

JUDGMENT OF THE COURT (First Chamber)

17 November 2011 *

In Case C-327/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Okresní soud v Chebu (Czech Republic), made by decision of 1 June 2010, received at the Court on 5 July 2010, in the proceedings

Hypoteční banka a.s.

v

Udo Mike Lindner,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Safjan (Rapporteur), A. Borg Barthet, J.-J. Kasel and M. Berger, Judges,

* Language of the case: Czech.

Advocate General: V. Trstenjak,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 25 May 2010,

after considering the observations submitted on behalf of:

- Hypoteční banka a.s., by J. Hrouzek, advokát,
- the Czech Government, by M. Smolek and J. Vlášil, acting as Agents,
- the Danish Government, by C. Vang, acting as Agent,
- the French Government, by G. de Bergues and B. Beaupère-Manokha, acting as Agents,
- the Hungarian Government, by M.Z. Fehér, K. Szíjjártó and K. Molnár, acting as Agents,
- the Netherlands Government, by C. Wissels, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 8 September 2011,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Article 81 TFEU and Articles 16(2), 17.3 and 24 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), as well as of Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).
- ² The reference has been made in proceedings between Hypoteční banka a.s. ('Hypoteční banka') and Mr Lindner, whose current address is unknown, seeking to secure payment of a sum of approximately 4.4 million Czech crowns (CZK), corresponding to the arrears on a mortgage loan which Hypoteční banka had granted to Mr Lindner.

Legal context

European Union legislation

Regulation No 44/2001

- 3 Recital 2 in the preamble to Regulation No 44/2001 states:

‘Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions 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 this Regulation are essential.’

- 4 In the words of Article 2 of that regulation:

‘1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.’

5 Article 3 of that regulation provides:

‘1. 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.

2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.’

6 Article 4 of Regulation No 44/2001 reads as follows:

‘1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.’

7 Section 4 of Chapter II of Regulation No 44/2001, entitled ‘Jurisdiction over consumer contracts’, comprises Articles 15 to 17 of that regulation.

8 Article 16(2) of the regulation states:

‘Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.’

9 Article 17 of Regulation No 44/2001 reads as follows:

‘The provisions of this Section may be departed from only by an agreement:

...

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.’

10 Article 24 of Regulation No 44/2001 provides:

‘Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.’

- ¹¹ Section 8 of Chapter II of Regulation No 44/2001, entitled ‘Examination as to jurisdiction and admissibility’, contains Article 26, paragraphs 1 and 2 of which are worded as follows:

‘1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.’

- ¹² Chapter III of Regulation No 44/2001, entitled ‘Recognition and Enforcement’, contains Article 34, paragraph 2 of which provides that a judgment is not to be recognised ‘where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so’.

- ¹³ Article 59 of Regulation No 44/2001 provides:

‘1. In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.

2. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.’

Directive 93/13

¹⁴ As provided in its Article 1(1), the purpose of Directive 93/13 is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

¹⁵ Article 6(1) of Directive 93/13 states:

‘Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.’

National legislation

¹⁶ Paragraph 29(3) of the Czech Rules of Civil Procedure (‘the Rules of Civil Procedure’), in the version in force on 30 June 2009, provided that, where no other measures apply, the president of the chamber may appoint a guardian *ad litem* for a party whose

domicile is not known, on whom it has not been possible to serve proceedings at a known address abroad, who suffers from a mental disorder, who on other health grounds is unable to participate in proceedings even for a temporary period, or who is unable to express himself in a comprehensible manner.

- 17 The referring court states that, in a judgment of 31 March 2005, the Ústavní soud (Czech Constitutional Court) held as follows in regard to the person of a guardian *ad litem* of a defendant whose domicile was unknown:

‘The role of guardian *ad litem* was established in order to defend the interests of the absent party until the outcome in the same way as such a duty would be fulfilled by a contractual representative. Where a party to proceedings has his own chosen representative, that party is himself responsible for his choice and for his concrete steps in the proceedings. Where, however, the court appoints a guardian *ad litem* as representative of a party to proceedings, it is responsible to ensure that the guardian *ad litem* defends the rights and legitimate interests of that party. At the same time, it is under a duty to relieve the guardian *ad litem* of his functions if it ascertains that he is either virtually not fulfilling his role in the proceedings at all ..., or is doing so in an entirely unsatisfactory manner.’

