

JUDGMENT OF THE COURT (Grand Chamber)

19 July 2012 (*)

(Judicial cooperation in civil matters – Regulation (EC) No 44/2001 – Jurisdiction over individual contracts of employment – Contract with an embassy of a third State – Immunity of the employing State – Concept of branch, agency or other establishment within the meaning of Article 18(2) – Compatibility with Article 21 of an agreement conferring jurisdiction on the courts of the third State)

In Case C-154/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Landesarbeitsgericht Berlin-Brandenburg (Germany), made by decision of 23 March 2011, received at the Court on 29 March 2011, in the proceedings

Ahmed Mahamdia

v

People’s Democratic Republic of Algeria,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, K. Lenaerts, J.-C. Bonichot, Presidents of Chambers, A. Rosas, R. Silva de Lapuerta, E. Levits, A. Ó Caoimh, L. Bay Larsen, T. von Danwitz, A. Arabadjiev, C. Toader (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

- the People’s Democratic Republic of Algeria, by B. Blankenhorn, Rechtsanwalt,
- the Spanish Government, by S. Centeno Huerta, acting as Agent,
- the European Commission, by M. Wilderspin and A.-M. Rouchaud-Joët, acting as Agents,
- the Swiss Confederation, by D. Klingele, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 24 May 2012,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 18(2) and 21 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).
- 2 The reference has been made in proceedings between Mr Mahamdia, an employee at the embassy of the People's Democratic Republic of Algeria in Berlin (Germany), and his employer.

Legal context

International law

The Vienna Convention

- 3 Under Article 3(1) of the Vienna Convention on Diplomatic Relations, concluded in Vienna on 18 April 1961:
 - ‘1. The functions of a diplomatic mission consist, inter alia, in:
 - (a) Representing the sending State in the receiving State;
 - (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
 - (c) Negotiating with the Government of the receiving State;
 - (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
 - (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.’

European Union law

Regulation No 44/2001

- 4 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 ... are essential.’
- 5 Recitals 8 and 9 in the preamble to that regulation, which concern the provisions on defendants domiciled in a third State, read as follows:
 - ‘(8) There must be a link between proceedings to which this Regulation applies and the territory of the Member States bound by this Regulation. Accordingly common rules on jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States.

- (9) A defendant not domiciled in a Member State is in general subject to national rules of jurisdiction applicable in the territory of the Member State of the court seised, and a defendant domiciled in a Member State not bound by this Regulation must remain subject to the [Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 1), as amended by the successive conventions on the accession of the new Member States to that Convention (“the Brussels Convention”).]
- 6 Recital 13 in the preamble, which concerns inter alia the rules on jurisdiction over individual contracts of employment, states:
- ‘In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.’
- 7 Article 1(1) of Regulation No 44/2001 defines the material scope of the regulation as follows:
- ‘This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.’
- 8 With respect to actions brought against persons domiciled in a third State, Article 4(1) of that regulation provides:
- ‘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.’
- 9 Article 5(5) of that regulation provides that a person domiciled in a Member State may be sued in another Member State ‘as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated’.
- 10 Section 5 of Chapter II of the regulation, which comprises Articles 18 to 21, sets out the rules of jurisdiction over disputes concerning individual contracts of employment.
- 11 Article 18 of the regulation reads as follows:
- ‘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.’
- 12 Article 19 of the regulation provides:
- ‘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.’

13 Article 21 of the regulation reads as follows:

‘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.’

German law

14 Article 25 of the Basic Law of the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) provides:

‘The general rules of international law are part of federal law. They take precedence over laws and create rights and obligations directly for the inhabitants of federal territory.’

15 Paragraph 18 of the Law on the judicial system (Gerichtsverfassungsgesetz), in the version published on 9 May 1975, provides:

‘The members of the diplomatic missions established in the territory in which this Law applies, the members of their families and their private servants are exempt from German jurisdiction in accordance with the Vienna Convention on Diplomatic Relations of 18 April 1961...’

