



## Reports of Cases

### JUDGMENT OF THE COURT (Seventh Chamber)

24 November 2022\*

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Jurisdiction and the enforcement of judgments in civil and commercial matters – Lugano II Convention – Jurisdiction clause – Formal requirements – Clause included in the general terms and conditions – General terms and conditions which may be viewed and printed from a hypertext link mentioned in a contract concluded in writing – Consent of the parties)

In Case C-358/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Court of Cassation, Belgium), made by decision of 20 May 2021, received at the Court on 9 June 2021, in the proceedings

**Tilman SA**

v

**Unilever Supply Chain Company AG,**

THE COURT (Seventh Chamber),

composed of M.L. Arastey Sahún, President of the Chamber, F. Biltgen (Rapporteur) and J. Passer, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Tilman SA, by N. Cariat, A. Hoc and B. Hoc,
- Unilever Supply Chain Company AG, by W. van Eeckhoutte, lawyer,
- the Belgian Government, by M. Jacobs, C. Pochet and M. van Regemorter, acting as Agents,
- the German Government, by J. Möller, U. Bartl, M. Hellmann and R. Kanitz, acting as Agents,

\* Language of the case: French.

- the Swiss Government, by N. Marville-Dosen and J. Schickel-Küng, acting as Agents,
- the European Commission, by A. Azéma and S. Noë, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 23(1)(a) and (2) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, the conclusion of which was approved on behalf of the European Community by Council Decision 2009/430/EC of 27 November 2008 (OJ 2009 L 147, p. 1; ‘the Lugano II Convention’).
- 2 The request has been made in proceedings between Tilman SA, whose registered office is in Belgium, and Unilever Supply Chain Company AG (‘Unilever’), whose registered office is in Switzerland, concerning the non-payment by Unilever of sums invoiced by Tilman.

### **Legal context**

#### ***Lugano II Convention***

- 3 The Lugano II Convention was signed by the European Community, the Kingdom of Denmark, the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation.
- 4 According to Article 1(3) of the Lugano II Convention:

‘In this Convention, the term “State bound by this Convention” shall mean any State that is a Contracting Party to this Convention or a Member State of the European Community. It may also mean the European Community.’
- 5 Article 23 of the Lugano II Convention, headed ‘Prorogation of jurisdiction’, provides in paragraphs 1 and 2:

‘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”.’

6 Under Article 64(1) and (2) of the Lugano II Convention:

‘1. This Convention shall not prejudice the application by the Member States of the European Community of the 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”)], as well as any amendments thereof, of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [(OJ 1972 L 299, p. 32)], signed at Brussels on 27 September 1968, and of the Protocol on interpretation of that Convention by the Court of Justice of the European Communities, signed at Luxembourg on 3 June 1971, as amended by the Conventions of Accession to the said Convention and the said Protocol by the States acceding to the European Communities [(“the Brussels Convention”)], as well as of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Brussels on 19 October 2005.

2. However, this Convention shall in any event be applied:

(a) in matters of jurisdiction, where the defendant is domiciled in the territory of a State where this Convention but not an instrument referred to in paragraph 1 of this Article applies, or where Articles 22 or 23 of this Convention confer jurisdiction on the courts of such a State;

...’

7 Under Article 1(1) of Protocol No 2 on the uniform interpretation of the [Lugano II] Convention and on the Standing Committee:

‘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 Communities’.

### ***The Brussels I Regulation***

8 Article 23(1) and (2) of the Brussels I Regulation provides:

‘1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State 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”.’

### ***The Brussels Ia Regulation***

9 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’) repealed the Brussels I Regulation.

10 Article 25 of the Brussels Ia Regulation, headed ‘Prorogation of jurisdiction’, which is in Chapter II of that regulation, itself headed ‘Jurisdiction’, states:

‘1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State 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, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:

- (a) in writing or evidenced in writing;
- (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”.

...’

