

## Court of Justice of the EU Upholds Exclusive Jurisdiction Clauses in B2B ‘Click-wrap’ Contracts

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The **Court of Justice of the EU** (‘CJEU’) has held that an exclusive choice of forum clause can validly be imposed by so-called “click-wrap” contracts in online B2B transactions (see Case C-322/14, *El Majdoub v. CarsOnTheWeb.Deutschland GmbH*). The ruling will make it easier for online businesses in the EU to impose a favorable choice of forum in their online B2B contracts, ensuring that they can sue defendants in courts of their own choosing, rather than the defendants’ local courts.

The general EU-wide rule for B2B contractual disputes is that a defendant must be sued in its local courts only. However, parties can waive the default rule by agreement “in writing” (Article 23(1)).

To deal with contracts concluded electronically, Article 23(2) states – in the English version of the law – that any “electronic communication” that “provides” a durable record of the agreement is equivalent to “writing”; the French and German versions refer to the mere “possibility” of a durable record being formed.

There has been some uncertainty as to whether mere hyperlinking to terms and conditions is a “communication”. The case before the Court focused on this point, with the claimant arguing that the relevant terms and conditions should at least have been displayed (automatically) before they placed their order.

Taking a pragmatic view, the CJEU stated that the requirements of Article 23 are met if it is possible to print and save the text of online terms and conditions before a contract is concluded – even if the contractual terms are never actually displayed to the person accepting them. Providing a hyperlink to a printable version suffices.

Although the Brussels I Regulation has been phased out (as of January 10<sup>th</sup>, 2015, in favor of the ‘recast’ “Brussels Ia” Regulation (Regulation (EU) No 1215/2012)), it is likely that the CJEU’s ruling in *El Majdoub* will equally apply to the new law, given that the relevant provisions of the new law (now contained in Article 25) are in effect identical to those in Article 23 of the original.

It is important to note that the scope of this ruling is limited to B2B disputes, and forum selection clauses specifically. In respect of consumer (B2C) contracts, the Brussels I and Ia Regulations generally do not allow businesses to restrict a consumer's choice of courts.

Also, the CJEU's earlier judgment in Case C-49/11 *Content Services* has already determined that 'click-wraps' did *not* satisfy more general legal requirements for online consumer contracts under Article 5(1) of the Distance Selling Directive (Directive 97/7/EC), since mandatory information about contract terms simply made available via a hyperlink is neither "given" by the service provider nor "received" by the consumer.

However, that Directive has now been superseded by the Consumer Rights Directive (Directive 2011/83/EU). The new law's relevant provisions have been worded differently to the Distance Selling Directive; there is therefore some doubt as to whether the *Content Services* ruling may apply by analogy to B2C click-through contracts concluded under the new law.

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