

**Case C-358/21****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

9 June 2021

**Referring court:**

Cour de cassation (Belgium)

**Date of the decision to refer:**

20 May 2021

**Appellant in cassation:**

Tilman SA

**Respondent in cassation:**

Unilever Supply Chain Company AG

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**Brief summary of the facts and the procedure in the main proceedings**

- 1 In 2010, the appellant, Tilman SA, a company governed by Belgian law, concluded with Unilever Supply Chain Company AG, a company governed by Swiss law, an agreement entitled the Unilever Purchasing Contract ('the UPC'), by which the appellant undertook to wrap and package boxes of tea bags for a fixed price. In 2011, the parties signed a second agreement amending the price agreed. Following a change in the method of operation, a dispute arose in relation to the increase in the price charged by the appellant and the respondent paid the invoices only in part. The appellant brought proceedings against the respondent for payment of the outstanding amounts.
- 2 Before the court of first instance, the respondent contended that, in accordance with its general terms and conditions, only the English courts have jurisdiction to hear and determine the dispute. By judgment of 12 August 2015, the court of first instance ruled that the Belgian courts have jurisdiction to hear and determine the dispute, but that the contract is governed by, and must be interpreted in accordance with, English law.

- 3 The appellant lodged an appeal against that judgment. In its view, the contract must be governed by, and interpreted in accordance with, Belgian law, pursuant to its own general terms and conditions. The respondent brought a cross appeal, claiming that it is not the Belgian courts which have jurisdiction but rather the English courts.
- 4 The judgment delivered on 12 February 2020 by the Cour d’appel de Liège (Court of Appeal, Liège) (‘the judgment under appeal’) allowed the appeals, upheld the plea alleging a lack of jurisdiction raised by the respondent and held that, pursuant to the clause conferring jurisdiction contained in the respondent’s general terms and conditions, the Belgian courts have no jurisdiction to hear and determine the dispute that has arisen from the performance of the contract at issue.

### **Main arguments of the parties to the main proceedings**

- 5 Before the Cour de cassation (Court of Cassation, Belgium), the appellant has put forward one ground of appeal, alleging infringement of Article 23(1) and (2) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 (OJ 2009 L 147, p. 5) (‘the Lugano II Convention’), in so far as the judgment under appeal treats the agreement at issue in the same way as a contract concluded online in the context of which the buyer is required to tick a box stating that he accepts the seller’s general terms and conditions before being able to finalise his purchase and finds, therefore, that the appellant’s consent to the clause conferring jurisdiction contained in the respondent’s general terms and conditions is established because the appellant signed the contract at issue without reservation after having had the opportunity to take note of those general terms and conditions, download them and print them, without it being ensured that they were actually communicated to the appellant.
- 6 The agreement at issue states that, unless otherwise provided by contract, it is subject to the general terms and conditions for the purchase of goods [set out] at <https://e4us.unilever.com>, in other words the general terms and conditions available on the respondent’s website.
- 7 Those general terms and conditions of purchase include:
  - Article 1.2, pursuant to which, by accepting the UPC, the supplier agrees that those terms and conditions form part of the UPC and apply to it, to the exclusion of all other terms and conditions, and that they govern the contractual relations between the parties, together with the provisions of the UPC; and
  - Article 15.9, under which the English courts have jurisdiction to hear and determine any dispute in connection with the contract, and that contract is governed by, and to be interpreted in accordance with, English law.

The dispute concerns whether that agreement conferring jurisdiction – or choice of forum clause – was properly concluded between the parties and, therefore, whether it is enforceable against the appellant.

The parties agree that the Lugano II Convention is applicable.

8 Article 23 of the Lugano II Convention provides:

‘1. If the parties, one or more of whom is domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’.

...’

9 That provision is identical to Article 23 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; ‘the Brussels I Regulation’) (replaced with effect from 10 January 2015 by 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, OJ 2012 L 351, p. 1, ‘the Brussels Ia Regulation’). The objective of the Lugano II Convention signed by the Member States of the European Union with Iceland, Norway and Switzerland is to extend to those three States the rules contained in the Brussels I Regulation.

10 In view of that objective, of the substantial connection existing between the Lugano II Convention and the Brussels I Regulation and of the fact that the Lugano II Convention is an integral part of EU law and that the Court therefore has jurisdiction to rule on the interpretation of its provisions vis-à-vis their application by the courts of the Member States, ‘any court applying and interpreting this Convention shall pay due account to the principles laid down by

any relevant decision concerning the provision(s) concerned or any similar provision(s) of the 1988 Lugano Convention and the instruments referred to in Article 64(1) of the Convention rendered by the courts of the States bound by this Convention and by the Court of Justice of the [European Union]’ (that is to say, *inter alia*, the Brussels I Regulation) (Article 1 of Protocol 2 to the Lugano II Convention).

