

Case C-189/20**Request for a preliminary ruling****Date lodged:**

5 May 2020

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

27 February 2020

Appellant in the appeal on a point of law and defendant:

Laudamotion GmbH

Respondent in the appeal on a point of law and applicant:

Verein für Konsumenteninformation

8Ob 107/19x

The Oberster Gerichtshof (Supreme Court, Austria), sitting as the court ruling on appeals on points of law (*‘Revision’*) [...], in the case of the applicant, the Verein für Konsumenteninformation (Association for Consumer Information), 1060 Vienna, [...], versus the defendant, Laudamotion GmbH, 2320 Schwechat, [...], concerning a prohibitory order and publication of the judgment, following the appeal on a point of law brought by the defendant against the judgment of the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), sitting as the court ruling on appeals on the merits (*‘Berufung’*), of 28 May 2019 [...], by which the judgment of the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria) of 5 February 2019 [...] was partly confirmed and partly amended, has made, in closed session, the following

O r d e r:**[Or. 2]**

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1. Are the provisions of Regulation (EU) No 1215/2012, in particular Article 25, Article 17(3) and Article 19, and in any event in the light of Article 67, to be interpreted as precluding a review of unfairness of international agreements conferring jurisdiction in accordance with Directive 93/13/EEC or the corresponding national implementing provisions?

2. Is the last clause of the first sentence of Article 25(1) of Regulation (EU) No 1215/2012 (*‘unless the agreement is null and void as to its substantive validity under the law of that Member State’*) to be interpreted as meaning that it opens up the possibility — which extends even beyond the area of harmonised law — of a substantive review in accordance with the national law of the Member State on which jurisdiction has been conferred via prorogation?

3. In the event that Questions 1 and 2 are answered in the negative:

Are the national implementing provisions applicable to a review of unfairness in accordance with Directive 93/13/EEC determined by the law of the Member State on which jurisdiction has been conferred via prorogation or by the *lex causae* of the Member State seised?

Grounds:

I. The facts:

The main proceedings concern an action for a prohibitory injunction in relation to the validity of contractual terms (*‘Klauselprozess’*). The applicant is an association for upholding consumer interests that is entitled to bring an action under Austrian consumer protection law. The defendant air carrier (a [Or. 3] ‘low-cost airline’) operates a flight booking portal at www.laudamotion.com. In so doing, it uses General Conditions of Carriage and General Terms and Conditions in the course of its trade with consumers. Flights can only be booked with the defendant online. The defendant does not offer purely domestic transport within Austria.

The following clause in the aforementioned General Terms and Conditions of the defendant are of importance in the preliminary ruling proceedings:

‘2.4 Except as otherwise provided by the Convention or applicable law, your contract of carriage with us [...] and any dispute arising out of or in connection with this contract shall be subject to the jurisdiction of the Irish courts.’

II. Forms of order sought and arguments of the parties:

The applicant argued that the clause conferring jurisdiction was ineffective. The wording *‘Except as otherwise provided by the Convention or applicable law’* was non-transparent within the meaning of Paragraph 6(3) of the

Konsumentenschutzgesetz (Law on consumer protection, ‘the KSchG’), because consumers themselves had to find out whether the jurisdiction provided for was permissible. Moreover, such an agreement was grossly prejudicial under Paragraph 879(3) of the Allgemeines Bürgerliches Gesetzbuch (Austrian General Civil Code, ‘the ABGB’), not least because the other jurisdictions conferred by the Brussels I Regulation (recast), in particular by Article 7, were not available to the consumer, and, moreover, the agreement was surprising within the meaning of Paragraph 864a of the ABGB, because, in view of the fact that the defendant was domiciled in Austria, a consumer should not have to expect that the Irish courts had exclusive jurisdiction.

The defendant claimed that the agreement conferring jurisdiction contained in the clause was to be assessed solely [Or. 4] in the light of the Brussels I Regulation (recast). Article 17(3) of the Brussels I Regulation (recast) excluded contracts of transport from the restrictions applicable to consumer contracts pursuant to Article 19 of the Brussels I Regulation (recast). Agreements conferring jurisdiction were therefore permissible under Article 25 of the Brussels I Regulation (recast) without the restrictions laid down in Section 4 of Chapter I of the Brussels I Regulation (recast). Owing to the primacy of EU law, a review of unfairness could not take place in accordance with the provisions of national law. Moreover, the provision was not surprising, on account of the foreseeable foreign connection, nor was it non-transparent, since the first sentence made it clear that the jurisdiction provided for therein was additional to those provided for by the Montreal Convention (‘the Convention’) or other applicable law.

III. Previous proceedings:

The court of first instance dismissed the claim brought in relation to that clause. It held that Article 25 of the Brussels I Regulation (recast) took precedence over national law in terms of its scope of application. The provision was definitive with regard to the permissibility, form and effects of agreements conferring jurisdiction.

