



## International

# Effective jurisdiction clause in general terms and conditions in cross-border B2B business transactions

Dear Reader,

With the following newsletter we would like to inform you about a very practically-relevant decision of the European Court of Justice ("ECJ") of November 24, 2022, Ref.: C-358/21, which concerns important principles for the use of jurisdiction agreements in general terms and conditions in business-to-business ("B2B") transactions.

### Facts of the case

The judgment concerns the interpretation of Art. 23 I letter a and II of the Lugano Convention (LuGÜ II) and the agreement of General Terms and Conditions (GTC) in the context of a dispute between the Belgian company Tilman SA and the Swiss enterprise Unilever Supply Chain Company AG. The parties concluded two contracts: one contract for the packaging and filling of tea bag boxes and a second contract to change the agreed price. The second contract referred to Unilever's GTC, which could be viewed and downloaded via a hyperlink on a website. The GTC contained a jurisdiction clause which provided for the exclusive jurisdiction of the **English** courts for the resolution of disputes.

Following disagreements over the increase in the invoiced price, Unilever only partially paid the invoices issued by Tilman. Tilman sued Unilever in the **Belgian** courts for payment of the outstanding amounts. Unilever objected that, according to the General Terms and Conditions, the English courts alone had jurisdiction to decide the dispute. The Belgian court of first instance declared itself **competent** but ruled that the contract was governed

by English law and had to be interpreted in accordance with English law. Both parties appealed against this ruling, with Tilman claiming Belgian law and Unilever claiming the jurisdiction of the English courts.

The ECJ ruled that the jurisdiction clause was valid and thus the **English** courts had jurisdiction, while the Belgian courts had **no jurisdiction**.

### Summary of the decision

Article 23 para. (1) of the Brussels II Convention generally allows jurisdiction clauses. According to Art. 23 para. (1) sentence 2 LuGÜ II, the courts so chosen shall then have **exclusive** jurisdiction. However, Art. 23 (1) sentence 3 (a) stipulates that a choice of court agreement must be either concluded in writing or concluded orally with written confirmation. Since this strict written form requirement may be impractical in commercial transactions, Art. 23 para (1) sentence lit. (b) and (c) also allow an agreement in a form which corresponds to the "trade practices" which have arisen between the parties or which corresponds to a trade practice which the parties knew or ought to have known and which is generally known and regularly observed by parties to contracts of this kind in the relevant line of business. Finally, Art. 23 para. (2) of the LuGÜ II stipulates that electronic transmissions that enable a permanent record of the agreement are deemed equivalent to "written form" as defined in (1).

Taking this standard into account, the ECJ ruled that in cross-border business transactions between entrepreneurs ("B2B"), a jurisdiction clause in general terms and conditions may also be



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validly agreed if:

- the contract refers to the GTC by providing a hyperlink to the GTC on a website,
- these **can** be taken note of there and downloaded as well as printed out.

According to the ruling, it is **not** necessary in B2B:

- to attach the GTC directly to the contract,
- to have to confirm the GTC by clicking a checkbox.

### Significance for practice

First of all, this decision is of great importance for companies engaged in cross-border legal transactions between the EU and Switzerland, Norway and Iceland. However, due to comparable regulations in intra-European legal transactions and because of the explicit reference by the court, it is also groundbreaking for future contract conclusions if both companies are domiciled in a different EU member state in each case. By confirming the effectiveness of such jurisdiction clauses in GTCs, legal certainty is created and the administrative burden for contract conclusions in B2B business transactions is reduced.

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### Recommendation

A choice of law clause in itself does not automatically concern the question of the competent courts who shall rule over a potential dispute. This means that the parties may well agree (expressly or by conclusive conduct) on the application of a particular legal system without, however, agreeing on a place of jurisdiction. This can then have the consequence that the courts of another country must decide according to an applicable law that is “foreign” to them. For this reason alone, it is advisable to choose not only the question of the applicable law, but also the place of jurisdiction.

To ensure that your jurisdiction clauses in GTCs are effectively agreed, we recommend:

- a clear and understandable wording of the jurisdiction clause,
- the provision of a clearly visible hyperlink to the GTC on your website,
- ensuring that the GTC are easily accessible, downloadable, and printable.

If you have any questions regarding the drafting of contracts in an international context, we will be happy to assist you!



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