### ***The Withdrawal Agreement***

- 11 Article 2 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7), which was signed in Brussels and London on 24 January 2020 and entered into force on 1 February 2020 (‘the Withdrawal Agreement’), provides:

‘For the purposes of this Regulation, the following definitions shall apply:

(a) “Union law” means:

...

(iv) the international agreements to which the Union is party and the international agreements concluded by the Member States acting on behalf of the Union;

...’

- 12 Article 67 of the Withdrawal Agreement, headed ‘Jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities’, provides in paragraph 1:

‘In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, in respect of legal proceedings instituted before the end of the transition period and in respect of proceedings or actions that are related to such legal proceedings pursuant to Articles 29, 30 and 31 of [the Brussels Ia Regulation] ..., the following acts or provisions shall apply:

(a) the provisions regarding jurisdiction of [the Brussels Ia Regulation];

...’

- 13 Under Article 126 of the Withdrawal Agreement, headed ‘Transition period’:

‘There shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020.’

- 14 Article 127 of the Withdrawal Agreement, headed ‘Scope of the transition’, states:

‘1. Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period.

...

6. Unless otherwise provided in this Agreement, during the transition period, any reference to Member States in the Union law applicable pursuant to paragraph 1, including as implemented and applied by Member States, shall be understood as including the United Kingdom.

...'

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

- 15 On 22 November 2010, Tilman and Unilever concluded an initial contract under which Tilman undertook, on behalf of Unilever, to wrap and package boxes of tea bags for a fixed price.
- 16 By a second contract, concluded on 6 January 2011, the agreed price was amended. That contract specified that, unless otherwise provided, it was governed by Unilever's general terms and conditions for the purchase of goods. Those general terms and conditions, which could be viewed and downloaded from a website by means of a hypertext link included in that contract, provided that each party to the contract '[would] irrevocably submit to the exclusive jurisdiction of the English courts for the resolution of any dispute which might arise directly or indirectly from the contract'.
- 17 Following a change in the invoicing arrangements, a disagreement arose between the parties in relation to the increase in the price charged and Unilever paid the invoices issued by Tilman only in part.
- 18 Tilman brought proceedings against Unilever before the Belgian courts for payment of the outstanding amounts. Unilever then claimed that, under the general terms and conditions of the contract at issue in the main proceedings, only the English courts had jurisdiction to hear the dispute.
- 19 By judgment of 12 August 2015, the Belgian court of first instance declared that it had jurisdiction to hear the case, but held that the contract was governed by and had to be interpreted in accordance with English law.
- 20 Tilman lodged an appeal against that judgment, claiming that the contract should be governed by, and interpreted in accordance with, Belgian law. Unilever brought a cross-appeal, arguing that jurisdiction lay not with the Belgian courts but with the English courts.
- 21 By judgment of 12 February 2020, the Cour d'appel de Liège (Court of Appeal, Liège, Belgium) upheld Unilever's plea alleging a lack of jurisdiction, holding that, in accordance with the jurisdiction clause contained in the general terms and conditions of the contract at issue in the main proceedings, the Belgian courts had no jurisdiction to hear the dispute arising from the performance of that contract.
- 22 Tilman brought an appeal on a point of law against that judgment before the Cour de cassation (Court of Cassation, Belgium), alleging infringement of Article 23(1) and (2) of the Lugano II Convention. According to Tilman, the Cour d'appel de Liège (Court of Appeal, Liège) wrongly equated the situation in the main proceedings with that in which the contract is concluded online but in which the purchaser has to tick a box stating that he or she accepts the seller's general terms and conditions.