The court of appeal allowed the applicant’s appeal on the merits, upholding the action brought at first instance. It based this on the assumption that, even within the scope of application of Article 25 of the Brussels I Regulation (recast), agreements conferring jurisdiction in consumer contracts covered by the Unfair Contract Terms Directive or the corresponding national transposition provisions would also be subject to the review of unfairness under the Unfair Contract Terms Directive and could therefore be ineffective in individual cases. The national provisions implementing the Unfair Contract Terms Directive served to govern jurisdiction within the meaning of Article 67 of the Brussels I Regulation (recast), because, pursuant to [Or. 5] subparagraph (q) of point 1 of the annex to the directive, terms which excluded or hindered the consumer’s right to have recourse to the state courts could be regarded as unfair. A review of unfairness on the basis of the Unfair Contract Terms Directive was especially important in the present

situation in particular, because, pursuant to Article 17(3) of the Brussels I Regulation (recast), the restrictions otherwise imposed in the interests of consumer protection were not applicable in the case of a contract of transport. The clause was non-transparent pursuant to Paragraph 6(3) of the KSchG, however.

The Supreme Court is now called upon to rule on the defendant's appeal on a point of law brought against the decision on the appeal on the merits, by which it seeks to have the action dismissed.

IV. Legal basis:

Basis in EU law:

The basis in EU law of this request for a preliminary ruling is formed by Articles 25, 17(3), 19 and 67 of 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 ('the Brussels I Regulation (recast)') and by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('the Unfair Contract Terms Directive').

National law:

Paragraph 6(3) of the KSchG reads as follows:

'Any term in general terms and conditions or standard form contracts shall be ineffective if it is unclear or unintelligible.' [Or. 6]

Paragraph 864a of the ABGB reads:

'Unusual terms used by one of the parties to the contract in its general terms and conditions or in standard form contracts shall not form part of the agreement if they are disadvantageous to, and, including in the light of the circumstances, in particular the objective appearance of the legal instrument, could not be expected by, the other party, unless the former specifically drew the attention of the latter to those terms.'

Paragraph 879(3) of the ABGB provides:

'A term in the general terms and conditions of a contract or in standard form contracts which does not govern a fundamental obligation of one of the parties shall be regarded as void if, in the light of all of the circumstances, it is seriously detrimental to one of the parties.'

V. Questions referred

Right to make the reference:

[...]

Reasons for the questions referred:

1. The question as to whether and to what extent international agreements conferring jurisdiction that fall within the [Or. 7] scope of the Brussels I Regulation (recast) are subject to a general review of unfairness is the subject of contentious discussion in the legal literature:

1.1. According to one view, Article 25 of the Brussels I Regulation (recast) was a definitive rule on the permissibility, form and effects of an agreement conferring jurisdiction, excluding any form of substantive review under national law, even in the case of clauses conferring jurisdiction in general terms and conditions. The objective of protecting the party typically in a weaker position was already achieved by limiting the permissibility of agreements conferring jurisdiction with consumers, policyholders and employees.

Advocates of this view [...] assume that the Brussels I Regulation (recast) was a closed system of jurisdiction. An interpretation of Article 25 of the Brussels I Regulation (recast) that would allow a substantive review under national law would clash with the harmonisation objective pursued by the Brussels I Regulation (recast). They base this view in particular on the case-law of the Court of Justice of the European Union on Article 17 of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [...], pursuant to which, in the interests of legal certainty, the choice of court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down by that provision (see ECLI:EU:C:1999:142, C-159/97, paragraph 46 et seq.). [Or. 8]

1.2. However, the question arises as to whether agreements conferring jurisdiction are not subject to restrictions on unfairness that arise from secondary European legislation, in particular from the Unfair Contract Terms Directive [...]. Although Article 19 of the Brussels I Regulation (recast) places restrictions on agreements conferring jurisdiction with consumers, Article 17(3) of the Brussels I Regulation (recast) excludes contracts on transport from the application of Section 4 Chapter I. Specifically, therefore, there remained a need for protection from the consumer perspective which could be met by recourse to the provisions of the Unfair Contract Terms Directive [...].

Some advocate a review of unfairness in accordance with the Unfair Contract Terms Directive, particularly in the light of the provision in Article 67 of the Brussels I Regulation (recast): the national provisions implementing the directive served to govern jurisdiction, because the ineffectiveness of a clause conferring jurisdiction had the result that the statutory jurisdictional order would intervene and a court other than that chosen in the clause would generally have jurisdiction [...]. Another line of argument is based on the premise that, pursuant to the second clause of the first sentence of Article 25(1) of the Brussels I Regulation (recast),

an agreement conferring jurisdiction must be assessed with regard to its substantive validity on the basis of the minimum standards of the [Or. 9] Unfair Contract Terms Directive [...].

1.3. There are also those who believe that the European legislature's reference in the second clause of the first sentence of Article 25(1) of the Brussels I Regulation (recast) to 'null and void as to its substantive validity' also allows a substantive assessment of clauses conferring jurisdiction that appear in general terms and conditions [...].

2. The question therefore arises for the Supreme Court as to what the relationship is between the provisions of the Brussels I Regulation (recast) and the Unfair Contract Terms Directive or the corresponding national implementing provisions and whether an infringement of consumer protection provisions — even if they do not originate from European secondary law — is to be subsumed under the term 'null and void as to its substantive validity' used in Article 25 of the Brussels I Regulation (recast). Finally, it appears to be unclear whether the specifically applicable national provisions implementing the Unfair Contract Terms Directive would have to be determined in accordance with the conflict-of-law rule in the second clause of the first sentence of Article 25(1) of the Brussels I Regulation (recast) — that is to say in accordance with the law of the *forum prorogatum*.

Supreme Court,

Vienna, 27 February 2020

[...]