Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 24 May 2012 [1]

Case C-154/11

Ahmed Mahamdia
v
People's Democratic Republic of Algeria

(Reference for a preliminary ruling from the Landesarbeitsgericht Berlin-Brandenburg (Germany))

(Judicial cooperation in civil matters — Jurisdiction — State immunity from jurisdiction — Jurisdiction over individual contracts of employment — Dispute concerning the validity of the dismissal of the applicant who had been employed as a driver in a Member State by the embassy of a non-member country — Notion of agency, branch or other establishment within the meaning of Regulation (EC) No 44/2001 — Jurisdiction clause inserted in an individual contract of employment upon its conclusion — Compatibility of such a clause with Regulation No 44/2001)

1. The present reference for a preliminary ruling raises the question of the interpretation of the notions of 'agency', 'branch' or 'other establishment' within the meaning of Article 18(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 [2] in an unprecedented situation: a dispute concerning the validity of the dismissal of a worker who had been employed as a driver by a non-member country at one of its embassies in a Member State.

I – Legislative framework

A – *Regulation No 44/2001*

2. Article 2(1) of Regulation No 44/2001 provides that '[s]ubject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.

3. Under Article 4(1) of Regulation No 44/2001, '[i]f 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'.

4. Section 5 of Chapter II of Regulation No 44/2001, which comprises Articles 18 to 21 of that regulation, lays down special rules of jurisdiction over individual contracts of employment.

1 — Original language: French.
2 — OJ 2001 L 12, p. 1.

5. Article 18 of Regulation No 44/2001 provides:

‘1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.’

6. Article 19 of Regulation No 44/2001 stipulates:

‘An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or

2. in another Member State:

   (a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

   (b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.’

7. Article 21 of Regulation No 44/2001 reads:

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

1. which is entered into after the dispute has arisen; or

2. which allows the employee to bring proceedings in courts other than those indicated in this Section.’

B – *German law*

8. Paragraph 38 of the Code of Civil Procedure (Zivilprozessordnung) concerns jurisdiction clauses and, in subparagraph 2, provides that ‘[t]he jurisdiction of a court of first instance may be agreed, furthermore, where at least one of the parties to the agreement has no general forum in Germany. Such agreement shall be concluded in writing or, should it have been concluded orally, confirmed in writing’.

II – The main proceedings and the questions referred for a preliminary ruling

9. The applicant in the main proceedings, Mr Mahamdia, has dual Algerian and German nationality. He lives in Berlin. From September 2002, he had been employed at the Berlin embassy of the defendant in the main proceedings, the People’s Democratic Republic of Algeria. For his work, Mr Mahamdia had to drive the embassy’s guests and staff. He was not the official driver of Algeria’s ambassador to Germany, but could occasionally drive him. He was never directly responsible for the diplomatic bag, but could drive the colleague who received it or passed it on. The parties in the main proceedings are in dispute whether or not Mr Mahamdia also provided interpretation services. The referring court nevertheless assumes that he did not perform functions connected with the exercise of the sovereignty of the Algerian State.

10. The employment contract between the applicant in the main proceedings and his employer, the People's Democratic Republic of Algeria, was drafted in French and contained, from its conclusion, a clause conferring exclusive jurisdiction for any dispute arising out of that contract on the Algerian courts.

11. The People's Democratic Republic of Algeria terminated Mr Mahamdia's employment contract in August 2007 with effect from 30 September 2007. Mr Mahamdia made an application to the Arbeitsgericht Berlin (Labour Court, Berlin) seeking a declaration that the employment relationship was not annulled by the termination and requesting that his employer be ordered to pay compensation for delay in accepting performance of the contract and to employ him temporarily. The People's Democratic Republic of Algeria thereupon contested the international jurisdiction of the German courts on the basis of both the extraterritorial character of his work and the jurisdiction clause contained in the employment contract. On 2 July 2008, the Arbeitsgericht Berlin dismissed Mr Mahamdia's application on the basis of the immunity from jurisdiction enjoyed by the defendant. An appeal was lodged with the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin-Brandenburg) which, in a judgment delivered on 14 January 2009, partially altered the judgment at first instance and ruled that the employment relationship was not annulled by the termination. That court first found that the defendant could not invoke State immunity from jurisdiction in the context of the dispute. Second, it held that, in any event, the jurisdiction clause contained in the employment contract did not satisfy the conditions laid down in Article 21 of Regulation No 44/2001. Lastly, it found that the defendant's embassy could be considered to fall within the scope of Article 18 of the regulation as an establishment.