- 18 According to the first sentence of Paragraph 89a of the Rules of Civil Procedure, in the version in force at the time material to the main proceedings, parties to a commercial dispute could agree in writing on the local jurisdiction of another first-instance court, unless exclusive jurisdiction was provided for by statute.
- 19 Under Paragraph 173(1) of the Rules of Civil Procedure, a payment order must be served on the defendant personally, and any notification served otherwise is to be disregarded.

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

- ²⁰ On 16 September 2008, Hypoteční banka, a company governed by Czech law and established in Prague (Czech Republic), brought an action before the referring court by which it sought an order requiring Mr Lindner, a German national, to pay to it the sum of CZK 4 383 584.60, plus default interest, by way of arrears on the mortgage loan which was granted to Mr Lindner pursuant to a contract between the parties dated 19 August 2005 ('the contract').
- ²¹ In Article VIII, point 8, of the contract, Hypoteční banka and Mr Lindner agreed, with reference to Paragraph 89a of the Rules of Civil Procedure, that, 'in relation to any disputes arising out of this ... contract, the local court of the bank, determined according to its registered office as entered in the commercial register at the time of the lodging of the claim, shall have jurisdiction.'
- ²² It is apparent from the order for reference that, at the time when the contract was concluded, Mr Linder was deemed to be domiciled in Mariánské Lázně (Czech Republic), that is to say, the place where the consumer was domiciled was more than 150 km from Prague, where the 'local court of the bank' designated by the parties to the contract is situated.
- ²³ However, according to Hypoteční banka, it brought an action before the 'court with general jurisdiction over the defendant' rather than before the 'local court of the bank' since, at the date on which the proceedings were brought, it was unable, for reasons beyond its control, to submit the original contract to its local court and thereby fulfil the statutory requirement that it bring proceedings before the latter court.
- ²⁴ On 16 October 2008, the Okresní soud v Chebu (Cheb District Court) granted the application by way of a payment order whereby, firstly, the defendant was required to pay to the applicant the sum claimed, plus default interest, and, secondly, the defendant

was ordered to pay the costs of the proceedings. As that payment order was, however, not able to be served on the defendant personally, as required by Paragraph 173(1) of the Rules of Civil Procedure, it was set aside by the referring court by an order of 8 September 2009.

25 As the defendant was not staying at any of the addresses known to the referring court, and given that that court was unable to establish any other place of residence for the defendant in the Czech Republic, that court, in application of Paragraph 29(3) of the Rules of Civil Procedure, assigned, by order of 3 June 2009, a guardian *ad litem* to the defendant, who was considered to be a person whose domicile was unknown.

26 By a deposition of 26 October 2009, which was the first action carried out by the guardian *ad litem* in the proceedings before the referring court, the guardian *ad litem* raised factual objections to the part of the claim put forward by Hypoteční banka relating to interest.

27 In those circumstances, the Okresní soud v Chebu decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) If one of the parties to court proceedings is a national of a State other than the one in which those proceedings are taking place, does that fact provide a basis for the cross-border element within the meaning of Article 81 (formerly Article 65) of the Treaty, which is one of the conditions for the applicability of Council Regulation [No 44/2001] ...?’

(2) Does Regulation [No 44/2001] preclude the use of provisions of national law which enable proceedings to be brought against persons of unknown address?

- (3) If Question 2 is answered in the negative, can the making of submissions by a court-appointed guardian *ad litem* of the defendant in the case be regarded on its own as submission by the defendant to the jurisdiction of the local court for the purposes of Article 24 of Regulation [No 44/2001], even where the subject-matter of the dispute is a claim arising out of a consumer contract and the courts of the Czech Republic would not have jurisdiction under Article 16(2) of that regulation to determine that dispute?
- (4) Can an agreement on the local jurisdiction of a particular court be regarded as establishing the international jurisdiction of the chosen court for the purposes of Article 17.3 of Regulation [No 44/2001], and, if so, does that apply even if the agreement on local jurisdiction is invalid on the ground that it conflicts with Article 6(1) of ... Directive [93/13] ... on unfair terms in consumer contracts?’