- 23 The referring court asks whether, in the case in the main proceedings, the conditions to which the proof of Tilman's genuine consent to the jurisdiction clause is subject have been satisfied, given that that clause was set out in Unilever's general terms and conditions for the purchase of goods and not in the contract at issue in the main proceedings, and that those terms and conditions were not directly annexed to that contract.
- 24 On the one hand, the referring court points out that, in the judgment of 12 February 2020, the Cour d'appel de Liège (Court of Appeal, Liège) held that the conditions set out in the Court's case-law, inter alia 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), appear to be satisfied.
- 25 As regards the condition that the contract must refer expressly to the general terms and conditions, the contract sent by Unilever to Tilman for signature and actually signed by Tilman on 6 January 2011 expressly provides that it is governed by Unilever's general terms and conditions for the purchase of goods, unless otherwise provided in the contract or in other agreements made between the parties. As for the condition that 'it must be possible for a person exercising ordinary diligence to check' the reference to the general terms and conditions, that contract includes a hypertext link which allows access to Unilever's general terms and conditions. As for the condition that the general terms and conditions must be capable of being 'recorded in a durable format', it was possible for Tilman, by accessing the website on which Unilever's general terms and conditions appeared, to download them and to print them.
- 26 However, on the other hand, Tilman was not asked to tick a box to indicate that it accepted Unilever's general terms and conditions, so that the question arises as to whether the provisions of Article 23(1) and (2) of the Lugano II Convention were complied with.
- 27 In those circumstances, the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following question to the Court:

'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?'

### **The question referred for a preliminary ruling**

- 28 As a preliminary point, it should be recalled that, in accordance with Article 67(1)(a) of the Withdrawal Agreement, the provisions on jurisdiction in the Brussels Ia Regulation apply, in the United Kingdom as well as in the Member States in situations involving the United Kingdom, in respect of legal proceedings instituted before the end of the transition period provided for in Article 126 of the Withdrawal Agreement.
- 29 In addition, under Article 127 of the Withdrawal Agreement, EU law, including the international agreements among which is the Lugano II Convention, is applicable to the United Kingdom during that transition period.

- 30 As regards jurisdiction clauses, it must be borne in mind that those clauses are, by their nature, a choice of jurisdiction which has no legal effect for so long as no judicial proceedings have been commenced and which takes effect only on the date on which the judicial action is set in motion (judgment of 13 November 1979, *Sanicentral*, 25/79, EU:C:1979:255, paragraph 6). That is therefore the relevant date for the purposes of assessing the scope of such a clause in relation to the applicable legal rules.
- 31 In the present case, it is apparent from the information in the file before the Court that the judicial action at issue in the main proceedings was brought prior to 31 December 2020, the expiry date of the transition period provided for in Article 126 of the Withdrawal Agreement, with the result that the interpretation of the Lugano II Convention remains necessary in order to resolve the dispute in the main proceedings.
- 32 As to the substance, the referring court seeks, in essence, to ascertain whether Article 23(1)(a) and (2) of the Lugano II Convention must be interpreted as meaning that a jurisdiction clause is validly concluded where it is contained in general terms and conditions to which the 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 operates having been asked to accept those general terms and conditions by ticking a box on that website.
- 33 For the purpose of answering that question, it must be borne in mind that, as is apparent from Article 1(1) of Protocol No 2 on the interpretation of the Lugano II Convention, that convention must be applied and interpreted in the light of the principles laid down by the Court concerning the provision(s) at issue or any similar provision contained in other instruments, including the Brussels Convention and the Brussels I Regulation.
- 34 Accordingly, and since Article 23(1) and (2) of the Lugano II Convention is identical to Article 23(1) and (2) of the Brussels I Regulation, and Article 23(1) of that regulation was itself drafted in almost identical terms to the first paragraph of Article 17 of the Brussels Convention, it is necessary, for the purposes of interpreting Article 23(1) and (2) of the Lugano II Convention, to take account of the Court's interpretation of the corresponding provisions of the Brussels Convention and of the Brussels I Regulation (see, by analogy, judgments of 7 February 2013, *Refcomp*, C-543/10, EU:C:2013:62, paragraphs 18 and 19, and of 21 May 2015, *El Majdoub*, C-322/14, EU:C:2015:334, paragraphs 27 and 28). Similarly, in so far as Article 25(1) and (2) of the Brussels Ia Regulation has replaced, essentially in identical terms, Article 23(1) and (2) of the Brussels I Regulation, the Court's case-law on the first of those provisions must also be taken into consideration.
- 35 Under Article 23(1) of the Lugano II Convention, the parties, one or more of whom is domiciled in a State bound by that convention, may agree to confer exclusive jurisdiction on a court of a State which is also bound by that convention to settle any disputes which have arisen in connection with a particular legal relationship. In order to be valid, that conferral of jurisdiction must be agreed, *inter alia*, as is apparent from subparagraph (a) of that provision, 'in writing or evidenced in writing'.
- 36 Regarding the provisions of Article 23 of the Brussels I Regulation, the Court has held that they must be strictly interpreted, since they exclude both jurisdiction as determined by the general principle of the courts of the State in which the defendant is domiciled, laid down in Article 2 of