12. The People's Democratic Republic of Algeria lodged an appeal on a point of law against the decision of 14 January 2009. On 1 July 2010, the Bundesarbeitsgericht (Federal Labour Court) quashed that decision and referred the case back to the court making the reference, which must therefore give another ruling in the present case. In its decision, the Bundesarbeitsgericht inter alia requested the referring court to re-examine the problems in relation to the applicable law for determining the court having jurisdiction in the light of the fact that the Court has not, thus far, ruled on whether the embassy of a non-member country in a European Union Member State may be regarded as an 'agency', 'branch' or 'other establishment' within the meaning of Article 18(2) of Regulation No 44/2001.

13. In its order for reference, that court states that the People's Democratic Republic of Algeria cannot be granted immunity from jurisdiction, in particular under the decision of the Bundesarbeitsgericht of 1 July 2010, given in the main proceedings, under which employment disputes between an employee of an embassy situated in Germany and the non-member country which it represents come under the jurisdiction of the German courts, provided the worker did not perform, under his employment contract, functions connected with the exercise of the sovereignty of that non-member country.

14. Against that background, the Landesarbeitsgericht Berlin-Brandenburg has decided to stay the proceedings and, by an order for reference received by the Registry of the Court on 29 March 2011, to refer the following two questions to the Court for a preliminary ruling in accordance with Article 267 TFEU:

'1. Does an embassy of a State outside the scope of ... Regulation No 44/2001 ... which is situated in a Member State constitute a branch, agency or other establishment within the meaning of Article 18(2) of Regulation No 44/2001?

2. If the answer to the first question should be in the affirmative: Can an agreement conferring jurisdiction reached prior to the existence of a dispute confer jurisdiction on a court outside the scope of Regulation No 44/2001, if, by virtue of the agreement conferring jurisdiction, the jurisdiction conferred under Articles 18 and 19 of Regulation No 44/2001 would not apply?'

III – The procedure before the Court

15. The defendant in the main proceedings, the Spanish and Swiss Governments and the European Commission submitted written observations to the Court.

IV – Legal analysis

A – *Preliminary remarks on the immunity from jurisdiction of the State as an employer*

16. Before answering the two questions referred for a preliminary ruling, I would like to comment briefly on immunity from jurisdiction, as invoked by the People's Democratic Republic of Algeria.

17. The rule that a State may not be sued in the courts of another sovereign entity is a well-known rule of public international law. However, it is settled case-law that the European Union 'must respect international law in the exercise of its authority' [3] and that 'when it adopts an act, it is bound to observe international law in its entirety, including customary international law'. [4] The rules of secondary law must, where appropriate, be interpreted in the light of the rules of customary international law. In my view, the question therefore arises whether or not, in a particular dispute like the main proceedings, the issue of the enjoyment of immunity from jurisdiction by the State which is party to the dispute — an issue to be examined in the light of international practice, which I will address presently — can influence the solution to the problems raised in the present reference for a preliminary ruling concerning the interpretation of Regulation No 44/2001.

18. First of all, the referring court has made clear that the People's Democratic Republic of Algeria has pleaded its immunity from jurisdiction from the very beginning of the dispute and it has also clearly proceeded from the principle that that immunity cannot apply in the present case. It relies on national case-law according to which, in order to assess whether a State may invoke its immunity from jurisdiction in a dispute concerning an employment contract concluded by it, it must be determined whether or not the functions performed by the worker under that contract involve the exercise of public authority. Because the referring court takes the view that the applicant in the main proceedings performed only lower-level, essentially technical functions under his employment contract, it considered that he did not contribute to the exercise of public authority by Algeria. Consequently, in the view of the referring court, the Algerian State could not invoke its immunity from jurisdiction.

19. Second, there is some uncertainty as to the status in public international law of State immunity from jurisdiction.

20. The concept of immunity from jurisdiction is vague, difficult to anticipate and highly dependent on national sensitivities. The assessment made by the referring court is a new judicial stone in the construction of the doctrine of immunity, since the system of State immunity from jurisdiction is very much based on case-law. Few States have written instruments in this field.

21. Note should nevertheless be taken of a more or less general trend towards establishing relative immunity from jurisdiction based on the fundamental distinction between acts committed *iure imperii* and acts committed *iure gestionis*, the latter being treated in the same way as acts committed by private individuals. In other words, the fact that a State is the defendant in an action is no longer sufficient in itself for immunity from jurisdiction to be granted to it immediately. [5] The modern State has become a polymorphous actor in law and may act and enter into legal relations without, however, exercising its

3 — Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019.

4 — Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755, paragraph 101 and cited case-law.