16 Paragraph 20 of the Law on the judicial system reads as follows:

‘1. German jurisdiction also does not extend to representatives of other States and persons accompanying them who stay in the territory in which this Law applies on the official invitation of the Federal Republic of Germany.

2. Furthermore, German jurisdiction also does not extend to persons other than those mentioned in subparagraph 1 and in paragraphs 18 and 19 in so far as they are exempt therefrom under the general rules of international law or on the basis of international agreements or other legislation.’

17 Paragraph 38 of the German Code of Civil Procedure (Zivilprozessordnung), in the version published on 5 December 2005, ‘Permitted agreement on jurisdiction’, provides in subparagraph 2:

‘The jurisdiction of a court of first instance can also be agreed if for at least one of the contractual parties there is no general jurisdiction in Germany. The agreement must be concluded in writing or, if it is made orally, be confirmed in writing...’

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

- 18 Mr Mahamdia, who has Algerian and German nationality, lives in Germany. On 1 September 2002 he concluded with the Ministry of Foreign Affairs of the People’s Democratic Republic of Algeria a contract of employment for a renewable period of one year, for work as a driver at the Algerian Embassy in Berlin.
- 19 The contract, which was in French, contained an agreement on jurisdiction which read as follows:

‘VI. Settlement of disputes

In the event of differences of opinion or disputes arising from this contract, the Algerian courts alone shall have jurisdiction.’
- 20 According to the order for reference, in the exercise of his duties Mr Mahamdia had to drive guests and colleagues and, as a replacement driver, also the ambassador. In addition, he delivered embassy correspondence to entities in Germany and to the post office. Diplomatic post was received or passed on by a colleague at the embassy who for his part was driven by Mr Mahamdia. The order for reference states that the parties disagree, however, on whether he also provided interpreting services.
- 21 On 9 August 2007 Mr Mahamdia brought proceedings against the People’s Democratic Republic of Algeria in the Arbeitsgericht Berlin (Labour Court, Berlin), seeking to be paid for overtime he claimed to have worked in the years 2005 to 2007.
- 22 On 29 August 2007, by letter from the embassy’s chargé d’affaires, Mr Mahamdia was dismissed as from 30 September 2007.
- 23 Mr Mahamdia thereupon added to his principal claim before the Arbeitsgericht Berlin a claim for a declaration that the termination of his employment contract had been unlawful and for him to be paid compensation for non-acceptance and to have his employment continued until the end of the dispute.
- 24 In the proceedings concerning the dismissal, the People’s Democratic Republic of Algeria raised the objection that the German courts had no jurisdiction, relying both on international rules on immunity from jurisdiction and on the agreement on jurisdiction in the employment contract.
- 25 By judgment of 2 July 2008, the Arbeitsgericht Berlin allowed that objection, and consequently dismissed Mr Mahamdia’s claim. It took the view that, in accordance with the rules of international law, States enjoy immunity from jurisdiction in the exercise of their sovereign powers and the applicant’s activities, which were functionally connected to the diplomatic activities of the embassy, were outside the jurisdiction of the German courts.

