29.9.99

REPORT

on the national case-law relating to the Lugano Convention

drawn up in performance of the task entrusted to the Spanish, Greek and Swiss delegations at the 5th session of the Lugano Convention's Standing Committee (Interlaken, 18.9.1998)

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Introduction

The original impetus to draw up the present report was given at the last meeting of the Lugano Convention's Standing Committee during discussions aimed at exploring "the possibilities to improve its system" (point 4 of the agenda). The idea was triggered off by some remarks of the Italian delegation; these led the Committee to examine whether it was sufficient, as up till now, to simply take cognizance of the case-law materials communicated by the services of the Court of justice in application of Protocol No. 2 or whether it should go a step further and start analysing it. This would in particular also entail analysing the case-law relating to the Brussels Convention and "underlining the current divergencies of interpretation as well as those which may occur in the future" (minutes of the 5th meeting of the Standing Committee, point II.4, fifth paragraph). Questions having been raised as to the appropriateness of such an undertaking as well as to its consistency with the provisions of Protocol No. 2, the Committee decided to postpone its final decision until a "model report" on national case-law had been drawn up (above-mentioned minutes, point II.4, sixth paragraph). Indeed, in the light of such a report, which is as yet experimental, the Committee would be in a better position to take a final decision concerning the proposals as to the use of the case-law materials relating to the Lugano Convention. This is precisely the purpose of the present report and its authors hope it will lay the foundations for an "in-depth discussion" on the matter (above-mentioned minutes, *ibid*).

In accordance with the general feeling expressed at the meeting, the drafters of the present report agreed to base it above all on the case-law communicated by the services of the Court of Justice in application of Protocol No. 2 of the Lugano Convention and, in principle, to concentrate their research on one single provision of the Convention. Insofar however as this first experimental report was to lay the foundations for a discussion aiming not only at ensuring the conformity of the system envisaged with Protocol No. 2, but also its appropriateness and its practical and actual interest, the authors took the liberty of also trying to give a brief overview of the case-law relating to the Lugano Convention. Moreover, they agreed to focus this report on art. 5.1, which, apart from the interest it offers in itself, is the most often quoted provision in the case-law materials under survey.

I. PRELIMINARY OBSERVATIONS

In application of Protocol No. 2 of the Lugano Convention, the competent service of the Court of Justice (i.e. the Division Library, Research and Documentation) has currently brought out seven (7) fascicles relating to case-law. The first one was communicated to the Contracting States in 1992 and the latest one in July 1998. The first three fascicles have moreover been published by the Swiss Institute of comparative Law (Collection of jurisprudence of the European Court of Justice and of the highest courts of the States Parties concerning the Lugano Convention, Schulthess Polygraphischer Verlag, vol. I/1992, vol. II/1993 and vol. III/1994, Zurich 1996, 1997 and 1998).

The seven above-mentioned fascicles contain all the judgments which the Court of Justice gave since 1992 on the interpretation of the Brussels Convention as well as a large selection of national case-law materials; the latter concern both Brussels and Lugano and currently total over two hundred (200) national decisions including those relating to requests for preliminary rulings. With a few exceptions, which mostly concern the first fascicles (or the preliminary procedure), the judgments were all delivered by the Supreme Courts of the Contracting States.

There are twenty-five (25) of them relating to the Lugano Convention, some of which also concern the Brussels Convention.

Some of those twenty-five decisions declare the Lugano Convention to be inapplicable *ratione temporis,* but mention it all the same*,* either to simply recall a legal instrument destined to enter into force in the near future and which might sanction different solutions (*Norwegian Høyesterett*, 20 January 1993, *Information No. 1993/43*, art. 6/1 – see also German *Bundesgerichtshof*, 21 November 1996, *Information No. 1997/43*, art. 18, which also concerns the Brussels Convention), or in order to corroborate the interpretation envisaged under national law (*Norwegian Høyesterett*, 31 May 1994, *Information No. 1995/20*, art. 5.3, Austrian *Oberster Gerichtshof*, 8 April 1997, *Information No. 1998/12*, art. V of Protocol No. 1).

As for the other decisions, i.e. those which actually interpret and apply the Lugano Convention, one should note from the outset that they offer elements of interpretation of nearly every provision of the Convention which offers more than a merely average interest (art.1, 5.1, 5.3, 6.1, 16, 17, 21, 24, 27-28, 31, 54) and that, as a general rule, they follow the case-law developed in application of the Brussels Convention faithfully.