5 — Doctrine of absolute immunity.

sovereignty or its public authority in doing so: I am thinking in particular of the State as a trader, but also, of course, the State as an employer. Because these different facets of the State's legal activity are not systematically accompanied by the exercise of powers as a public authority, they tend no longer to justify the automatic recognition of immunity from jurisdiction. The Bundesarbeitsgericht, for example, has ruled that the activities of a lift fitter employed at the embassy of the United States of America in Germany did not come under State sovereignty and that there was therefore no reason to recognise immunity from jurisdiction for the State as an employer.[6] It gave the same ruling with regard to the functions of an in-house technician employed at the same embassy who was responsible for maintaining various technical installations including the alarm system[7] and the functions of a doorman.[8]

22. This new relativity can be explained by the excessive power of immunity from jurisdiction, which destroys any legal action and is the institutionalised embodiment of the denial of justice.

23. In those circumstances, it must also be acknowledged that no theory of State immunity from jurisdiction has really emerged. Returning to the State as an employer, national approaches are very varied and national courts sometimes give preference to the nature of the functions performed, sometimes the purpose of those functions and sometimes the nature of the contract. In some cases these criteria have to be satisfied cumulatively for immunity to be waived. Furthermore, the issue of immunity may be seen differently depending on whether the dispute concerns recruitment, dismissal or the actual performance of functions.

24. These national differences are so pronounced that any codification at international level is very difficult[9] and may even cast doubt on the actual existence of a rule of customary international law in this regard which is any more than an undeniable tendency.

25. The case-law of the European Court of Human Rights does not offer a much more convincing answer. First of all, it has ruled that 'the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty'[10] and that 'measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1)' of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.[11]

26. However, in its judgment in Cudak v Lithuania,[12] the European Court of Human Rights took note of the shifts in the international community towards the doctrine of relative immunity in matters relating to dismissal. In that case, a Lithuanian national had performed duties as a secretary at the Polish embassy in Vilnius and had brought an action for compensation in the Lithuanian courts following her dismissal. The Republic of Poland had claimed immunity from jurisdiction, which had

6 — Bundesarbeitsgericht, judgment of 20 October 1997, 2 AZR 631/96, BAGE 87, 144-153.

7 — Bundesarbeitsgericht, judgment of 15 February 2005, 9 AZR 116/04, BAGE 113, 327-342.

8 — Bundesarbeitsgericht, judgment of 30 October 2007, 3 AZB 17/07.

9 — The European Convention on State Immunity was drawn up within the Council of Europe and was opened for signature by the States in Basel (Switzerland) on 16 May 1972. Article 5 of the Convention regulates situations in which a State may claim immunity from the jurisdiction if the proceedings relate to a contract of employment. To date only eight States have ratified the Convention. Furthermore, in December 2004, the United Nations General Assembly adopted the Convention on Jurisdictional Immunities of States and their Property ('the New York Convention'). which was opened for signature by the States on 17 January 2005. Article 11 concerns contracts of employment. The Convention on Jurisdictional Immunities of States and their Property now has 28 signatory States, including 13 States Parties, but it has not entered into force.

10 — European Court of Human Rights, *Fogarty v. the United Kingdom* [GC], no. 37112/97, ECHR 2001-XI (§ 34). See also European Court of Human Rights, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI (§ 54); *Cudak v. Lithuania* [GC], no. 15869/02, ECHR 2010 (§ 60); *Sabeh El Leil v. France* [GC], no. 34869/05 (§ 52).

11 — European Court of Human Rights, abovementioned judgments in *Fogarty v. the United Kingdom* (§ 36), *Cudak v. Lithuania* (§ 57), and *Sabeh El Leil v. France* (§ 49).

12 — Cited above in footnote 10.

resulted in the Lithuanian courts declining jurisdiction. Whilst continuing to recognise that immunity from jurisdiction pursued a legitimate aim in the light of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights ruled that the reaction of the Lithuanian courts was disproportionate, having determined that the applicant had not performed any functions related to the exercise of sovereignty by the Polish State,[13] and found that there had been a violation of Article 6(1) of the Convention.[14] The European Court of Human Rights confirmed its ruling in Cudak v Lithuania in its judgment in Sabeh El Leil v France.[15] In those two cases, it examined the legislative situation and the case-law in the States referred to in the applications in order to determine whether they already accepted cases of relative immunity, before stating that Article 11 of the — unratified — New York Convention which lays down, in paragraph 1, the principle that 'a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State'[16] is binding in so far as, according to the European Court of Human Rights, it reflects customary international law. The non-binding character of the Convention itself was overcome by the European Court of Human Rights in each case by taking the view that the defendant States had not made specific objections when Article 11 was drafted and were also not opposed to the New York Convention.[17] However, this series of assertions does raise certain questions.[18] The national differences which I mentioned earlier could, moreover, suggest a more nuanced view.