- 26 The applicant in the main proceedings appealed against that judgment to the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin and Brandenburg), which by judgment of 14 January 2009 quashed in part the judgment of the Arbeitsgericht Berlin.
- 27 It observed that, since the applicant was a driver at the embassy, his activities did not form part of the exercise of public powers by the defendant State, but constituted an activity that was ancillary to that State's exercise of sovereignty. The People's Democratic Republic of Algeria therefore did not enjoy immunity in this case. Moreover, it considered that the German courts had jurisdiction to hear the case, since the embassy was an 'establishment' within the meaning of Article 18(2) of Regulation No 44/2001. Consequently, the rules set out in Article 19 of the regulation applied. It pointed out that, while an 'establishment' is indeed normally a place where commercial activities are carried on, Article 18(2) of Regulation No 44/2001 is applicable to an embassy since, first, that regulation does not contain any provision under which the diplomatic representations of States are excluded from its scope and, secondly, an embassy has its own management which concludes contracts independently, including contracts in civil matters such as employment contracts.
- 28 The Landesarbeitsgericht Berlin-Brandenburg also rejected the agreement on jurisdiction in the employment contract in question. It considered that the agreement did not satisfy the conditions laid down in Article 21 of Regulation No 44/2001, as it had been concluded before the dispute arose and referred the employee to the Algerian courts exclusively.
- 29 The People's Democratic Republic of Algeria appealed on a point of law to the Bundesarbeitsgericht (Federal Labour Court), relying both on the immunity from jurisdiction it should enjoy and on the agreement on jurisdiction.
- 30 By judgment of 1 July 2010, the Bundesarbeitsgericht set aside the judgment appealed against and remitted the case to the Landesarbeitsgericht Berlin-Brandenburg. It ordered the Landesarbeitsgericht *inter alia*, on the basis of the evidence before it, to assess the activities of Mr Mahamdia, in particular those relating to interpreting, in order to establish whether they could be regarded as sovereign functions of the defendant State. In addition, should it emerge from the examination that that State did not enjoy immunity from jurisdiction, it instructed the Landesarbeitsgericht to determine the court with jurisdiction to hear the main proceedings, taking account *inter alia* of Article 18(2) of Regulation No 44/2001 and Article 7 of the European Convention on State Immunity, drawn up within the Council of Europe and opened to signature by the States in Basle on 16 May 1972.
- 31 As regards the law applicable to the contract at issue in the main proceedings, the Bundesarbeitsgericht ruled that the Landesarbeitsgericht should examine whether, in the absence of an express choice by the parties, they had impliedly decided on Algerian law as the law of the contract. Factors such as the language of the contract, the origin of the applicant or the nature of his activities could be indications.
- 32 In its order for reference the Landesarbeitsgericht Berlin-Brandenburg considers that, in accordance with Article 25 of the Basic Law of the Federal Republic of Germany, States can plead immunity from jurisdiction only in disputes concerning the exercise of

their sovereignty. According to the case-law of the Bundesarbeitsgericht, employment law disputes between embassy employees and the State concerned are within the jurisdiction of the German courts where the employee has not carried out, for the State by which he is employed, activities forming part of the sovereign functions of that State.

- 33 In the present case, the referring court ‘presumes’ that Mr Mahamdia did not carry out such activities, since the People’s Democratic Republic of Algeria has not shown that he took part in those activities.
- 34 That court further considers that the jurisdiction of the German courts follows from Articles 18 and 19 of Regulation No 44/2001, but that, for the purpose of applying those articles, it must be established whether an embassy is a ‘branch, agency or other establishment’ within the meaning of Article 18(2) of that regulation. Only if that is the case may the People’s Democratic Republic of Algeria be regarded as an employer domiciled in a Member State.
- 35 Furthermore, in that case, in accordance with Article 21(2) of Regulation No 44/2001, the agreement on jurisdiction in the contract at issue in the main proceedings cannot in principle be applied to oust the jurisdiction of the German courts.
- 36 On the basis of those considerations, the Landesarbeitsgericht Berlin-Brandenburg decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘1. Is the embassy of a State outside the scope of ... Regulation No 44/2001 ... which is situated in a Member State a branch, agency or other establishment within the meaning of Article 18(2) of Regulation No 44/2001?
 2. If the answer to Question 1 is in the affirmative: Can an agreement on jurisdiction, reached before the dispute arises, confer jurisdiction on a court outside the scope of Regulation No 44/2001, if, by virtue of the agreement on jurisdiction, the jurisdiction conferred under Articles 18 and 19 of Regulation No 44/2001 would not apply?’