It also seems to us to be useful to point out that the currently available case-law materials relating to the Lugano Convention are considerable and that the twenty-five above-mentioned decisions, which serve as a basis for the present report, were chosen by the services of the Registrar of the Court of Justice in application of Protocol No. 2 of the Convention. Let us add here that, whilst the services of the Registrar of the Court of Justice (which is the central body entrusted with implementing the system of exchange of information set up by the above-mentioned Protocol No. 2) necessarily possess the most complete collection of decisions

relating to the Lugano Convention, such decisions are published more and more often in numerous law periodicals; apart from the publications which are of purely national interest (as, for instance, the commentary on Swiss case-law by Volken in the *Schweizerische Zeitschrift für Internationales und europäisches Recht*), the *International Litigation Procedure* (hereafter *ILP*) is especially worthy of mention as it regularly publishes decisions of all the Contracting States in English or translated into English.

May we also specify that all through this report the term "judgment" will be used in an overall sense, so as to extend to any judgment given by a court or tribunal of a Contracting State, whatever it may be called, including a decree, order, decision or writ of execution (see in the same sense art. 25 of the Convention), as well as judgments given within the framework of *exequatur* proceedings.

II. OVERVIEW OF THE CASE-LAW

If one leaves aside the judgments relating to art. 5.1, which will be analysed more in detail in chapter III hereafter, as well as certain judgments declaring the Convention to be inapplicable *ratione temporis,* one can present the following overview of the case-law, according to the subject-matter of each decision:

A. With respect to the material scope of application of the Convention, one should mention two judgments, which both declare the Convention to be inapplicable: one case concerned a request for protective measures of the conjugal union including maintenance claims (Swiss *Bundesgericht*, 27 May 1993, *Information No. 1994/12*) and the other, which concerned the compulsory winding-up of a State-owned enterprise and the companies controlled by it as well as a prohibition to pay the debts, was qualified by the national court as "proceedings analogous" to bankruptcy within the meaning of art. 1.2.2 (Norwegian *Høyesterett*, 18 January 1996, *Information No. 1996/28*).

B. One single judgment (Swedish *Högsta Domstolen*, 23 February 1994, *Information No. 1996/12*) concerns exclusive jurisdiction. It related to proceedings concerned with the registration or validity of patents and the national court held that the rule of art.16.4 does not extend to a dispute between an employee for whose invention a patent has been applied for and his employer, where the dispute regards their respective rights in that patent.

C. There are two judgments relating to prorogation of jurisdiction. The first concerned the definition of a stipulation in favour of one party only, in a case where one also had to pay account to art. I a of Protocol No. 1 (*Tribunale d'appello del Canton Ticino*, in Switzerland, 2nd November 1993, *Information No. 1994/17*). The second concerned the formal requirements in the light of the case-law of the Court of Justice pertaining to the Brussels Convention (Norwegian *Høyesterett*, 17 December 1993, *Information No. 1994/19*).

D. As for the alternative criteria of jurisdiction, if one leaves aside the judgments falling within the ambit of art. 5.1, which will be dealt with in the following chapter, one can, strangely enough, only find two single judgments, which were both delivered by the Supreme Court of Norway (Norwegian *Hoyesterett*, 31 May 1994, *Information No. 1995/20,* above-mentioned in chapter I, and 6 June 1996, *Information No. 1997/36)*[*]. They concern matters relating to tort, which are governed by art. 5.3; however the Court decided the cases in application of national law, because the Lugano Convention was inapplicable *ratione temporis.* One should nevertheless note that both decisions concern disputes relating to cross-frontier defamation and that the most recent one expressly mentions the ECJ judgment of 7.3.1995 in the C-68/93 Shevill/Press Alliance case.

E. With respect to the special jurisdiction foreseen in art. 6, the only judgments which will be mentioned are those relating to point 1 and concerning a plurality of defendants. There are three of them, two of which in particular stand out. One is an English judgment which refuses to apply the forum non conveniens theory with respect to the co-defendant domiciled in another Contracting State (*High Court*, 26 March 1992, *Information No. 1993/42)* and the other is a Norwegian decision. In the latter case the court had to examine whether the fact that the dispute between the plaintiff and the other co-defendant had later been settled out of court, without that circumstance having led the Norwegian court to renounce exercising its jurisdiction, could arouse the suspicion that art. 6.1 had merely been invoked in order to prevent the foreign defendant from being sued before the courts of his domicile (*Høyesteretts kjaeremålsutvalg*, 23 February 1996, *Information No. 1997/21*). The third judgment, given by the same Norwegian court, does not seem to be of great interest (*Høyesteretts kjaeremålsutvalg,* 17 August 1995, *Information No. 1996/26).* One may also recall that amongst the judgments declaring the Convention to be inapplicable *ratione temporis* one again comes across a Norwegian decision concerning a plurality of defendants (*Høyesterett*, 20 January 1993, *Information No. 1993/43*, mentioned previously in chapter I).

