AG Cruz Villalón on the circumstances allowing the review of a European order for payment

This post has been written by Irene Maccagnani.

On 2 July 2015, Advocate General Pedro Cruz Villalón delivered his Opinion in *Thomas Cook Belgium* (C-245/14), a case before the ECJ concerning the interpretation of Regulation No 1896/2006 creating a European order for payment procedure (the Opinion is not available in English; the French version may be found here, the Italian version here and the German version here).

The request for a preliminary ruling arose from a dispute concerning a contract concluded between a Belgian travel agency and an Austrian company.

The Austrian company applied for a European order for payment, alleging that the travel agency had failed to fulfill its obligations under the contract. The application was filed before the Vienna Commercial Court on the assumption that jurisdiction could be asserted on the basis of Article 5(1) of Regulation No 44/2001 (Brussels I), now Article 7(1) of Regulation No 1215/2012 (Brussels I*a*), Vienna being the place of performance of the relevant obligation.

In the application, the Austrian company omitted to mention that the contract concluded with the travel agency featured a choice-of-court agreement conferring exclusive jurisdiction on Belgian courts.

The Vienna Commercial Court issued the order for payment. The defendant was duly served with the order, but did not lodge a statement of opposition within the 30-day time limit indicated in Article 16(2) of Regulation No 1896/2006. Only later did the travel agency applied for a review, relying on Article 20 of the Regulation ("Review in exceptional cases").

Seised of the request for review, the Vienna Commercial Court asked the ECJ to clarify the interpretation of Article 20(2). Pursuant to this provision, the defendant is entitled to apply for a review "where the order for payment was clearly wrongly issued, having regard to the requirements laid down in this

Regulation, or due to other exceptional circumstances". According to Recital 25 of the Regulation, such other exceptional circumstances "could include a situation where the European order for payment was based on false information provided in the application form".

Specifically, the Vienna Commercial Court asked whether "exceptional circumstances" within the meaning of Article 20(2) could be deemed to exist when an order for payment has been issued on the basis of information provided in the application form, which subsequently turned out to be inaccurate, where the jurisdiction of the seised court depends on such inaccurate information.

In his Opinion, the AG begins by noting that Article 20(2) is to be interpreted restrictively. It allows for review only "where the order for payment was clearly wrongly issued". Thus, only false or inaccurate information which could not be detected by the defendant before the expiry of the time limit for opposition may be considered to amount to "exceptional circumstances" for the purposes of the provision in question. By contrast, if it is established that the defendant could have reacted to those false or inaccurate information by lodging a timely statement of opposition, he should not be allowed to avail himself of Article 20(2).

According to the AG, this conclusion equally applies to cases where the seised court asserted its jurisdiction based on false or inaccurate information provided by the applicant. In this connection, he reminded that, according to Recital 16, the court should examine the application, including the issue of jurisdiction, "on the basis of the information provided in the application form".

Since the court is merely required to determine if jurisdiction is "plausible" pursuant to the Brussels I Regulation, and the defendant is informed that the order "has been issued solely on the basis of the information provided by the claimant and not verified by the court", the defendant – once the order has been served on him – must be deemed to be aware that the applicant did not inform the court about the existence of a choice-of-court agreement.

The AG goes on to recall that the parties may always waive their choice-of-court agreement and concludes that, in circumstances like those of the case at hand, the fact for the applicant of referring to the place of performance of the relevant contractual obligation as a basis for jurisdiction does not amount to

providing “false information” for the purposes of Article 20 of Regulation No 1896/2006.

The mere presence of a choice-of-court clause in the contract, he adds, leaves the issue open of whether the clause is vlid, or not. Assessing the validity of such a clause requires, in fact, a broader examination than that provided under Article 8 of Regulation No 1896/2006, regardless of whether the judge is aware of the existence of the clause itself. If the applicant has a doubt as to the validity of the choice-of-court agreement, he is not required to mention that clause in the application form, since similar issues cannot be discussed in the framework of this kind of proceedings.

In conclusion, according to the AG, the ECJ should state that, under Article 20(2) of Regulation No 1896/2006, read in conjunction with Recital 25, the “exceptional circumstances” that entitle the defendant to apply for a review of the order for payment cannot be said to already exist for the mere fact that the order for payment, effectively served on the defendant, is based on “false or inaccurate information”, even if the jurisdiction of the court depends on such information.

This does not preclude the defendant from relying on Article 20 when he can show that he could discover such falsity or inaccuracy only after the expiry of the time limit for opposition.