Consideration of the questions referred

Question 1

- 37 By its first question, the referring court essentially asks whether Article 18(2) of Regulation No 44/2001 must be interpreted as meaning that an embassy is an ‘establishment’ within the meaning of that provision and, consequently, whether that regulation is applicable for the purpose of determining the court which has jurisdiction to hear an action brought against a third State by an employee of an embassy of that State in a Member State.
- 38 It should be noted, to begin with, that Regulation No 44/2001, which lays down the rules for determining the jurisdiction of the courts of the Member States, applies to all disputes in civil and commercial matters with the exception of certain matters expressly mentioned in that regulation. As may be seen from paragraph 10 above, Section 5 of

Chapter II of the regulation, which comprises Articles 18 to 21, sets out the rules of jurisdiction for disputes relating to individual contracts of employment.

- 39 As regards the territorial scope of Regulation No 44/2001, it follows from recital 2 in the preamble to that regulation and from Opinion 1/03 [2006] ECR I-1145, paragraph 143, that the purpose of that regulation is to unify the rules on jurisdiction of the Member States, not only for disputes within the European Union but also for those with an external element, with the objective of eliminating obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject.
- 40 Regulation No 44/2001, in particular Chapter II of which Article 18 forms part, contains a set of rules forming a unified system, which apply not only to relations between different Member States but also to relations between a Member State and a third State (see Opinion 1/03, paragraph 144).
- 41 In particular, Article 18(2) of the regulation provides that, where an employee concludes a contract of employment with an employer who is domiciled outside the European Union but has a branch, agency or other establishment in a Member State, that employer must be regarded as domiciled in that State for the purpose of determining which court has jurisdiction.
- 42 To ensure the full effectiveness of that regulation, in particular Article 18, the legal concepts it uses must be given an independent interpretation common to all the States (see, to that effect, concerning the interpretation of the Brussels Convention, *inter alia*, Case 33/78 *Somafer* [1978] ECR 2183, paragraph 8).
- 43 In particular, to determine the elements which characterise the concepts of ‘branch’, ‘agency’ and ‘other establishment’ in Article 18(2) of Regulation No 44/2001, in the absence of any indication in the wording of the regulation, the purpose of the provision must be taken into account.
- 44 For disputes relating to employment contracts, Section 5 of Chapter II of Regulation No 44/2001 lays down a series of rules whose objective, as stated in recital 13 in the preamble to that regulation, is to protect the weaker party to the contract by means of rules of jurisdiction that are more favourable to his interests (see, to that effect, Case C-462/06 *Glaxosmithkline and Laboratoires Glaxosmithkline* [2008] ECR I-3965, paragraph 17).
- 45 In particular, they enable an employee to sue his employer before the court which he regards as closest to his interests, by giving him the option of proceeding before a court of the State in which he is domiciled, the State in which he habitually carries out his work, or the State in which his employer’s establishment is situated. The provisions of that section also limit the choice of jurisdiction by an employer suing an employee, and the possibility of derogating from the rules of jurisdiction laid down by the regulation.
- 46 As follows from the Court’s case-law on the rules of jurisdiction over contracts of employment in the Brussels Convention (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 22; and Case C-437/00 *Pugliese* [2003]

ECR I-3573, paragraph 18), the provisions of Section 5 of Chapter II of Regulation No 44/2001 must be interpreted with account being taken of the concern to ensure proper protection for the employee as the weaker of the contracting parties.