F. There are two judgments on the interpretation of article 21 relating to lis pendens; both concern the determination of the court "first seised" and in that matter they seem to follow the case-law of the Community (English *High Court,* 14 October 1993, *Information No. 1995/15*, and Swiss *Bundesgericht*, 26 September 1997, *Information No. 1998/13*).

G. Two judgments relate to provisional measures. Of those two, one is English and concerns the jurisdiction of the courts of a Contracting State to order the defendant, who is domiciled in that State, but is sued in another, to refrain from disposing of his assets and to disclose their localisation in the whole world (*Court of Appeal,* 11 June 1997, *Information No. 1998/34*). The other concerns the enforcement of a judicial sequestration order in another contracting State (Swedish *Högsta Domstolen*, 12 September 1995, *Information No*. *1996/27*).

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[*] The authors thank Ms Løvold of the Norwegian delegation for her comments on these decisions.

H. Of the three judgments concerning the grounds for refusing recognition and enforcement, two relate to cases in which the defendant was in default of appearance in the country of origin. However, only the first, which related to a payment order, directly concerned the refusal ground *ad hoc*, i.e. art. 27.2, which is moreover the provision of art. 27 most often invoked in practice (Swiss *Bundesgericht,* 12 June 1997, *Information No. 1998/15*). In the other, which concerned an order to pay costs issued to a person who was unaware of the proceedings, the ground invoked was that of public policy foreseen in art. 27.1 (Norwegian *Høyesteretts* kjaeremålsutvalg, 29 March 1996, *Information No. 1997/28*). The third does not seem to be of any particular interest (Norwegian *Høyesteretts* k*jaeremålsutvalg*, 7 March 1996, *Information No. 1997/26*.).

I. In matters relating to the enforcement procedure (art. 31 et seq. of the Convention) one can find one single judgment. It refers to the effects of the judgment in the State in which enforcement is sought and thereby takes into account the limitations resulting from the application of the law of the State of execution proper (Swedish *Högsta Domstolen*, 12 September 1995, *Information No. 1996/2*, mentioned previously under G).

K. The still recent entry into force of the Convention gave rise to two – previously mentioned - judgments on the application of the transitional provisions of art. 54.2. The judgment of the *Tribunale d'appello del Canton Ticino (*2 November 1993*, Information No. 1994/17*, previously mentioned under C) ruled that enforcement was to be authorized in accordance with the Convention once the jurisdiction of the court of the State of origin had been examined. In the other case, the Swiss *Bundesgericht* (12 June 1997, *Information No. 1998/15*, previously mentioned under H), after having held that the court of the State where enforcement was sought was bound by the findings of fact on which the court in the State of origin had based its jurisdiction, refused to recognize or enforce the foreign judgment on the ground that it neither contained any findings of fact nor stated the grounds on which it rests.

III. **CASE-LAW RELATING IN PARTICULAR TO ART. 5.1**

The fascicles brought out by the services of the Court of Justice contain five judgments concerning art. 5.1, i.e., in chronological order:

- Swiss *Bundesgericht*, 18 January 1996, *Information No. 1997/18*
- Swiss *Bundesgericht*, 21 February 1996, *Information No. 1998/14*
- Norwegian *Høyesteretts kjaeremålsutvalg*, 10 May 1996, *Information No. 1997/33*

- Swedish *Högsta Domstolen*, 13 June 1997, *Information No. 1997/45*

- English *Court of Appeal*, 13 July 1997, *Information No. 1998/33*

However, so as to allow the national delegations to get a broader overview of the case-law relating to art. 5.1, we thought that it would be appropriate to extend our analysis to other judgments of Supreme courts given during the same period as the five above-mentioned judgments, i.e. during the judicial years 1995/1996 and 1996/1997; there are two (2) of them:

- Swiss *Bundesgericht,* 23 August 1996
- Norwegian *Høyesterett,* 15 May 1997.

The most recent judgments, in particular the Austrian ones which were published in the *Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht* (*Oberster Gerichtshof,* 9.9.1997, 1998.163, 10.9.1998, 1999.23 [sum.], 1999.23 [sum.] and 1999.24 [sum.], 28.10.1997, 1998.167 and 1999.35 [sum.], 27.1.1998, 1997.157, 25.2.1998, *Juristische Blätter* 1998.518, 12.8.1998, 1999.22 – see also Norwegian *Høyesterett*, 27.1.1998, *ILP* 1998.550 [sum.], and Swiss *Bundesgericht*, 9.3.1998, *Coll*., vol.124 III, p. 188) can be included in the next report, assuming, of course, that the Standing Committee decides to pursue its examination of national case-law by drawing up reports.