that regulation, and the special jurisdiction provided for in Articles 5 to 7 thereof (see, to that effect, judgment of 21 May 2015, *El Majdoub*, C-322/14, EU:C:2015:334, paragraph 25 and the case-law cited).

- 37 Article 23(1) of the Brussels I Regulation clearly indicates that its scope is limited to cases in which the parties have ‘agreed’ on a court. It is that consensus between the parties which justifies the primacy granted, in the name of the principle of the freedom of choice, to the choice of a court other than that which may have had jurisdiction under that regulation (see, to that effect, judgments of 21 May 2015, *El Majdoub*, C-322/14, EU:C:2015:334, paragraph 26 and the case-law cited, and of 20 April 2016, *Profit Investment SIM*, C-366/13, EU:C:2016:282, paragraph 24).
- 38 By making the validity of such a jurisdiction clause subject to the existence of an ‘agreement’ between the parties, Article 23(1) of the Brussels I Regulation imposes on the court before which the matter is brought the duty of examining whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated (see, by analogy, judgments of 14 December 1976, *Estasis Saloti di Colzani*, 24/76, EU:C:1976:177, paragraph 7; of 7 February 2013, *Refcomp*, C-543/10, EU:C:2013:62, paragraph 27; and of 20 April 2016, *Profit Investment SIM*, C-366/13, EU:C:2016:282, paragraph 27).
- 39 Indeed, the purpose of the requirements as to form imposed by Article 23(1) of the Brussels I Regulation is to ensure that consensus between the parties is in fact established (see, by analogy, as regards the Brussels Convention, judgment of 14 December 1976, *Estasis Saloti di Colzani*, 24/76, EU:C:1976:177, paragraph 7), since ensuring real consent is one of the aims of that provision (see, to that effect, judgments of 7 February 2013, *Refcomp*, C-543/10, EU:C:2013:62, paragraph 28 and the case-law cited, and of 20 April 2016, *Profit Investment SIM*, C-366/13, EU:C:2016:282, paragraph 27).
- 40 In that regard, the Court has held, as regards the Brussels Convention, that, in principle, a jurisdiction clause included among the general terms and conditions of sale of one of the parties satisfies the requirement as to the written form laid down in the first paragraph of Article 17 of the Brussels Convention, where those general terms and conditions are printed on the back of the contract and that the contract contains an express reference to those general terms and conditions, or where the parties have expressly referred in the text of their contract to an offer which, in turn, makes express reference to the general terms and conditions, where such express reference may be checked by a party exercising ordinary diligence and if it is established that the general terms and conditions containing the jurisdiction clause were in fact communicated to the other contracting party (see, to that effect, judgment of 14 December 1976, *Estasis Saloti di Colzani*, 24/76, EU:C:1976:177, paragraphs 10 and 12).
- 41 However, the Court has stated that the requirement as to the written form laid down in the first paragraph of Article 17 of the Brussels Convention is not fulfilled in the case of indirect or implied references to earlier correspondence, since that would not provide any certainty that the jurisdiction clause was in fact part of the subject matter of the contract itself (see, to that effect, judgment of 14 December 1976, *Estasis Saloti di Colzani*, 24/76, EU:C:1976:177, paragraph 12).
- 42 Similarly, the Court has held that a jurisdiction clause does not satisfy the requirements of Article 25(1)(a) of the Brussels Ia Regulation, the wording of which is similar to that of Article 23(1)(a) of the Lugano II Convention, where the contract was concluded verbally and was