27. Thus, even though there is still an obligation to take account of the rules of customary international law, where relevant for the purposes of the interpretation of EU secondary legislation, in the light of these considerations the referring court is correct in its initial position according to which the People's Democratic Republic of Algeria may not invoke its immunity from jurisdiction in the main proceedings, especially since that premiss seeks to safeguard the effective judicial protection of the applicant in the main proceedings. I will therefore answer the two questions which have been asked by the Landesarbeitsgericht Berlin-Brandenburg in the light of the fact that they concern a dispute in which the defendant State may not invoke its immunity from jurisdiction.

28. I will conclude these preliminary remarks by discounting the argument put forward by the Spanish Government that it is not possible to hide the fact that, even if the jurisdiction of the German courts were ultimately to be established in the main proceedings, if necessary pursuant to Regulation No 44/2001, the People's Democratic Republic of Algeria could subsequently invoke its immunity from execution, the purpose of which is precisely to exclude the State concerned from any administrative or judicial constraint resulting from the application of a judgment. I must state, however, that this entirely hypothetical observation[19] cannot influence the analysis relating to the applicability of Regulation No 44/2001, since it goes beyond the question concerning jurisdiction which has been asked.

29. This being the case, I will now analyse the two questions referred for a preliminary ruling.

13 — European Court of Human Rights, *Cudak v. Lithuania*, cited above (§ 70).

14 — European Court of Human Rights, *Cudak v. Lithuania*, cited above (§ 75).

15 — Cited above in footnote 10.

16 — Article 11(2) of the New York Convention (cited in footnote 9 of this Opinion) makes the principle laid down in paragraph 1 subject to a number of exceptions, including the situation where the employee has been recruited to perform particular functions in the exercise of governmental authority (Article 11(2)(a) of the Convention) or is a diplomatic agent, a consular officer or himself enjoys diplomatic immunity (Article 11(2)(b)(i), (ii) and (iv) of the Convention).

17 — See European Court of Human Rights, abovementioned judgments in *Cudak v. Lithuania* (§ 66) and *Sabeh El Leil v. France* (§ 57).

18 — With regard to the assertion that a provision of an unratified treaty is binding, I refer to the concurring opinion of Judge Cabral Barreto in that case.

19 — The question of immunity from execution would arise only in the twin scenario where the German courts granted the application submitted by the applicant in the main proceedings as to the merits and the Algerian State refused to execute the court decision which would thus have been adopted.

B – *The first question*

30. The rules of jurisdiction set out by Regulation No 44/2001 are applicable only where the defendant is domiciled in a Member State. If that is not the case, the question of jurisdiction continues, in principle, to be determined by the law of Member States. [20]

31. Nevertheless, in Regulation No 44/2001, the legislature wished to dedicate a specific section to rules of jurisdiction over employment contracts. Article 18(2) of the regulation expressly envisages the situation of an employer who is not domiciled in a Member State and provides that '[w]here an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State'. The main proceedings raise the question whether the embassy at which Mr Mahamdia worked may be regarded as a 'branch', 'agency' or 'other establishment' for the purposes of the application of the special rules of jurisdiction laid down in section 5 of Regulation No 44/2001.

32. The fact that, according to the referring court, immunity from jurisdiction cannot be granted to the Algerian State explains the assessment made by that court. In its view, under the employment contract concluded with Mr Mahamdia, the Algerian State did not exercise powers as a public authority and Mr Mahamdia did not, in performing his functions, contribute to the exercise of his employer's public sovereignty. This premiss also suggests that, even though the work was performed at an embassy, which is undeniably an emanation of the Algerian State, that State itself may be treated in the same way as any private employer in so far as it does not perform sovereign functions. In other words, in my view, the fact that the worker was posted at an embassy of a non-member country is not sufficient in itself to frustrate the application of Articles 18 and 19 of Regulation No 44/2001. It must therefore be determined whether that embassy satisfies the definition of the notions of 'branch', 'agency' or 'other establishment' within the meaning of the regulation.

33. Whilst the regulation makes several references to these three notions, [21] the fact remains that it does not give an express definition.