Thus the present report only mentions the seven (7) above-mentioned judgments, which were given during the judicial years 1995/1996 and 1996/1997.

We will successively examine the contents of each of those judments and its conformity with the case-law concerning the Brussels Convention (for the judgment under [b] we will add some subtitles because it presents certain special features).

(a) Swiss *Bundesgericht*, 18 January 1996, *Information No. 1997/18, T/C* [ILP 1998.77]

The corporation S., with its registered office in Switzerland, sold to the Italian company T. an exhaust gas cleaning unit which it installed on the spot. Afterwards the company T. claimed that the system was deficient and rescinded the contract. The corporation S. brought an action in Zurich against the Italian company T. for payment of the purchase price; the company T. raised the plea of lack of international jurisdiction. The parties disagreed on the question whether an agreement conferring jurisdiction incorporated in their contract was valid. However, the Federal Court first examined whether the courts of Zurich had jurisdiction within the meaning of art. 5.1, a question to which it gave an affirmative answer. It then found that, whereas one should resort to an autonomous interpretation of the concept of "matters relating to a contract", the place of performance should be governed by the law applicable to the contract or the obligation. In the case of entirely bilateral contracts it further held that

according to the rule of jurisdiction foreseen by art. 5.1 there was a different place of performance for each obligation, the object of the dispute being in the present instance the claim relating to the purchase price. The Federal Court applies the substantive rules of the Vienna Convention on contracts for the international sale of goods "as the applicable law". By interpreting art. 57 and 58 of that Convention, it comes to the conclusion that in the present case one is not dealing with a transaction where each obligation is conditional on the counter-performance, because at no time of the performance of the contract did the partial obligation of one of the parties have to be performed at the same time as that of the other. It follows that it is not letter [b] but letter [a] of article 57.1 of the Vienna Convention, which is applicable and that according to that last provision the purchase price should be paid at the place where the seller and plaintiff is established, which means that Zurich would have jurisdiction.

In its judgment of 4.3.1982 in the Peters/ZNAV case (34/82) the Court of Justice (hereafter ECJ in this chapter III) had already ruled that the concept of "matters relating to a contract" should be interpreted autonomously, an interpretation which it for instance confirmed in its judgment of 8.3.1988 in the Arcado/Haviland case (9/87) and in that of 17.6.1992 in the Handte/TMCS case (C-26/91). But it was in its judgment of 6.10.1976 in the Tessili/Dunlop case (12/76) that the ECJ ruled that the place of performance was to be determined by the law applicable to the contract or the obligation. Furthermore, in its judgment of 6.10.1976 in the De Bloss/Bouyer case (14/76) the ECJ held that, within the framework of a bilateral contract, there can be a different jurisdiction for the disputes relating to the main obligation of each party. Finally, in its judgment of 29.6.1994 in the Custom Made/Stawa Metallbau case (C-288/92), the ECJ decided that the place of performance can also be determined by the *lex causae*, even if the latter is a uniform law, as for instance the Hague Convention on the law applicable to the international sale of goods in the case adjudged by the ECJ and the Vienna Convention on contracts for the international sale of goods, which replaced the Hague Convention, in the case adjudged by the Federal Court.

One can therefore state that in the present judgment the Federal Court resorted to the same concept of jurisdiction in contractual matters as that which was held applicable in the case-law of the ECJ.

b) Swiss *Bundesgericht*, 21 February 1996, *Information No. 1998/14*, B/K

1.The judgment

In 1993, Ms K. sued Mr B (domiciled in Rome or London) in Zurich. She brought an action against the defendant for the repayment of two loans. The defendant contested both the existence of the loans and the territorial jurisdiction of the court in Zurich. The question was whether, within the meaning of art. 5.1 of the Lugano Convention, the place of performance was in Zurich.

The Federal Court was of the opinion that the place of performance of the obligation to repay the loans may also be determined by an agreement between the parties provided that such an agreement is valid under the applicable *lex causae*. In such a

case, in principle, the agreement need not be entered into in one of the forms required by art. 17. However, the agreement must relate to the actual place of performance; this requirement aims at avoiding that the rules of form contained in art. 17 be circumvented.

On the other hand, with respect to the application of art. 5.1 and the procedure aiming at identifying the place of performance in dispute between the parties, the Federal Court distinguishes according to whether or not the factual allegations of the plaintiff also have a bearing on the judgment as to substance.