not evidenced in writing, and the general terms and conditions containing that jurisdiction clause were mentioned only in the invoices issued by one of the parties (see, to that effect, judgment of 8 March 2018, *Saey Home & Garden*, C-64/17, EU:C:2018:173, paragraphs 28 and 29).

- 43 However, according to Article 23(2) of the Brussels I Regulation, which constitutes a new provision as compared with Article 17 of the Brussels Convention, added in order to take account of the development of new methods of communication, the validity of an agreement conferring jurisdiction, such as that at issue in the main proceedings, may depend, inter alia, on the possibility of providing a durable record (judgment of 21 May 2015, *El Majdoub*, C-322/14, EU:C:2015:334, paragraph 32).
- 44 As follows from a literal interpretation of that provision, it requires there to be the ‘possibility’ of providing a durable record of the agreement conferring jurisdiction, regardless of whether the text of the general terms and conditions has actually been durably recorded by the purchaser before or after he or she clicks the box indicating that he or she accepts those terms and conditions (judgment of 21 May 2015, *El Majdoub*, C-322/14, EU:C:2015:334, paragraph 33).
- 45 Indeed, the purpose of that provision is to treat certain forms of electronic communications in the same way as written communications, in order to simplify the conclusion of contracts by electronic means, since the information concerned is also communicated if it is accessible on screen. In order for electronic communication to offer the same guarantees, in particular as regards evidence, it is sufficient that it is ‘possible’ to save and print the information before the conclusion of the contract (judgment of 21 May 2015, *El Majdoub*, C-322/14, EU:C:2015:334, paragraph 36).
- 46 In the present case, it is apparent from the file before the Court that the jurisdiction clause at issue in the main proceedings is set out in Unilever’s general terms and conditions, to which express reference is made in the written contract concluded between the parties.
- 47 As for a situation in which, as in the present case, the general terms and conditions in which the jurisdiction clause appears are not directly annexed to the contract, it must be held that, in the light of the case-law cited in paragraphs 37 to 45 of the present judgment, such a clause is lawful where, in the actual text of the contract signed by both parties, an express reference is made to those general terms and conditions containing that clause.
- 48 That applies, however, only in case of an explicit reference, which can be checked by a party exercising ordinary diligence and where it is established that the general conditions containing the jurisdiction clause were actually communicated to the other contracting party (judgment of 7 July 2016, *Hószig*, C-222/15, EU:C:2016:525, paragraph 40).
- 49 In the present case, it does not appear to be disputed that the text of the contract at issue in the main proceedings contains such an express reference, capable of being checked by the applicant in the main proceedings, which is, however, a matter for the referring court to assess.
- 50 It is necessary, therefore, to ascertain whether the general terms and conditions were in fact communicated to that contracting party.
- 51 Since, in accordance with Article 23(2) of the Brussels I Regulation, as interpreted by the Court, the information concerned is transmitted if that information is accessible by means of a screen, the reference in the written contract to general terms and conditions by the inclusion of a

hypertext link to a website, access to which, in principle, allows those general terms and conditions to be viewed, so long as that hypertext link functions and can be activated by a party exercising ordinary diligence, equates a fortiori to evidence of communication of that information.