34. Furthermore, it is clear from the scheme of Regulation No 44/2001 that the rules of jurisdiction laid down in Article 18 et seq. of the regulation operate as *lex specialis* and constitute exceptions to the principle that the rules of jurisdiction laid down by the regulation are applicable only where the defendant is domiciled in a Member State. They clearly have the effect of extending the scope of Regulation No 44/2001. The special nature of those rules therefore requires that they be given a strict interpretation. [22]

35. However, this literal and schematic interpretation must be reconciled with the teleological interpretation of Article 18 of Regulation No 44/2001. In relation to individual contracts of employment, the objective is that 'the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for' [23] by increasing the number of situations in which the worker may sue his employer in the courts which are closest and most familiar to him. The Court has repeatedly held that the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ('the Brussels Convention') [24] must be

20 — See Article 4 of Regulation No 44/2001.

21 — See Articles 5(5), 9(2), 15(2), and, of course, 18 of Regulation No 44/2001.

22 — The Court has ruled that 'the rules of special jurisdiction [laid down by Regulation No 44/2001] must be interpreted strictly and cannot be given an interpretation going beyond the cases expressly envisaged by the regulation' (Case C-462/06 *Glaxosmithkline and Laboratoires Glaxosmithkline* [2008] ECR I-3965, paragraph 28 and cited case-law).

23 — See recital 13 in the preamble to Regulation No 44/2001.

24 — OJ 1998 C 27, p. 1 (consolidated version).

interpreted taking account of 'the concern to afford proper protection to the party to the contract who is the weaker from the social point of view, in this case the employee'.[25] The notions of 'agency', 'branch' and 'other establishment', as used in Article 18(2) of Regulation No 44/2001, must therefore also be interpreted in the light of that specific objective.

36. Furthermore, when the Court has been asked to interpret Article 5(5) of the Brussels Convention, which also lays down a derogation with regard to jurisdiction, albeit in a different context, making reference to a 'dispute arising out of the operations of a branch, agency or other establishment', it has ruled that 'the need to ensure legal certainty and equality of rights and obligations for the parties as regards the power to derogate from the general jurisdiction ... requires an independent interpretation, common to all the Contracting States, of the concepts in Article 5(5) of the Convention'.[26] *Mutatis mutandis*, such a solution must be adopted for the interpretation of the notions of 'agency', 'branch' or 'other establishment' within the meaning of Article 18(2) of Regulation No 44/2001, which must therefore be independent.

37. These notions are defined only very rarely in the legislation. To my knowledge only the European Convention on State Immunity might provide the slightest clarification of their meaning, as it provides, in Article 7, that '[a] Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment'.[27]

38. Regard must therefore be had to the case-law of the Court. It must first be stated that the Court has interpreted the notions of 'agency', 'branch' or 'other establishment' only in the context of the Brussels Convention, and never in relation to a dispute concerning an employment contract.

39. The Court attempted to define these notions for the first time in *De Bloos*.[28] In that judgment, it stated that 'one of the essential characteristics of the concepts of branch or agency is the fact of being subject to the direction and control of the parent body'[29] and that the notion of establishment is 'based on the same essential characteristics as a branch or agency'.[30]

40. The Court has subsequently made further clarifications. In *Somafer*,[31] it ruled that 'having regard to the fact that the concepts referred to give the right to derogate from the principle of jurisdiction ..., their interpretation must show without difficulty the special link justifying such derogation'.[32] It added that 'such special link comprises in the first place the material signs enabling the existence of the branch, agency or other establishment to be easily recognised and in the second place the connection that there is between the local entity and the claim directed against the parent body'.[33] With regard to the first issue, the Court stated that 'the concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact

25 — See Case 133/81 *Ivenel* [1982] ECR 1891, paragraph 14; Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraph 18; Case C-383/95 *Rutten* [1997] ECR I-57, paragraph 17; and Case C-437/00 *Pugliese* [2003] ECR I-3573, paragraph 18.

26 — Case 33/78 *Somafer* [1978] ECR 2183, paragraph 8.

27 — Basel Convention, cited in footnote 9.

28 — Case 14/76 [1976] ECR 1497.

29 — Ibid., paragraph 20.

30 — Ibid., paragraph 21.

31 — Cited above in footnote 26.

32 — Case 33/78 *Somafer*, cited above, paragraph 11.