In the former situation, an hypothesis which was not that of the case adjudged by the Federal Court, the court would be empowered to determine its jurisdiction merely by relying on the contents of the claim and to postpone examining any contrary allegations of the defendant till the case was examined on the merits. That principle, which – let us repeat it – is only applicable if the contested claim is relevant both with respect to the examination as to jurisdiction under the Lugano Convention and as to the substance of the claim, aims at protecting the defendant: since the latter must reply to decisive allegations both with respect to jurisdiction and to the substance of the claim, he must afterwards be in a position to oppose a second claim which would be substantively identical to the first by raising the plea of *res judicata*.

If, on the other hand, the existence of an agreement concerning the place of performance – claimed by the plaintiff, but contested by the opposite party – is only relevant with respect to the determination of jurisdiction but has no bearing on the claim as to its substance, the court cannot simply leave it to the allegations of the plaintiff on that point, should the defendant contest them; the plaintiff must, on the contrary, if necessary, submit evidence on that point. In the present case, the claim for repayment of the loans in dispute could be adjudged on the merits without it being necessary to decide whether the place of performance of the obligation was in Zurich or not. Thus the case was remanded to the cantonal court so that the latter require the submission of proofs on the agreement relating to the place of performance according to art. 5.1 of the Lugano Convention.

2. Observance of the case-law relating to the Brussels Convention

In its judgment of 17.1.1980 in the Zelger/Salinitri case (56/79), the ECJ is of the opinion that jurisdiction within the meaning of art. 5.1 can be based on an agreement determining the place of performance, even if no particular form was chosen, it being understood that the form requirements foreseen in art. 17 need in principle not be observed. The ECJ based its interpretation on the difference between the teleological and the systematic conception of art. 5.1 and that of art. 17: whereas the forum foreseen in art. 17 is based on an agreement between the parties relating directly to jurisdiction, it is the proximity of the forum to the object of the dispute which is considered decisive in the case of art. 5.1. That is sound and coherent reasoning even if Advocate general Capotorti (and later on various authors) perceived the danger that art. 17 could thus be circumvented. By denying that a purely fictive agreement on the place of performance may have any power to confer jurisdiction within the meaning of art. 5.1 the Federal Court not only takes into consideration that

preoccupation, but it also in a way anticipates the judgment that the ECJ was to deliver one year later in the MSG/Gravières Rhénanes case (21.2.1997, C – 106/95). Indeed, according to that judgment an "agreement on the place of performance, which is designed….solely to establish that the courts for a particular place have jurisdiction" (tenor, point 2), cannot confer jurisdiction.

3. New development of the case-law relating to the Conventions

The opinion according to which "one need not proceed to a formal initial analysis" of the allegations of the plaintiff, such as described in the fourth above-mentioned paragraph of our presentation of the Bundesgericht's judgment, is shared by some German and Swiss authors (see Kropholler, Europäisches Zivilprozessrecht, Heidelberg 1998,6th ed., art. 19, note 5).

In its above-mentioned judgment in the Peters/ZNAV case, the ECJ simply found that the national courts could determine their own jurisdiction in accordance with art. 5.1. without being obliged to examine the case as to its merits (point 17). The above judgment of the Federal Court seems to tackle this problem in a more sophisticated manner, insofar as it distinguishes according to the consequences that the allegations relating to jurisdiction could have on the merits. Such an approach could be generalized and its scope could perhaps be extended beyond the case foreseen in art. 5.1.

One may however note that the rules of the Convention concerning "examination as to jurisdiction and admissibility" (see in particular art. 19) seem to be interpreted in the sense that, if the allegations of the plaintiff are only relevant with respect to the determination of jurisdiction, the court seised cannot be obliged to rely solely on them. Furthermore, the conventions do not allow one to draw the conclusion that there is a real duty to ordain the submission of proofs, where the facts generating jurisdiction are contested, such a duty resulting - possibly, as in the present case - from national law.

c) Norwegian *Høyesterettskjaeremålsutvalg, 10 May 1996, Information No. 1997/33 Deutsche Bank*
[ILP 1997.8, sum.]

The analysis of this judgment is based on the English summary prepared by the Norwegian authority entrusted with the exchange of information, as well as on an officious French translation kindly communicated by the services of the Committee, the Norwegian language not being known to the authors of the present report.