- 47 Moreover, to ensure continuity between that regulation and the Brussels Convention, the terms ‘branch’, ‘agency’ and ‘other establishment’ in the regulation must be interpreted in accordance with the criteria set out by the Court in its case-law on Article 5(5) of the Brussels Convention, which contains the same terms and lays down the special rules of jurisdiction for disputes relating to the operation of a secondary establishment of an undertaking. That provision is repeated word for word in Article 5(5) of Regulation No 44/2001.
- 48 In interpreting those concepts of ‘branch’, ‘agency’ and ‘other establishment’ the Court has identified two criteria which determine whether an action relating to the operations of one of those categories of establishments is linked to a Member State. First, the concept of ‘branch’, ‘agency’ or ‘other establishment’ implies a centre of operations which has the appearance of permanency, such as the extension of a parent body. It must have a management and be materially equipped to negotiate business with third parties, so that they do not have to deal directly with the parent body (see Case 139/80 *Blanckaert & Willems* [1981] ECR 819, paragraph 11). Secondly, the dispute must concern acts relating to the management of those entities or commitments entered into by them on behalf of the parent body, if those commitments are to be performed in the State in which the entities are situated (see, to that effect, *Somafer*, paragraph 13).
- 49 In the dispute in the main proceedings, it should be recalled that the functions of an embassy, as stated in Article 3 of the Vienna Convention on Diplomatic Relations, consist essentially in representing the sending State, protecting the interests of the sending State, and promoting relations with the receiving State. In the exercise of those functions, the embassy, like any other public entity, can act *iure gestionis* and acquire rights and obligations of a civil nature, in particular as a result of concluding private law contracts. That is the case where it concludes contracts of employment with persons who do not perform functions which fall within the exercise of public powers.
- 50 As regards the first criterion mentioned in paragraph 48 above, an embassy may be equated with a centre of operations which has the appearance of permanency and contributes to the identification and representation of the State from which it emanates.
- 51 As regards the second criterion mentioned in that paragraph, it is clear that the subject-matter of the dispute in the main proceedings, namely a dispute in the field of employment relations, has a sufficient link with the functioning of the embassy in question with respect to the management of its staff.
- 52 Consequently, as regards contracts of employment concluded by an embassy on behalf of the State, the embassy is an ‘establishment’ within the meaning of Article 18(2) of Regulation No 44/2001 where the functions of the employees with whom it concludes those contracts are connected with the management activity carried out by the embassy in the receiving State.
- 53 Before the German courts and in the observations it submitted in the present proceedings for a preliminary ruling, the People’s Democratic Republic of Algeria

argued that recognising the jurisdiction of a court of the receiving State of an embassy would amount to disregarding the rules of customary international law on immunity from jurisdiction, and that, taking those rules into account, Regulation No 44/2001, in particular Article 18, is not applicable in a dispute such as that in the main proceedings.

- 54 On this point, it must be observed that under the generally accepted principles of international law concerning immunity from jurisdiction a State cannot be sued before the court of another State in a dispute such as that in the main proceedings. Such immunity of States from jurisdiction is enshrined in international law and is based on the principle *par in parem non habet imperium*, as a State cannot be subjected to the jurisdiction of another State.
- 55 However, as the Advocate General observes in points 17 to 23 of his Opinion, in the present state of international law, that immunity is not absolute, but is generally recognised where the dispute concerns sovereign acts performed *iure imperii*. It may be excluded, by contrast, if the legal proceedings relate to acts performed *iure gestionis* which do not fall within the exercise of public powers.
- 56 Consequently, in view of the content of that principle of customary international law concerning the immunity of States from jurisdiction, it must be considered that it does not preclude the application of Regulation No 44/2001 in a dispute, such as that in the main proceedings, in which an employee seeks compensation and contests the termination of a contract of employment concluded by him with a State, where the court seised finds that the functions carried out by that employee do not fall within the exercise of public powers or where the proceedings are not likely to interfere with the security interests of the State. On the basis of that finding, the court seised of a dispute such as that in the main proceedings may also consider that that dispute falls within the material scope of Regulation No 44/2001.
- 57 It follows from the foregoing that the answer to Question 1 is that Article 18(2) of Regulation No 44/2001 must be interpreted as meaning that an embassy of a third State situated in a Member State is an ‘establishment’ within the meaning of that provision, in a dispute concerning a contract of employment concluded by the embassy on behalf of the sending State, where the functions carried out by the employee do not fall within the exercise of public powers. It is for the national court seised to determine the precise nature of the functions carried out by the employee.