33 — Ibid.

business at the place of business constituting the extension'.[34] As regards the second issue, the Court ruled that 'the claim in the action must concern the operations of the branch, agency or other establishment'[35] and that 'this concept of operations comprises on the one hand actions relating to rights and contractual or non-contractual obligations concerning the management properly so-called of the agency, branch or other establishment itself such as those concerning the situation of the building where such entity is established or the local engagement of staff to work there'.[36]

41. Lastly, in *Blanckaert & Willems* [37] and *SAR Schotte*,[38] the Court held that a branch, agency or establishment 'must appear to third parties as an easily discernible extension of the parent body'[39] and that 'the close connection between the dispute and the court called upon to hear it must be assessed ... also by reference to the way in which these two undertakings behave in their business relations and present themselves vis-à-vis third parties in their commercial dealings'.[40]

42. It remains to be seen whether and in what way the embassy of a non-member country can satisfy this definition, established in case-law, of the notions of 'agency', 'branch' and 'establishment' within the meaning of Article 18(2) of Regulation No 44/2001.

43. It is common ground, first, that the abovementioned notions essentially refer to entities lacking legal personality.[41] The embassy, as an organ of the State which it represents, is effectively lacking legal personality. This is shown by the fact that, in the main proceedings, the worker brought his application against the Algerian State, and not against the embassy itself.

44. Second, the question arises whether these notions are exclusively connected with entities which carry on a commercial activity, as the Court's existing case-law clearly shows a position along such lines. That being the case, it should be borne in mind that the abovementioned rulings of the Court concerned the interpretation of Article 5(5) of the Brussels Convention, whose *telos* was markedly different from that of Article 18(2) of Regulation No 44/2001, since the former provision had not been drafted specifically for disputes concerning employment contracts. In my view, this fundamental difference calls for an updated and adapted interpretation of these notions.

45. The functions of an embassy, as a diplomatic mission, are laid down by Article 3 of the Vienna Convention on Diplomatic Relations of 18 April 1961. Under that article, those functions consist in representing the sending State in the receiving State, protecting in the receiving State the interests of the sending State, negotiating with the government of the receiving State, ascertaining conditions and developments in the receiving State, and promoting friendly relations and developing economic, cultural and scientific relations between the sending State and the receiving State. Strictly speaking, the functions of an embassy cannot be described as 'commercial', but their commercial implications cannot be completely ignored either.

46. In any event, the notions of 'agency', 'branch' or 'establishment' should not necessarily be required to have a link with a commercial activity, but, more likely, to refer to entities which operate as a private actor. This is suggested by the specific objective pursued by Article 18(2) of Regulation No 44/2001, especially since the wording of that article does not expressly contain any such limitation. To take up the example cited by the Commission in its written observations, if the interpretation of these notions were restricted solely to commercial or financial activities, the workers at a non-governmental

34 — Ibid. (paragraph 12).
35 — Ibid. (paragraph 13).
36 — Idem.
37 — Case 139/80 [1981] ECR 819.
38 — Case 218/86 [1987] ECR 4905.
39 — *Blanckaert & Willems*, paragraph 12.
40 — *SAR Schotte*, paragraph 16.
41 — See Opinion 1/03 [2006] ECR I-1145, point 150.

organisation whose seat is situated in a non-member country who are posted to a section of that organisation situated in a Member State could not benefit from the increased protection which is afforded to them, in principle, by Regulation No 44/2001 or rely on Article 18(2) of the regulation, and could not therefore benefit from the application of the EU legislation on jurisdiction, since their employer is not domiciled in the Member State.

47. With the removal of this first obstacle to the application of the notions of 'agency', 'branch' or 'establishment' within the meaning of Article 18(2) of Regulation No 44/2001, it is now necessary to determine whether an embassy displays sufficient material signs enabling its existence to be recognised (first criterion identified in *Somafer*) and to analyse the special link which may exist between the embassy and the claim in the action in so far as it is brought against the Algerian State (second criterion identified in *Somafer*).

48. As regards the first criterion, the embassy may be treated in the same way as a place of business which has the appearance of permanency, such as the extension of a parent body. The embassy contributes to the identification and the representation of the sending State in the State in which it is situated. It clearly constitutes its extension. It is evidently materially equipped. In addition, it is managed by the ambassador, whose role cannot be reduced to that of an ordinary intermediary without operational or decision-making powers. Whilst the embassy's activities are performed in close cooperation with the central government, the fact remains that it has much greater freedom of action in a number of areas, such as the management of its technical and service staff, including contract staff.