The case concerned an action brought in Norway by virtue of art. 5.1, the application of the said provision having in this instance been contested by the defendant on the ground that the claim in dispute was not of a contractual, but of a delictual nature. The Norwegian court seised with the claim seems to have held, that in order to declare itself competent, it should be in possession of sufficiently clear indications

("relatively clear indications" according to the terms of the summary drawn up by the national authority) of a contractual relationship and that, besides, it was for the plaintiff to give these indications. Such an interpretative approach of art. 5.1 seems to us to harmonize perfectly with the case-law of the ECJ relating to Effer/Kantner (4.3.1982, 38/81), to which the national judgment moreover refers.

d) Swiss *Bundesgericht*, 13 August 1996, K/Ms P and F

Ms P. and F., domiciled in Geneva, brought an action against K. domiciled in London, for the payment of a sum of money due for a brokerage commission. The defendant argued that the cantonal court had transgressed art. 5.1 of the Lugano Convention by not examining sufficiently whether the case in dispute fell within the concept of "matters relating to a contract " or not, especially as the existence, respectively the validity of the contract were in dispute. Such an examination, it was contended, would have led to the conclusion that the said provision was not applicable.

The Federal Court was of the opinion that the concept of "matters relating to a contract" is an autonomous notion which is not to be interpreted by reference to the national law of a State. It includes disputes relating to the existence or validity of a contract, failing which the defendant would have only to claim that the contract does not exist or is not valid, in order to evade the jurisdiction established by art. 5.1. The Federal Court adds that the obligation to be taken into consideration is neither any one of the obligations resulting from the contract, nor the characteristic obligation, but the obligation on which the action is based. Furthermore, the place where the obligation has been or must be performed should be determined according to the law governing the obligation in dispute according to the conflict rules of the forum. The special jurisdiction would then derive from the place of performance designated by that law. The Court concludes that the defendant could be sued in Switzerland, because, according to the applicable Swiss law, the payment must be made at the place where the creditor is domiciled at the time of the payment, unless otherwise stipulated. The Court also adds an argument based on art. 18, since the defendant had never contested the jurisdiction of the Genevese authorities.

In this judgment, the Federal Court also follows the above-mentioned case-law of the ECJ (see under judgment of the Swiss Bundesgericht of 18.I.1996, point III. a above): a special forum for each principal obligation in the case of entirely bilateral contracts and determination of the place of performance according to the law applicable to the contract, respectively to the obligation. Moreover, as results from the equally above-mentioned judgment of the ECJ in the Effer/Kanter case, the concept of "matters relating to a contract " also includes the case where the very formation of the contract is litigious.

e) Norwegian Høyesterett, 15 May 1997, Annie Haug
[*ILP* 1998.804]

The heirs of the recipient of a loan repayed it to the creditor and then turned against the guarantors. The latter were domiciled in Spain, but the action was brought in Norway, place were the loan was repayed. The defendants objected that the Norwegian courts lacked jurisdiction, on the ground that the dispute was not of a contractual nature and that, in any case, art. 5.1 was only applicable in commercial matters. The court of first instance accepted the plea of lack of jurisdiction, but the Court of Appeal reversed the judgment and the Supreme Court confirmed the appeal judgment.

As for the objection that the dispute was not of a contractual nature, the Supreme Court held itself to be bound by the findings of the Court of Appeal, the latter having concluded that the dispute was of a contractual nature, and, therefore, that art. 5.1 was applicable. In consequence, the Supreme Court directly expressed an opinion only on the other aspect relating to lack of jurisdiction, i.e. the inapplicability of art. 5.1 to disputes of a non-commercial nature, an objection which it refutes, by stating that such a limitation by no means results from the text of art. 5.1.

As to that last point, the judgment of the Supreme Court seems to be in harmony with the case-law of the ECJ, which never limited the applicability of art. 5.1 to disputes of a commercial nature (see the above-mentioned judgment in the Peters/ZNAV case, as well as the judgment of 15.1.1987 in the Shenavai/Kreischer case 266/85); the same applies in regard to academic teaching (Jenard Report, p. 23; Donzallaz, La Convention de Lugano, Berne, Staempfli, III/1998, No. 4442-4443) and, to our knowledge, to national case-law (Italian Corte di Cassazione, 1.10.1980, Rep. I-5.1.2-B32).

However, with respect to the contractual nature of the dispute, one can reasonably wonder whether and to what extent the interpretation given in the present instance is in accordance with the above-mentioned Handte/TMCS case of the ECJ. Of course, the *Høyesterett* did not directly examine whether the litigious obligation was contractual or not, as it considered itself to be bound, under national law, by the findings of the Court of Appeal, whose reasoning is not known to us. But it seems to us, that, as in the Handte/TMCS case, there was in this instance "no obligation which had been freely assumed by one party towards the other" (point 15 of the Handte/TMCS case).