Question 2

- 58 By its second question, the referring court essentially asks whether Article 21(2) of Regulation No 44/2001 must be interpreted as meaning that an agreement on jurisdiction concluded before a dispute arises falls within that provision where the agreement confers exclusive jurisdiction on a court outside the scope of that regulation, ousting the jurisdiction based on the special rules in Articles 18 and 19 of that regulation.
- 59 The People’s Democratic Republic of Algeria considers that Article 21 does not preclude the parties, by means of a term in a contract of employment, from conferring on a court of a third State jurisdiction over disputes relating to that contract. In the

present case, that choice entails no disadvantage for the employee and coincides with the wish of the parties to the contract to subject it to the law of that State.

- 60 As stated in recital 13 in the preamble to Regulation No 44/2001, the objective of the special rules in Section 5 of Chapter II is to ensure proper protection for employees. According to the Court's case-law, recalled in paragraph 46 above, that objective must be taken into account when interpreting those rules.
- 61 Article 21 of Regulation No 44/2001 restricts the conclusion by the parties to a contract of employment of an agreement on jurisdiction. Such an agreement must thus be concluded after the dispute has arisen or, if it was concluded beforehand, must allow the employee to bring proceedings before courts other than those on which those rules confer jurisdiction.
- 62 Having regard to the purpose of Article 21 of Regulation No 44/2001, the last mentioned condition must, as the Advocate General observes in points 58 and 59 of his Opinion, be understood as meaning that such an agreement, concluded before the dispute arose, must confer jurisdiction over the action brought by the employee on courts additional to those provided for in Articles 18 and 19 of Regulation No 44/2001. The effect of the agreement is thus not to exclude the jurisdiction of the latter courts but to extend the employee's possibility of choosing between several courts with jurisdiction.
- 63 Moreover, in accordance with the wording of Article 21 of Regulation No 44/2001, agreements on jurisdiction may 'allow' the employee to bring proceedings in courts other than those indicated in Articles 18 and 19. Consequently, that provision cannot be interpreted as meaning that an agreement on jurisdiction could apply exclusively and thus prohibit the employee from bringing proceedings before the courts which have jurisdiction under Articles 18 and 19.
- 64 The objective of protecting the employee as the weaker party to the contract, recalled in paragraphs 44 and 46 above, would not be attained if the jurisdiction provided for by Articles 18 and 19 in order to ensure that protection could be ousted by an agreement on jurisdiction concluded before the dispute arose.
- 65 Furthermore, it does not follow either from the wording or from the purpose of Article 21 of Regulation No 44/2001 that such an agreement may not confer jurisdiction on the courts of a third State, provided that it does not exclude the jurisdiction conferred on the basis of the articles of the regulation.
- 66 It follows from the foregoing that the answer to Question 2 is that Article 21(2) of Regulation No 44/2001 must be interpreted as meaning that an agreement on jurisdiction concluded before a dispute arises falls within that provision in so far as it gives the employee the possibility of bringing proceedings, not only before the courts ordinarily having jurisdiction under the special rules in Articles 18 and 19 of that regulation, but also before other courts, which may include courts outside the European Union.

Costs

67 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 (Grand Chamber) hereby rules:

- 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 an embassy of a third State situated in a Member State is an ‘establishment’ within the meaning of that provision, in a dispute concerning a contract of employment concluded by the embassy on behalf of the sending State, where the functions carried out by the employee do not fall within the exercise of public powers. It is for the national court seised to determine the precise nature of the functions carried out by the employee.**
- 2. Article 21(2) of Regulation No 44/2001 must be interpreted as meaning that an agreement on jurisdiction concluded before a dispute arises falls within that provision in so far as it gives the employee the possibility of bringing proceedings, not only before the courts ordinarily having jurisdiction under the special rules in Articles 18 and 19 of that regulation, but also before other courts, which may include courts outside the European Union.**

[Signatures]