- 11 Article 23(1) and (2) of the Lugano II Convention must therefore be interpreted in accordance with the case-law of the Court of Justice of the European Union on Article 23 of the Brussels I Regulation.
- 12 The Court’s interpretation of the provisions of the Brussels Convention of 27 September 1968, the predecessor to the Brussels I Regulation, likewise applies to that regulation in so far as their provisions may be regarded as equivalent (judgment of 23 October 2014, *flyLAL-Lithuanian Airlines*, C-302/13, EU:C:2014:2319, paragraph 25 and the case-law cited).
- 13 According to the Court, the purpose of the formal conditions laid down in Article 23 of the Brussels I Regulation (previously Article 17 of the Brussels Convention of 27 September 1968) is to ensure that the consent of the parties is genuine. If one of the formal conditions laid down in Article 23 is satisfied, consent is established (judgment of 24 June 1981, *Elefanten Schuh*, 150/80, EU:C:1981:148, paragraph 29).
- 14 The issue is relatively simple when the general terms and conditions are annexed to the contract itself. Matters are more complicated when that is not the case. In its examination of the conditions to which proof of the genuine nature of one contracting party’s consent to a clause conferring jurisdiction contained in the general terms and conditions of the other contracting party is subject when those terms and conditions are not annexed to the contract itself, the Court of Appeal referred to the guidance provided in the judgments of 14 December 1976, *Estasis Saloti di Colzani* (24/76, EU:C:1976:177) and of 21 May 2015, *El Majdoub* (C-322/14, EU:C:2015:334) and took the view that:
  - with regard to the condition that, where the general terms and conditions are not annexed to the contract itself, reference must be made to them expressly in that contract, the contract at issue communicated by the respondent for signature by the appellant expressly provides that it is governed by the respondent’s general terms and conditions, unless otherwise provided in the contract or in other agreements concluded between the parties;
  - with regard to the condition that it must be possible for a person exercising ordinary care to check the reference to those general terms and conditions, the contract at issue indicates the hypertext link which allows the appellant to access the respondent’s general terms and conditions; the court of first instance noted that that link redirects to a page displaying two tabs, a ‘Log on’ tab and a ‘General Supplier Information’ tab, the latter of which leads to a page from

which various documents can be downloaded, including the general terms and conditions of purchase; it is established that the parties are to use English in all their commercial transactions, which, on the basis of the evidence adduced, are conducted solely by electronic means; the appellant is therefore familiar with the IT tools and ‘new communication techniques’ and has never expressed the slightest concern that it had been unable to access the respondent’s general terms and conditions;

- with regard to the condition that it must be possible for the general terms and conditions communicated by electronic means to be recorded in a durable format, a mere ‘possibility’ is sufficient; the page of the respondent’s website on which its general terms and conditions appear and to which access is provided via a hypertext link must allow those terms and conditions to be printed and saved before the contract is concluded; the court of first instance noted that the respondent’s general terms and conditions were one of the documents available for download by the appellant and could therefore be printed, and the appellant signed the contract at issue without reservation after having had the opportunity to take note of the respondent’s general terms and conditions, download them and print them.

15 Before the Court of Cassation, the appellant states that it is not in dispute that it signed a contract which contained merely a reference to the respondent’s general terms and conditions, which are available on the latter’s website. The judgment under appeal wrongly treats the agreement at issue in the same way as a ‘contract concluded online’ in the context of which the buyer is required ‘to tick a box indicating (that he) accepts the seller’s general terms and conditions before being able to finalise his purchase’. The appellant was in no way prompted to accept the respondent’s general terms and conditions formally by clicking on the corresponding box on the latter’s website. It therefore follows that the guidance provided by case-law and applied by the court of appeal cannot be transposed to the specific situation brought before it, since the situation in which a party signs a document which contains a reference to general terms and conditions that are accessible online differs from that in which that party formally and directly agrees to those general terms and conditions by ticking a relevant box.

16 It therefore concludes that the judgment under appeal is not legally justified in so far as it rules that the appellant’s consent to the clause conferring jurisdiction contained in the respondent’s general terms and conditions is established because the appellant signed the contract at issue without reservation after having had the opportunity to take note of those general terms and conditions, download them and print them – thereby finding simply that the respondent’s general terms and conditions were accessible – but fails to ensure that they were actually communicated to the appellant and that the appellant expressly agreed to them, even though the conditions to which the validity of clauses conferring jurisdiction are subject are to be interpreted strictly in so far as they pursue the overriding objective of ensuring that the consent of the interested parties is genuine.

### **Question referred for a preliminary ruling**

- 17 The Court of Cassation considers that, in order to examine that ground of appeal, the following question must be referred to the Court of Justice of the European Union for a preliminary ruling:

‘Are the requirements under Article 23(1)(a) and (2) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007, satisfied where a clause conferring jurisdiction is contained in general terms and conditions to which a contract concluded in writing refers by providing the hypertext link to a website, access to which allows those general terms and conditions to be viewed, downloaded and printed, without the party against whom that clause is enforced having been asked to accept those general terms and conditions by ticking a box on that website?’