(f) Swedish *Högsta Domstolen,* 13 June 1997, Information No. 1998/45, Probo Ab[*]

Like the judgment analysed under (c), the language of the judgment delivered on 13 June 1997 in the Probo Ab case by the Supreme Swedish Court is unknown to the drafters of the present report. In addition, no summary was established by the national authority entrusted with the exchange of information, the short analysis which follows having been rendered possible thanks to the help of the services of the European Commission in the form of an officious French translation of the relevant

[*] The authors thank Ms Renfors of the Swedish delegation for her comments on this decision.

judgment (let us also note that a very brief summary of that judgment appeared in English in the *Praxis des internationalen Privat- und Verfahrensrechts,* 1999, 54).

The proceedings opposed a creditor to a person who provided a guarantee for his debtor, the proceedings having been brought before the Swedish courts on the ground that the place of performance of the obligation resulting from the guarantee was to be performed in Sweden.

The first question which arose was whether such an action, based on a guarantee contract, fell within the scope of art. 5.1 or not. The national courts, which from the outset recall the principle of the autonomous interpretation of the concept of "matters relating to a contract", answer the above-mentioned question in the affirmative; this seems to us to be in accordance with the case-law and academic teaching relating to the Brussels Convention, even if we are not able to support our position by an *ad hoc* quotation, other than that of a judgment of the French Court of cassation of 3 March 1992 (*Information No. 1992/12*).

Moreover, with respect to the determination of the competent jurisdiction under art. 5.1, the Högsta Domstolen faithfully follows the interpretation consisting in taking into consideration the "litigious" obligation and determining its place of performance in accordance with the *lex causae*, identified by the conflict rules of the *forum*, even if it did not have to choose between Swedish and English law (the only two laws which could come into consideration), as in both cases the disputed obligation was to be performed at the domicile of the plaintiff, i.e. in Stockholm.

(g) English *Court of Appeal*, 13 July 1997, *Information No. 1998/33, Agnew* [*]

The judgment dealt with a claim for annulment/rescission of a contract on the ground that the behaviour of the other party during the negotiations was in breach of good faith. It was a contract of reinsurance and the behaviour in bad faith consisted in "misrepresentation and non-disclosure of material facts".

The question was whether the dispute fell within the scope of art. 5.1 and, if so, which would be the competent court according to that provision.

Both the Court of first instance and the Court of Appeal answered the first part of the question in the affirmative and then held the English courts to have jurisdiction as the negotiations had taken place in England.

With respect to the applicability of art. 5.1, the Court of Appeal, whilst recognizing that the obligation to act in good faith has its origin in *equity* and that it has not, as such, a contractual character, based its conclusion on the observation that in any case the above-mentioned obligation would only have a practical meaning in relation to a particular contract. Moreover the fact that the action aimed at the annulment/rescission of the contract does not seem to have shed any doubt on the applicability of art. 5.1; insofar as the action was of a contractual nature, the Court of

[*] The authors thank Mr Van der Velden of the Dutch delegation for his comments on this decision.

Appeal does not distinguish according to whether it aims at the performance of the contract or its validity/annulment.

On the other hand, with respect to the determination of the competent jurisdiction pursuant to art. 5.1, the reasoning of the Court of Appeal is essentially based on pragmatic considerations leading to the conclusion that, insofar as the action is based on an alleged breach of the principle of good faith during the negotiations, the court best placed to hear the case can only be the one of the place where the negotiations were held.

On the whole, this interpretation seems to us to be in accordance with the Brussels Convention, even if we are not in a position to support this allegation by precedents relating to national case-law or that of the Community. Only the second aspect of the question relating to the applicability of art. 5.1 seems to have been examined in the case-law of the Community, in particular, in the above-mentioned Effer/Kantner case; in that instance however the fact that the contract was void was only invoked incidentally, in a plea relating to lack of jurisdiction and not as the main issue in proceedings on the merits, as is the case here.

We can however make the following observations:

The decision of the Court of Appeal adopts the well-known principle of the Brussels Convention according to which art. 5 should be interpreted by reference to the objectives of the Convention and not to the concepts of the national laws, and is based, to a great extent, on the judgments of the ECJ relating to art. 5 (above-mentioned judgments Bloos, Shenavai and Custom Made/Stawa Metallbau, as well as the judgment of 27.9.1988 in the Kalfelis/Schröder case). In other words, the Court of Appeal acts as if it had to interpret the Brussels Convention.