- 52 In such a situation, the fact that there is no box on the webpage in question that could be ticked for the purposes of expressing acceptance of those general terms and conditions or that the page containing those terms and conditions does not open automatically on access to that website cannot call that finding into question (see, to that effect, judgment of 21 May 2015, *El Majdoub*, C-322/14, EU:C:2015:334, paragraph 39), since it is possible to access those general terms and conditions before the contract is signed and those terms and conditions are accepted when the contracting party concerned signs the contract.
- 53 Moreover, since the mere possibility of saving and printing the general terms and conditions before the conclusion of the contract is sufficient to satisfy the formal requirements, it matters little whether the information transmitted was ‘given’ by the undertaking concerned or ‘received’ by the contracting party.
- 54 The formal requirements laid down in Article 23(1) of the Brussels I Regulation reflect a wish not to impede commercial practices but to override the effects of clauses which might go unnoticed in contracts, such as conditions which appear in printed forms used for correspondence or in invoices and which have not been accepted by the party against whom they operate (see, to that effect, judgments of 24 June 1981, *Elefanten Schuh*, 150/80, EU:C:1981:148, paragraph 24, and of 7 July 2016, *Hószig*, C-222/15, EU:C:2016:525, paragraph 36).
- 55 In the present case, the case at issue in the main proceedings concerns ongoing contractual relationships between commercial undertakings, with the result that consumer protection requirements for purchasers cannot be taken into consideration.
- 56 In any event, and even though the referring court has not asked the Court about any possible usage in international trade or commerce known to the parties, it should be added that, apart from the two options provided for in Article 23(1)(a) of the Lugano II Convention, namely conclusion in writing or evidenced in writing, Article 23(1) of that convention adds, in paragraphs (b) and (c) respectively, that a jurisdiction clause may also be concluded in a form which accords with practices which the parties have established between themselves, or, 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 (see, by analogy, judgment of 8 March 2018, *Saey Home & Garden*, C-64/17, EU:C:2018:173, paragraph 31).
- 57 In such a case, a jurisdiction clause is deemed to be valid where it is concluded in a form accepted in that sector of which the parties are aware or ought to have been aware. While that relaxation does not mean that there is not necessarily any need for consensus between parties, since it is still one of the objectives of that provision to ensure that there is real consent on the part of the persons concerned, consensus on the part of the contracting parties as to a jurisdiction clause is nevertheless presumed to exist where commercial practices in the relevant branch of international trade or commerce exist in that regard, of which those parties are aware or ought to have been aware (see, to that effect, judgments of 20 February 1997, *MSG*, C-106/95, EU:C:1997:70, paragraphs 16, 17 and 19, and of 20 April 2016, *Profit Investment SIM*, C-366/13, EU:C:2016:282, paragraphs 39 and 40).

- 58 In the present case, it will be for the referring court, if necessary, to determine whether a jurisdiction clause was concluded between the parties to the main proceedings in one of the forms set out in Article 23(1)(b) and (c) of the Lugano II Convention.
- 59 Having regard to the foregoing considerations, the answer to the question referred is that Article 23(1) and (2) of the Lugano II Convention must be interpreted as meaning that a jurisdiction clause is validly concluded where it is contained in the general terms and conditions to which the contract concluded in writing refers by the inclusion of a hypertext link to a website, access to which allows those general terms and conditions to be viewed, downloaded and printed prior to that contract being signed, without the party against whom that clause operates having been formally asked to accept those general terms and conditions by ticking a box on that website.

### Costs

- 60 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 (Seventh Chamber) hereby rules:

**Article 23(1) and (2) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, the conclusion of which was approved on behalf of the European Community by Council Decision 2009/430/EC of 27 November 2008,**

**must be interpreted as meaning that a jurisdiction clause is validly concluded where it is contained in the general terms and conditions to which the contract concluded in writing refers by the inclusion of a hypertext link to a website, access to which allows those general terms and conditions to be viewed, downloaded and printed prior to that contract being signed, without the party against whom that clause operates having been formally asked to accept those general terms and conditions by ticking a box on that website.**

[Signatures]