

CJEU on Lugano II Convention and choice of court through a simple reference to a website, case Tilman, C-358/21

In its judgment handed down today, the Court of Justice clarifies in essence that, under the Lugano II Convention, an agreement of choice of court meets the requirements set in Article 23(1) and (2) of the Convention in the scenario where that choice of court agreement is contained in the general terms and conditions set out on a web page, to which the contract signed by the parties contains a reference to, with no box-ticking being mechanism being implemented on the said web page.

Doing so, the Court ruled that the relevant requirements provided for in the Lugano II Convention are drafted in essentially identical terms to those of the Brussels I bis Regulation (para. 34). Thus, the relevance of the judgment may not confine itself to the framework of the aforementioned Convention, but could possibly also extend to the Regulation.

Interestingly enough, earlier this week, thanks to the post made by Geert van Calster on his blog, I learned about the EWHC judgment concerning, inter alia, the choice of court and law included in general terms and conditions, by inclusion in email and /or e-mailed click-wrappable hyperlink. While the facts and issues discussed in those cases are not identical, both of them illustrate that there is still something to say about choice of court agreements in online environment, despite their widespread use.

Context of the request for a preliminary ruling and the legal issue at hand

A company established in Belgium enters into a contract with a Swiss company.

The contract states that it is subject to the general terms and conditions for the purchase of goods set out on a specific web page (with the address to the website

being precisely indicated in the agreement).

The aforementioned general terms and conditions provide that 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.

A dispute arises and the Belgian company initiates proceedings against its Swiss contractor before the courts in Belgium.

The dispute concerns whether that agreement on choice of court was properly concluded between the parties and, therefore, whether it is enforceable in the main proceedings.

Through the proceedings, up to the Court of Cassation, the Belgian company argues that it signed a contract which contained merely a reference to its contractor's general terms and conditions, which are available on the latter's website. It claims that it was in no way prompted to accept the general terms and conditions formally by clicking on the corresponding box on the website. It therefore follows that the guidance provided by case-law cannot be transposed to the present proceedings. The situation in which a party signs a document which contains a reference to general terms and conditions that are accessible online (as in the present case) differs from that in which that party formally and directly agrees to those general terms and conditions by ticking a relevant box (see judgments in *Estasis Saloti di Colzani*, 24/76, and *El Majdoub*, C-322/14).

Faced with this argument, the Court of Cassation brought its request for a preliminary ruling before the Court of Justice, asking:

“Are the requirements under Article 23(1)(a) and (2) of the [Lugano II Convention] 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?

Findings of the Court and its answer

Before addressing the preliminary question itself, the Court notes that is being called to interpret the Lugano II Convention in order to allow the Belgian courts to decide whether the parties to the main proceedings have conferred jurisdiction to set their disputes to the English courts. The Court recognizes that Brexit may have affected the admissibility of the request for a preliminary ruling and addresses that issue (paras. 28-31).

Indeed, under Article 23 of the Lugano II Convention, the parties may choose a court or the courts of a State bound by this Convention to set their disputes.

Seen from today's perspective, the choice of court made by the parties to the main proceedings relate to the courts of a State not-bound by the Convention (and, I digress, still looking from that perspective: even where the Belgian court declines jurisdiction in favour of the English prorogated court, the latter would not be bound by the Convention).

However, the Court notes that the main proceedings were initiated before the end of the transition period provided for in the Withdrawal Agreement (i.e. before 31 December 2020), during which the Lugano II Convention applied to the UK. As the choice of court agreement produces its effect at the time where the proceedings are brought before a national court (para. 30), and - in the present case - at that time the UK applied the Convention, it cannot be concluded that the interstition thereof is not necessary for the referring court to decide on the dispute before it (para. 31).

Concerning the substance, it stems from the request for a preliminary ruling that the argumentation of the Belgian company that led to the preliminary reference boiled down to the contention that the interpretation of the Lugano II Convention under which the choice of law agreement in question is enforceable against that company ignores the requirement of genuine consent. For the said company, observance of genuine consent should be an overriding interpretative policy with regard to Article 23.

The Court addresses this line of argumentation in a detailed manner in paras. 32-59. Thus, I just confine myself to mention only some of its findings.

In particular, the Court seems to stress the commercial/professional nature of the relationship that gave rise to the dispute in the main proceedings and distinguishes those proceedings from the situations that call for consumer-oriented protection (para. 55).

Following this approach the Court addresses, by extension, Article 23(1)(b) and (c) of the Lugano II Convention, which concern, respectively, the agreements concluded “in a form which accords with practices which the parties have established between themselves” and the agreements “in [a form regular for] international trade or commerce” (para. 56).

Ultimately, without necessarily distinguishing between the three scenarios described in (a), (b) and (c), the Court indicates that the requirements stemming from Article 23(1) and (2) can be met by a choice of court agreement, 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, even 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 (para. 59).

The judgment is available here (for now only in French).