49. As regards the second criterion, it is evident that the claim in the action, which involves the Algerian State, has a sufficient link with the embassy. The embassy of the People's Democratic Republic of Algeria in Berlin is the place where Mr Mahamdia was recruited,[42] the place where he performed his functions and the place where he was subject to appraisal and, if necessary, to the disciplinary authority of his employer. The Court has ruled that disputes arising out of the operations of an agency, a branch or an establishment include disputes relating to the local engagement of staff to work there.[43]

50. Lastly, contrary to claims made elsewhere, I do not think that the main proceedings lose their international character because, in this specific context, the Algerian State is deemed to be domiciled in the same Member State as Mr Mahamdia, since its embassy is situated in Germany.[44] First of all, Regulation No 44/2001 is made applicable by the notional determination of the defendant's domicile in a Member State. Nevertheless, this legal fiction cannot entirely conceal the inherently international character of the dispute. Second, to consider that, after applying the legal fiction, the dispute continues to be between two parties domiciled in two different Member States would amount to requiring an additional condition for the application of the special rules of jurisdiction and to reducing their scope, significantly in my view,[45] and would even prove to be contrary to the objective of protection pursued by the Union legislature when it drafted Article 18 et seq. of Regulation No 44/2001. Furthermore, the Court does not seem to have given a ruling to this effect.[46]

42 — It should be borne in mind that the worker was not part of the embassy's staff from Algeria, that he has dual Algerian and German nationality and that he was recruited in Berlin, where he lives.

43 — *Somafer*, paragraph 13.

44 — With regard to Article 13 of the Brussels Convention, which laid down the conditions under which, in matters relating to contracts concluded by a consumer, a professional could be deemed to be domiciled in a Member State when he was domiciled in a non-Contracting State, see point 58 et seq. of the Opinion of Advocate General Darmon in Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139, and point 24 et seq. of the Opinion of Advocate General Darmon in Case C-318/93 *Brenner and Noller* [1994] ECR I-4275.

45 — This would refer to the specific case of an employment contract concluded between a worker domiciled in a Member State and an employer domiciled in a non-member country where the worker's activity represents a link with an agency, a branch or another establishment of his employer, provided that agency, branch or other establishment has its seat in a Member State other than that in which the worker is domiciled.

46 — Whilst Advocate General Darmon had taken a position on this paragraph, the Court merely stated, in the operative part of its judgment, that for the purposes of the application of the legal fiction laid down in Article 13 of the Brussels Convention, the defendant had to be domiciled in a different Member State from the applicant (see paragraph 18 and the operative part of the judgment in *Brenner and Noller*).

51. For all these reasons, I suggest that the Court answer the first question referred for a preliminary ruling to the effect that Article 18(2) of Regulation No 44/2001 must be interpreted as meaning that the embassy of a non-member country in a Member State must be treated in the same way as an 'agency', 'branch' or 'other establishment' in a dispute concerning an employment contract concluded by that embassy in its capacity as a representative of the sending State where the worker was recruited and performed his functions in the Member State, provided those functions were unconnected with the exercise of public authority by the sending State.

C – *The second question*

52. By its second question, the referring court is essentially seeking to ascertain whether Article 21 of Regulation No 44/2001 precludes a clause inserted in an employment contract upon its conclusion which confers jurisdiction on the courts of a non-member country to hear and determine any dispute concerning that contract where both the worker and the employer are domiciled or deemed to be domiciled in the same Member State and the place of work is also situated in that Member State. This question evidently arises only if the Court should rule that the main proceedings fall within the scope of Regulation No 44/2001 and, as I have suggested, the embassy may be treated in the same way as an 'agency', 'branch' or 'other establishment' within the meaning of Article 18(2) of the regulation.

53. As a preliminary point, note should be taken of the Court's case-law according to which 'the designation of the court of a [Member] State as the court having jurisdiction on the ground of the defendant's domicile in that State, even in proceedings which are, at least in part, connected, because of their subject-matter or the claimant's domicile, with a non-Contracting State, is not such as to impose an obligation on that State'.[47] In the main proceedings, the possible designation of the German courts as courts having jurisdiction to hear and determine that dispute would not, in itself, result in an obligation being imposed on the non-member country. In the context of the present reference for a preliminary ruling, we are not dealing with the State as a legal person governed by public law and enjoying sovereignty, but the State as an employer exercising a non-sovereign function. The designation of the courts having jurisdiction to hear and determine the main proceedings pursuant to the rules of Regulation No 44/2001 would possibly constrain the State as an employer, but not as an entity exercising a sovereign function.

54. To return to the second question, the conditions in which there may be a valid departure from the rules laid down by Articles 18 and 19 of Regulation No 44/2001 are laid down in Article 21 of the regulation. That article, which also comes under the special section which the legislature decided to dedicate to individual contracts of employment, states that the only permitted departures must take the form of agreements. In addition, the agreement must have been entered into after the dispute has arisen (Article 21(1) of Regulation No 44/2001) or must allow the employee to bring proceedings in courts other than those indicated in Articles 18 and 19 (Article 21(2) of Regulation No 44/2001).