The interpretation given by the Court of Appeal on the applicability of art. 5.1 corresponds to that already advocated by the the prevailing academic opinion with regard to the Brussels Convention (Gaudemet-Tallon, Les Conventions de Bruxelles et de Lugano, Paris L.G.D.J., 1996, 2nd ed., p. 112, note 22), as well as to national case-law (Italian *Corte di Cassazione*, 17.2.1981, Cahiers de droit européen 1985.469, *Cour de cassation* française, 25.1.1983, *Revue critique de droit international privé* 1983.516). The same applies with respect to the *culpa in contrahendo* in particular (Donzallaz, op. cit., No. 4531-4534).

It can also be said of the obligation foreseen in view of applying art. 5.1, i.e. the obligation to act in good faith during the negotiations. The above-mentioned judgment of the French Cour de cassation is not sufficiently conclusive and could perhaps lend itself to two different interpretations, but the Italian judgment is much less ambiguous and closer to that of the English Court of Appeal. It concerned a contract that had been entered into orally in Italy but was to be formalized later on in Paris, which never happened; even if several obligations were to be performed in Italy, the Corte di Cassazione held the French courts to have jurisdiction, on the ground that for the purpose of applying art. 5.1, one had to take into account the obligation which had been transgressed and which justified the rescission of the contract (in the same sense Donzallaz, Nos 4611 and 4612, who quotes the above-mentioned Italian judgment as well as Schlosser Kommentar, no. 9, ad art. 5).

Last but not least, the judgment commented on expressly mentions the need for a uniform interpretation of the Brussels and the Lugano Conventions in accordance with Protocol No. 2 of the Lugano Convention.

In conclusion, the judgment of the Court of Appeal seems to proceed on the assumption that both conventions are to be interpreted uniformly and offers new elements of interpretation of a question in relation to which the case-law concerning the Brussels Convention does not yet seem quite set.

IV. FINAL CONSIDERATIONS

The foregoing analysis seems to point to the fact that the case-law on the Lugano Convention is developing in a similar manner to that relating to the Brussels Convention, whilst sometimes allowing greater clarification and a more in-depth research into the subject, as results for instance from the judgment of the Swiss *Bundesgericht* of 21 February 1996 and of the English *Court of Appeal* of 13 July 1997. Besides, even if a given decision should diverge somewhat from the case-law concerning the Brussels Convention, as appears to have happened in the case of the Norwegian *Høyesterett* of 15 May 1997, we are under the impression that those divergencies are not due to the specific nature of the Lugano Convention, but that they could well appear within the framework of the Brussels Convention itself.

However, these conclusions are only provisional and stated with some diffidence, insofar as our detailed analysis of the case-law refers solely to art. 5.1, the judgments concerning the other provisions of the Convention having only been examined in the "overview" of chapter II above. We therefore suggested to the Standing Committee to extend the analysis of the case-law undertaken in this report with respect to art. 5.1 alone to all the provisions of the Lugano Convention which have given rise to case-law. In this way, one will on the one hand be able to verify to what extent our conclusions relating to art. 5.1 have a general impact, and, on the other hand, case-law materials collected in application of Protocol No. 2 would have additional value, because they would be easier to use.

In our opinion the most appropriate method would be to draw up in a first stage a consolidated version of the report which would cover all the case-law materials currently available, i.e. from the 1st to the 8th fascicle, and afterwards to foresee annual updatings, whenever new fascicles are published. To judge from our experience, we take the liberty of adding that such work would be very much facilitated by material support, aiming mainly at covering the expenses occasioned by some translations and/or secretarial work.

Furthermore, the authors of the report draw your attention to the fact that several judgments appearing in fascicles written in "unusual" languages are later translated in particular into English in order to be published, in their entirety or in a summarized form, in law reviews. The fascicles mention these translations if they are available at the time each fascicle is prepared, but several translations are only published later on. In our report, we were careful to mention these "new" translations, i.e. those

which did not yet exist at the time each fascicle was prepared and which are not mentioned on the endpaper of each judgment included in the fascicles, and we think that it would be useful if the future reports (as well as the publications of the Swiss Institute of comparative law) would do the same.

In conclusion, the authors would like to thank the services of the Committee for the assistance they gave in securing the French translation of judgments (c) and (f) of chapter III and they furthermore acknowledge that their task has been greatly facilitated by the preliminary analysis of the case-law which the competent services of the Court of justice communicated in application of Protocol No. 2. They would also like to thank the members of the Standing Committee for the trust they placed in them by giving them the task of drawing up this first experimental report and express the wish that this report will indeed enable a useful discussion on the methods used to follow up of the case-law collected by the services of the Court of justice in application of Protocol No. 2.

Prof. Alegría Borrás (Spain)

Dr. Alexander R. Markus (Switzerland)

Prof. Haris Tagaras (Greece)