchaser needed to click a button in order to open a new window containing the conditions of delivery and payment (in a word, the purchaser was asked to "click-wrap"), in breach of Article 23(2) of Regulation (EU) 44/2001.

The issue raised by the claimant implied an interpretation of the above-mentioned provision and the Landgericht Krefeld decided to stay the proceedings and to refer to the CJEU for a preliminary ruling. The German court asked, in particular, 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 separate window, fulfills the requirements of Article 23(2) of Brussels I Regulation. Since the general conditions containing the jurisdiction clause could be saved and printed separately, the referring court asked whether such a technique may be regarded as a communication by electronic means which provides a durable record of the sale agreement and, therefore, to be considered in writing.

The CJEU argued, in short, that:

- ensuring the existence of a real consent of the parties is one of the aims of Article 23(1) of Brussels I Regulation as well and, in the case at hand, the purchaser expressly accepted the general terms and conditions of the agreement by clicking the related box on the seller's website;
- Article 23(2), compared to Article 17 of the Brussels Convention,³ includes the additional provision according to which, the validity of an agreement may depend, *inter alia*, on the possibility of providing a durable record of the given consent;
- a literal interpretation of Article 23 implies that there must 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;
- 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.

As anticipated, the same principle does not apply in business-to-consumer transactions, where Article 5(1) of EU Directive 97/7/EC of the European Parliament and of the Council of May 20, 1997 on the protection of consumers in respect of distance contracts provides that the consumer must 'receive' written confirmation or confirmation in another durable medium. In that respect, the CJEU, in a former decision (*Content Services*, C 49/11), ruled 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)".

III. Conclusive Remarks

The CJEU adopted a flexible approach clearly aimed at not creating disfavor or uncertainty versus the use of electronic means, since the purpose of Article 23 is *"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"* and *"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."*

However, while ascertaining the validity of choice of jurisdiction clauses it is opportune to consider the possible (additional or different) requirements set forth by the national law of the State whose courts has been chosen in the contract. In fact, Article 25 of the Recast Regulation (differently from Article 23 of Brussel I Regulation) provides for the validity of the agreement on jurisdiction under the above-described conditions *"unless the agreement is null and void as to its substantive validity under the law of that Member State."*

For instance, considering Italian legal framework, case law shows a quite strict approach with respect to the use of electronic communications. In general, the click-wrapping or the "point and click procedure" are valid means of conclusion of the contract and general terms and condition can be considered known, or capable to be known, according to Article 1341 of the Italian Civil Code when clearly highlighted in the website and easily accessible through a link. However, according to a merits court decision, the clauses limiting the rights of one of the parties and drafted by the other party (including arbitration clauses or choice of jurisdiction clauses) cannot be validly accepted through the mere "click wrapping" but require a digital signature.⁴

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¹ See <https://www.forrester.com>.

² In that respect, Article 23 of the Brussels I Regulation (corresponding to Article 25 of the Recast Regulation), sets forth that *"the 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."

³ Similarly to Article 23(2) of the Brussels I Regulation, article 17 of the Brussels Convention sets forth the requirement for the validity of the agreement conferring jurisdiction, that *"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 See Court of Catanzaro, 30th April 2012. This approach has been criticized and not yet supported by other courts, therefore it could not be excluded that future decisions will be more consistent with the actual trend (expressed in the above-mentioned CJEU decision and, for instance, in 1996 UNCITRAL Model Law on Electronic Commerce, not yet adopted in Italy). It is however a clear example of the need to consider national requirement in terms of validity of choice of courts agreements.

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