Consideration of the questions referred

The first question

- ²⁸ By its first question, the referring court asks, in essence, whether Regulation No 44/2001 must be interpreted as meaning that the conditions for application of the rules of jurisdiction laid down by that regulation are met in the case where one of the parties to the court proceedings is a national of a Member State other than that in which those proceedings are taking place.

- 29 In that regard, it must first be pointed out that, like the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the successive conventions relating to the accession of new Member States to that convention ('the Brussels Convention'), the interpretation of which is also valid for Regulation No 44/2001 whenever the provisions of those European Union instruments may be regarded as equivalent (Case C-189/08 *Zuid-Chemie* [2009] ECR I-6917, paragraph 18), the application of the rules of jurisdiction of that regulation requires the existence of an international element.
- 30 As the Court has already held in respect of the Brussels Convention, the international nature of a legal relationship may derive from the fact that the situation at issue in the proceedings is such as to raise questions relating to the determination of international jurisdiction (Case C-281/02 *Owusu* [2005] ECR I-1383, paragraph 26).
- 31 It is true that the foreign nationality of one of the parties to the proceedings is not taken into account by the rules of jurisdiction laid down by Regulation No 44/2001. However, as the Advocate General has noted in point 65 of her Opinion, a distinction must be made between, on the one hand, the conditions under which the rules of jurisdiction pursuant to that regulation must apply and, on the other, the criteria by which international jurisdiction is determined under those rules.
- 32 It is clear that, in circumstances such as those at issue in the main proceedings, the foreign nationality of the defendant may raise questions relating to the determination of the international jurisdiction of the court seised.
- 33 In a situation such as that in the main proceedings, the courts of the Member State of which the defendant is a national may also consider themselves to have jurisdiction even though the place in that Member State where the defendant is domiciled

is unknown. In those circumstances, application of the uniform rules of jurisdiction laid down by Regulation No 44/2001 to replace those in force in the various Member States would be in accordance with the requirement of legal certainty and with the purpose of that regulation, which is to guarantee, to the greatest extent possible, the protection of defendants who are domiciled in the European Union.

³⁴ Accordingly, it follows that, in a situation such as that in the main proceedings, in which the defendant is a foreign national and has no known place of domicile in the State of the court seised, the rules of jurisdiction laid down by Regulation No 44/2001 may be applicable.

³⁵ In the light of the foregoing, the answer to the first question is that Regulation No 44/2001 must be interpreted as meaning that the application of the rules of jurisdiction laid down by that regulation requires that the situation at issue in the proceedings of which the court of a Member State is seised is such as to raise questions relating to determination of the international jurisdiction of that court. Such a situation arises in a case such as that in the main proceedings, in which an action is brought before a court of a Member State against a national of another Member State whose domicile is unknown to that court.

The second question

³⁶ By its second question, the referring court asks whether Regulation No 44/2001 must be interpreted as precluding a provision of national law of a Member State which enables proceedings to be brought against persons whose domicile is unknown.

- 37 In order to answer that question, it must be noted at the outset that the purpose of Regulation No 44/2001, like the Brussels Convention, is not to unify the procedural rules of the Member States, but to determine which court has jurisdiction in disputes concerning civil and commercial matters in relations between Member States and to facilitate the enforcement of judgments (see, to that effect, Case C-18/02 *DFDS Torline* [2004] ECR I-1417, paragraph 23).
- 38 In the absence of an express provision in Regulation No 44/2001 which defines jurisdiction in a case such as that in the main proceedings, where the exact domicile of the defendant is unknown, the first matter to be determined is whether, and, if so, in accordance with which provision that regulation may none the less be held to be applicable and whether it is possible to derive from it a criterion on which to base jurisdiction.
- 39 In this regard, as the case in the main proceedings concerns an action brought against the consumer by the other party to the contract, it must be borne in mind that Article 16(2) of Regulation No 44/2001 provides that such proceedings may be brought only in the courts of the Member State in which the consumer is domiciled.
- 40 Thus, where proceedings against a consumer are brought before a national court, that court must, first of all, determine whether the defendant is domiciled in the Member State of that court by applying, in accordance with Article 59(1) of Regulation No 44/2001, that Member State's own law.
- 41 Secondly, where, as is the case in the main proceedings, that court concludes that the defendant in the main proceedings is not domiciled in the Member State of that court, it must then examine whether he is domiciled in another Member State. To this end it applies, in accordance with Article 59(2) of Regulation No 44/2001, the national law of that other Member State.

