Austrian Supreme Court Rules on the Validity of a Jurisdiction Clause Based on a General Reference to Terms of Purchase on a Website

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Recently, on 25 October 2023, the Austrian Supreme Court ('OGH') [2 Ob 179/23x, BeckRS 2023, 33709] ruled on whether a jurisdiction clause included in the terms of purchase ('ToP') was valid when a written contract made reference to the website containing the ToP but did not provide the corresponding internet link. The Court held that such a clause does not meet the formal requirements laid down under Article 25 of the Brussels I (recast) Regulation and, hence, is invalid. The judgment is undoubtedly of practical relevance for the conclusion of international commercial contracts that make reference to digitally available general terms and conditions ('GTCs'), and it is an important follow-up to the decisions by the Court of Justice of the European Union ('CJEU') in the cases of *El Majdoub* (C-322/14, available here) and *Tilman* (C-358/21, available here).

Factual Background and Procedure

A German company and an Austrian company concluded a service agreement in which the German company ('the service provider') undertook to provide the engineering plans for a product to the Austrian party ('the client'). The Austrian party sent its order to the service provider on a written form which stated (in translation): 'we order in accordance with the terms of purchase known to you (available on our website) and expect your confirmation by email immediately'. The order specified the client's place of business as the place of delivery. The German party subsequently signed and returned the same document, ticking its relevant parts and naming it as the 'order confirmation'. This confirmation was also in written form. The ToP – which were not attached to the contract, but

which were available on the client's website – contained a jurisdiction clause conferring jurisdiction on the Austrian courts for the resolution of disputes arising from the parties' contract. The clause also allowed the Austrian party to sue in another competent court and was thus asymmetric. The ToP additionally included a clause defining the place of performance for the delivery of goods or for the provision of services as the place specified by the client in the contract.

Upon a disagreement between the parties due to the allegedly defective performance of the service provider, the Austrian party brought proceedings against its contracting partner before the competent district court of Vienna, Austria, in reliance on the jurisdiction clause. The defendant successfully challenged the jurisdiction of the court by claiming that the clause did not meet the formal requirements of Article 25 of the Brussels I (recast) Regulation. Upon appeal, this issue was not addressed, but the judgment was nevertheless overturned as, in the court of appeals' view, the first instance court was competent based on the parties' agreement as to the place of performance. According to the court, the parties' numerous references to the place of business of the client should be understood as an agreement on the place of performance within the meaning of Article 7 of the Brussels I (recast) Regulation, even though the defendant argued that the engineering plans were actually drafted at their place of business and not that of the client. The defendant appealed against the judgment before the Austrian Supreme Court.

The Issue at Stake and the Judgment of the Court

As could be easily identified from the facts and the parties' dispute, the main question in this case is whether the formal requirements of the Brussels I (recast) Regulation, and in particular its demand of 'written form', could be satisfied by a simple reference to a website where the party's ToP – including the jurisdiction clause – could (allegedly) be retrieved, hence allowing the court to conclude that parties indeed reached an agreement as to jurisdiction.

The Court answered the first question in the negative and found the jurisdiction clause invalid. This is because the 'written form' requirement under Article 25(1)(a) of the Brussels I (recast) Regulation is met only if the contract expressly refers to the GTCs containing a jurisdiction clause and if it can be proved that the other party actually received them. According to the Court's reasoning, the mere reference to the website did not make the jurisdiction clause (or the ToP, in

general) accessible to the other contracting party in a reproducible manner; this is unlike the case of a written contract providing a specific link (as in *Tilman*) or the case of 'click-wrapping' (as in *El Majdoub*), as those are contractual constellations sufficiently establishing that the parties had access to the terms of the agreement (paras 19–20 of the judgment).

General Assessment in Light of the Case Law of the CJEU

Choice-of-court agreements are undoubtedly an important part of today's highly digitalised business environment, and it is to be expected that they will be found in digitally available GTCs. Yet in practice their validity is often challenged by one of the parties. The Court of Justice has indeed had to deal with such issues in the past, and the present case gives us cause to briefly revisit those rulings.

In *El Majdoub* (commented before on blogs, here and here), the CJEU had to decide on the question of whether a 'click-wrap' choice-of-court clause included in the GTCs provided a durable record which was to be considered as equivalent to a 'writing' under the then current Article 23(2) of the Brussels Regulation. In the *El Majdoub* case, a sales contract was concluded electronically between the parties by means of 'click-wrapping', i.e. in order to conclude the agreement, the buyer had to click on a box indicating acceptance of the seller's GTCs. The GTCs – which containing the agreement as to jurisdiction – were available in that box via a separate hyperlink that stated 'click here to open the conditions of delivery and payment in a new window'. Although this window did not open automatically upon registration to the website and upon every individual sale, the CJEU found that such a clause provided a durable record as required by Article 23(2) of the Brussels I Regulation since it gave the buyer the possibility of printing and saving the GTCs before conclusion of the contract. This holding should be welcomed as the CJEU gave its blessing to the already existing and much-used practice of 'click-wrapping' in the digital business environment, and the Court thus showed its support for the use of technology in contractual practices (in line with aims previously stated in the Commission Proposal (COM(1999) 348 Final)). The Court's conclusion is, of course, limited in the sense that it only confirms that the 'click-wrapping' method provides a durable record of the agreement; there is no analysis as to the requirement of a 'consensus' on jurisdiction between the parties in the case of digital contracts. Since the buyer had to accept the terms before the purchase, the Court took this as a consent and did not address the issue (see, similarly, van Calster and Dickinson and Ungerer, LMCLQ 2016, 15, 18–19). It