55. It is common ground that the clause which confers jurisdiction on the Algerian courts was inserted *ab initio* in the contract between the applicant in the main proceedings and his employer. It does not therefore satisfy the requirement laid down by Article 21(1) of Regulation No 44/2001.

56. On the basis of the wording of this article, in particular the use of the conjunction 'or', it must be acknowledged that a jurisdiction clause may, even if entered into before the dispute has arisen, still be consistent with that article if it allows the employee to bring proceedings in courts other than those which would have jurisdiction under Articles 18 and 19 of Regulation No 44/2001.

47 — Case C-281/02 *Owusu* [2005] ECR I-1383, paragraph 31.

57. Assuming that two contracting parties domiciled or deemed to be domiciled in the same Member State may agree on the jurisdiction of the courts of a non-member country to hear and determine disputes concerning the employment contract concluded between them,[48] where the place of employment is also in that Member State, the specificity of this kind of contract and the particular level of protection which must be provided for the worker must not be ignored. The assessment of the compatibility of such a clause must also have regard to the specific objective pursued by Article 18 et seq. of Regulation No 44/2001. Consequently, it seems clear that, to that end, the clause must give the worker a choice of the court before which to take his case.

58. As the Swiss Government and the Commission have suggested, correctly in my view, Article 21(2) of Regulation No 44/2001 must be interpreted to the effect that an agreement conferring jurisdiction entered into before the dispute has arisen is consistent with that article if it allows the employee to bring proceedings in other courts, in addition to the courts normally having jurisdiction under the special rules laid down in Articles 18 and 19 of Regulation No 44/2001. However, the clause at issue in the main proceedings enables proceedings to be brought only in Algerian courts and does not therefore place Mr Mahamdia, who is the weaker party whom must be guaranteed particular protection, in a position where he is able to choose the forum before which to take his case.

59. Such an interpretation is consistent with the analysis made in the Jenard Report[49] of provisions of the Brussels Convention whose content is similar to Article 21(2) of Regulation No 44/2001, although they do not relate directly to workers. That report stated, with regard to Article 12(2)[50] of the Convention, that the framework provided by agreements conferring jurisdiction was intended 'to prevent the parties from limiting the choice offered'[51] by that Convention. It added that, for such agreements which were concluded before the dispute arose to be permissible, they should be 'to the advantage'[52] of the party who is deemed to be weaker. The Court has always taken the view, including in respect of workers, that 'the rules on jurisdiction ... are inspired by concern to afford proper protection to the party to the contract who is the weaker from the social point of view'.[53]

60. In these circumstances, I suggest that the Court answer the second question asked by the referring court to the effect that, in order to ensure the conformity with Article 21(2) of Regulation No 44/2001 of a jurisdiction clause in an employment contract which was entered into before the dispute has arisen, the referring court must ensure that that clause allows the employee to bring proceedings in other courts, in addition to the courts normally having jurisdiction under the special rules laid down in Articles 18 and 19 of Regulation No 44/2001, thereby allowing him a choice.

48 — Unlike the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1) and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6), Regulation No 44/2001 does not contain a provision on the subject of its universal application which expressly acknowledges that the application of the rules contained therein may result in the courts of non-Contracting States being designated as having jurisdiction.

49 — Report by Jenard, P., on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 1).

50 — Under which '[t]he provisions of this Section may be departed from only by an agreement on jurisdiction ... which allows the policy-holder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section'.

51 — Jenard Report (p. 33).

52 — Jenard Report (p. 33).

53 — *Ivenel* (paragraph 16); *Rutten* (paragraph 22); *Mulox IBC* (paragraph 18); and *Pugliese* (paragraph 18).

V – Conclusion

61. In the light of all the above considerations, I suggest that the Court answer the questions referred by the Landesarbeitsgericht Berlin-Brandenburg as follows:

(1) Article 18(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 embassy of a non-member country in a Member State must be treated in the same way as an 'agency', 'branch' or 'other establishment' in a dispute concerning an employment contract concluded by that embassy in its capacity as a representative of the sending State where the worker was recruited and performed his functions in the Member State, provided those functions were unconnected with the exercise of public authority by the sending State.

(2) In order to ensure the conformity with Article 21(2) of Regulation No 44/2001 of a jurisdiction clause in an employment contract which was entered into before the dispute has arisen, the referring court must ensure that that clause allows the employee to bring proceedings in other courts, in addition to the courts normally having jurisdiction under the special rules laid down in Articles 18 and 19 of Regulation No 44/2001, thereby allowing him a choice.