- 42 Lastly, where the national court, on the one hand, is still unable to identify the place of domicile of the consumer and, on the other hand, also has no firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union, a situation in which Article 4 of Regulation No 44/2001 may be applicable, it is necessary to examine whether Article 16(2) of that regulation may be interpreted as meaning that, in a case such as that envisaged, the rule on jurisdiction of the courts of the Member State in which the consumer is domiciled, laid down in the latter provision, also covers the consumer's last known domicile.
- 43 Such an approach appears to be based on the logic of that regulation and is in keeping with the system established by it.
- 44 It is, above all, in accordance with the objective, pursued by Regulation No 44/2001, of strengthening the legal protection of persons established in the European Union, by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued (see, *inter alia*, Joined Cases C-509/09 and C-161/10 *eDate Advertising and Others* [2011] ECR I-10269, paragraph 50).
- 45 Such a solution, while promoting the application of the uniform rules laid down by Regulation No 44/2001 as opposed to that of divergent national rules, then enables a situation to be avoided in which the fact that it is not possible to identify the current domicile of the defendant precludes determination of the court having jurisdiction, thereby depriving the applicant of his right to bring proceedings. Such a situation may arise, *inter alia*, in a case such as that in the main proceedings, in which a consumer who, pursuant to Article 16(2) of that regulation, ought to be sued in the courts of the Member State in which he is domiciled, renounced his domicile before the proceedings against him were brought.

- 46 Lastly, for the purpose of applying Article 16(2) of Regulation No 44/2001, the criterion of the consumer's last known domicile ensures a fair balance between the rights of the applicant and those of the defendant precisely in a case such as that in the main proceedings, in which the defendant was under an obligation to inform the other party to the contract of any change of address occurring after the long-term mortgage loan contract had been signed.
- 47 In the light of the foregoing, it must therefore be held that, in a situation such as that in the main proceedings, in which a consumer who is a party to a long-term mortgage loan contract, which includes an obligation to inform the other party to the contract of any change of address, renounces his domicile before the proceedings against him for breach of his contractual obligations are brought, the courts of the Member State in which the consumer has his last known domicile have jurisdiction, pursuant to Article 16(2) of Regulation No 44/2001, to deal with those proceedings in the case where they have been unable to determine, in accordance with Article 59 of that regulation, the defendant's current domicile and also do not have any firm evidence allowing them to conclude that the defendant is in fact domiciled outside the European Union.
- 48 In that regard, so far as concerns the requirements to be complied with during the subsequent proceedings, it must be borne in mind that all the provisions of Regulation No 44/2001 express the intention to ensure that, within the scope of that regulation's objectives, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence are observed (see Case 125/79 *Denilauler* [1980] ECR 1553, paragraph 13, and Case C-394/07 *Gambazzi* [2009] ECR I-2563, paragraph 23).
- 49 However, the requirement that the rights of the defence be observed, as laid down also in Article 47 of the Charter of Fundamental Rights of the European Union, must be implemented in conjunction with respect for the right of the applicant to bring proceedings before a court in order to determine the merits of its claim.