should, in this regard, be observed that establishing the existence of such an agreement is the purpose of the form requirements, a fact confirmed by the case law of the Court, see, e.g. *Salotti*, para 7 (C-24/76, available here). Still, one should admit that questions as to the existence of consent would probably not be much of an issue in the 'click-wrapping' context, especially in B2B cases, as the 'click' concludes the agreement – unless, of course, there are other circumstances (e.g. mistake) that affect the quality of consent (see, similarly, van Calster on *Tilman*).

In the later case of *Tilman* (previously commented on PIL blogs on a couple of occasions, see the comments by Pacula, by Ho-Dac, and by Van Calster, here and here), the situation was more complex. There was a written agreement between the parties in which the GTCs – which for their part contained an agreement as to jurisdiction in favour of English courts – were referred to by provision of the link to the website where they could be accessed. In other words, there was no 'click-wrap' type of agreement; rather, it was a written agreement specifying the link (i.e. the internet address) of the website on which the GTCs could be retrieved. The CJEU then had to deal with the question of whether this manner of incorporating a jurisdiction clause satisfies the conditions of Article 23(1) and (2) of the Lugano II Convention, which are identical to Article 23(1) and (2) of the Brussels I Regulation. The Court answered this question in the affirmative and expanded the possibility of making reference to GTCs by inclusion of the link in written contracts because, in the Court's view, making those terms accessible to the other party via a link before the conclusion of the contract is sufficient to satisfy formal requirements, especially when the transaction involves commercial parties who can be expected to act diligently. There is no further requirement of actual receipt of those terms. This, again, is a modern and pragmatic approach that simplifies commercial contractual practice, and it is a ruling that should be welcomed. However, it is unfortunate that the Court did not address the technical details in the facts of the case; namely, the link did not open the GTCs directly and instead opened a page on which the GTCs could be searched for and downloaded (see, Summary of the Request for Preliminary Ruling, para 14, available here). This is a point which may give rise to questions as to the proper incorporation of GTCs into a contract (in this regard, see also Finkelmeier, NJW 2023, 33, 37; Capaul, GPR 2023, 222, 225) or as to the existence of consent (on further thoughts as regards the question of consent in both of the CJEU cases, see van Calster). The facts of the case also leave room for a different interpretation in

other circumstances, such as when the link refers to a homepage, the link is broken, or the website has been updated (see, in this regard, Finkelmeier, 37; Capaul, 225, and also Krümmel, IWRZ, 131, 134).

In the present case before the Austrian Supreme Court, we encounter yet a different scenario in which there is definitely room for different interpretations. Again, there is a written contract which makes reference to GTCs and which states that they are available on the client's website. But here, the client did not supply the service provider with the hyperlink address creating accessibility to the GTCs. And the Court rightly held that the CJEU's conclusion in *Tilman* should not be understood as saying that a general reference to GTCs in the contract will always be sufficient to prove they have been made available. In the Austrian Court's understanding, the mere reference to the existence of the GTCs was not sufficient so as to constitute their proper inclusion into the contract and to prove consensus between the parties in a clear and precise manner (paras 19–20 of the judgment). One could, of course, always argue in favour of a further relaxation of the form requirements, especially when the transaction involves commercial parties who should act diligently when entering into contracts. But it is obvious that in a case in which the written contract does not even provide the necessary link, it will be a burden for the counterparty to search the website and retrieve the actual version of the referenced GTCs before entering into the contract, whereas the other party would unduly benefit from being able to fulfil her/his obligation by making a mere reference to the existence of the GTCs. Hence, it is good that the Austrian court did not further extend *Tilman*'s already broad interpretation.

Conclusion

Despite being an important part of cross-border commercial practice, choice-of-court agreements often become the source of an additional dispute between the parties in terms of their existence and validity. In the vast majority of cases, these disputes are complex. This is probably even more the case with the increasing use of technology in contracting. All these cases are indeed good examples of such disputes. But they can only be seen as new and different additions to the jigsaw puzzle rather than the final pieces. More cases with even more complex scenarios will likely follow, as contracting practices continue to develop along with technological advancements.

Postscript: The Place of Performance

Having found the jurisdiction clause invalid, the Court would have had to determine the place of performance of the contract as another basis for special jurisdiction under the Regulation. A decision on this latter issue was deferred, however, since the Court had already referred a similar question on the determination of the place of performance to the CJEU in a different proceeding (OGH, decision of 13 July 2023, 1 Ob 73/23a) concerning a service contract.