- 50 In this respect, the Court held, in paragraph 29 of the judgment in *Gambazzi*, that fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be subject to restrictions. Such restrictions must, however, in fact correspond to the objectives of public interest pursued by the measure in question and must not constitute, with regard to the aim pursued, a disproportionate interference with the rights thus guaranteed.
- 51 In that regard, it must be borne in mind that the Court has already held that the objective of avoiding situations of denial of justice, which the applicant would face should it not be possible to determine the defendant's domicile, constitutes such an objective of public interest (see, to that effect, *Gambazzi*, paragraphs 31 to 33), it being a matter for the referring court to determine whether that objective is in fact pursued by the national provision at issue.
- 52 As regards the requirement relating to the need to avoid a disproportionate interference with the rights of the defence, it must be pointed out that this applies in particular for the interpretation of Article 26(2) of Regulation No 44/2001. That provision must be understood as meaning that a court having jurisdiction pursuant to that regulation may reasonably continue proceedings, in the case where it has not been established that the defendant has been enabled to receive the document instituting the proceedings, only if all necessary steps have been taken to ensure that the defendant can defend his interests. To that end, the court seised of the matter must be satisfied that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant.
- 53 It is true that, even if those conditions are satisfied, the possibility of taking further steps in the proceedings without the defendant's knowledge by means, as in the case in the main proceedings, of notification of the action served on a guardian *ad litem* appointed by the court seised constitutes a restriction of the defendant's rights of defence. That restriction is, however, justified in the light of an applicant's right to effective protection, given that, in the absence of such proceedings, that right would be meaningless.

54 In contrast to the situation of the defendant, who, when deprived of the opportunity to defend himself effectively, will have the opportunity to ensure respect for the rights of the defence by opposing, in accordance with Article 34(2) of Regulation No 44/2001, recognition of the judgment issued against him (see, to that effect, Case 49/84 *Debaecker and Plouvier* [1985] ECR 1779, paragraph 11), the applicant runs the risk of being deprived of all possibility of recourse.

55 The answer to the second question is therefore that Regulation No 44/2001 must be interpreted as meaning that:

- in a situation such as that in the main proceedings, in which a consumer who is a party to a long-term mortgage loan contract, which includes the obligation to inform the other party to the contract of any change of address, renounces his domicile before proceedings against him for breach of his contractual obligations are brought, the courts of the Member State in which the consumer had his last known domicile have jurisdiction, pursuant to Article 16(2) of that regulation, to deal with proceedings in the case where they have been unable to determine, pursuant to Article 59 of that regulation, the defendant's current domicile and also have no firm evidence allowing them to conclude that the defendant is in fact domiciled outside the European Union;
- that regulation does not preclude the application of a provision of national procedural law of a Member State which, with a view to avoiding situations of denial of justice, enables proceedings to be brought against, and in the absence of, a person whose domicile is unknown, if the court seised of the matter is satisfied, before giving a ruling in those proceedings, that all investigations required by the

principles of diligence and good faith have been undertaken with a view to tracing the defendant.

- 56 In the light of the answers given to the first and second questions, it is unnecessary to reply to the third and fourth questions.

Costs

- 57 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 (First Chamber) hereby rules:

1. **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 application of the rules of jurisdiction laid down by that regulation requires that the situation at issue in the proceedings of which the court of a Member State is seised is such as to raise questions relating to determination of the international jurisdiction of that court. Such a situation arises in a case such as that in the main proceedings, in which an action is brought before a court of a Member State against a national of another Member State whose domicile is unknown to that court.**

2. Regulation No 44/2001 must be interpreted as meaning that:

- **in a situation such as that in the main proceedings, in which a consumer who is a party to a long-term mortgage loan contract, which includes the obligation to inform the other party to the contract of any change of address, renounces his domicile before proceedings against him for breach of his contractual obligations are brought, the courts of the Member State in which the consumer had his last known domicile have jurisdiction, pursuant to Article 16(2) of that regulation, to deal with proceedings in the case where they have been unable to determine, pursuant to Article 59 of that regulation, the defendant's current domicile and also have no firm evidence allowing them to conclude that the defendant is in fact domiciled outside the European Union;**

- **that regulation does not preclude the application of a provision of national procedural law of a Member State which, with a view to avoiding situations of denial of justice, enables proceedings to be brought against, and in the absence of, a person whose domicile is unknown, if the court seised of the matter is satisfied, before giving a ruling in those proceedings, that all investigations required by the principles of diligence and good faith have been undertaken with a view to tracing the defendant.**

[Signatures]