Twelfth Report on national Case Law relating to the Lugano Convention

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I. Introduction

Since 1998, the jurisdiction of the courts of the Contracting States of the Brussels and the Lugano Conventions has been presented in a written report prepared by three delegations. In September 2009, the Standing Committee of the Lugano Convention of 1988 appointed the delegates from Bulgaria, France and Germany to draft the twelfth report on national case law relating to this Convention. The report is based on the 18th package of judgments presented by the Court of Justice of the European Communities in accordance with Protocol No. 2 to the Convention.

Out of the 39 judgments contained in the package, 14 related to the Lugano Convention and 6 to the Brussels Convention. The remaining court rulings were based on the Brussesl I Regulation. The report covers the following decisions, most of which were given by supreme courts:

Lugano Convention

- Oberster Gerichtshof (Austria): 1 decision (No 2009/25);
- Bundesgericht/Tribunal fédéral (Switzerland): 5 decisions (No 2009/28 – 2009/32);
- Bundesgerichtshof (Germany): 1 decision (No 2009/34);
- Oberlandesgericht Karlsruhe (Germany): 1 decision (No 2009/32);
- Sąd Najwyższy (Poland): 2 decisions (No 2009/60 and 2009/61);
- Svea hovrätt (Sweden): 1 decision (No 2009/62).

Brussels Convention

- Bundesgerichtshof (Germany): 1 decision (No 2009/34);
- Tribunal Supremo (Spain): 1 decision (No 2009/37);
- Cour de cassation (France): 3 decisions (No 2009/41, 2009/43 and 2009/46);
- Corte di cassazione (Italy) : 1 decision (No 2009/53).

Brussels I Regulation

- Oberster Gerichtshof (Austria): 2 decisions (No 2009/22, 2009/24);
- Bundesarbeitsgericht (Germany): 1 decision (No 2009/35);
- Bundesgerichtshof (Germany): 1 decision (No 2009/36);
- Oberlandesgericht München (Germany): 1 decision (No 2009/33);
- Cour de cassation (France): 2 decisions (No 2009/42and 2009/45 ;
- Court of Appeal (England) : 5 decisions (No 2009/47– 2009/51);
- Corte di cassazione (Italy): 2 decisions (No 2009/52and 2009/54);
- Cour d'appel (Luxembourg): 2 decision (No 2009/55 et 2009/56);
- Court of Appeal (Malta): 1 decision (No 2009/57;
- Gerechtshof's Hertogenbosch: 1 decision (No 2009/58)
- Supremo Tribunal de Justica: 1 decision (No 2009/59).

The decisions are reported below, regrouped according to the provisions of the Conventions/the Regulation to which they refer. It should be noted, as always, that the package is primarily based on the decisions sent to the Registrar of the Court of justice in accordance with Article 2 of the Protocol No 2 to the Lugano Convention of 1988. They do not necessarily cover the integrity of supreme court decisions given on rules of the Conventions/the Regulation. Where decisions are based on provisions of the Lugano Convention or the Brussels Convention, it can be presumed in general that – unless the wording has been changed – the reasoning of the courts would probably be the same under the new Lugano Convention. The report will highlight where a case would have been decided differently under the new Convention (and under Brussels I in so far as the provisions are identical).

II. Overview of the case law

The decisions in the package cover a large number of provisions of the Conventions/Regulation. However, it can be said that they focus on jurisdiction issues and in particular Article 5(3) of the instruments.

Title I – Scope of the Convention/the Regulation

Some decisions are very brief in affirming the applicability of the Regulation. E. g. the judgment of the German Bundesarbeitsgericht (No 2009/33, see p. 25 below) states that an action brought against a former employer for contribution to a specific pension fund (Zusatz-

versorgungskasse des Baugewerbes) did not fall within the term "social security" (Article 1(2)(c) as interpreted in ECJ judgment Gemeente Steenbergen v Luc Baten[1] where the ECJ had ruled that the meaning of "social security" in the Brussels Convention had to be interpreted in accordance with Article 4 of the Regulation (EEC) No 1408/71[2]. The report focuses on elements of the cases that may be of general interest and do not rely on specificities of the national system under which the decision was made.

Article 1(1): Civil and commercial matters

Judgment of the Oberster Gerichtshof (Austria) of July 16th 2008 (No 2009/26)

Facts of the case

This case relates to antitrust proceedings before the Austrian courts. The parties were an Austrian body governed by public law representing among others the Austrian wood-processing industry and a German body governed by public law concerned with the management of the Bavarian state forest. The Austrian statutory body applied for provisional measures claiming violations of Austrian antitrust-laws by the German statutory body. It argued German competitors were unduly favoured by the German statutory body in the sale of woods, leading to a competitive disadvantage of Austrian companies (who, according to the submission of the plaintiff, had difficulties of supply as well as of resale of wood).

The dispute touched upon a number of interesting legal issues in the context of the enforcement of antitrust rules through civil proceedings, covering both private international law (rules on jurisdiction and applicable law) and (Austrian) substantive antitrust law. This report is only concerned with issues of jurisdiction governed by the Regulation; aspects of Articles 5(3) and 31 of the Regulation (Articles 5(3) and 24 of the Lugano Convention) are discussed below (cf. p. 11 and 29).

The Austrian Oberster Gerichtshof had to decide whether the proceedings concerned civil and commercial matters (Article 1 of the Regulation) as the subject matter involved antitrust law – an area that could be regarded as a matter of public law and protecting public interests - and both parties were bodies governed by public law. The court held that the Austrian statutory body was not acting in a sovereign capacity and had no procedural or substantive rights other than those of a private party. The court referred to the ECJ judgment Verein für Kon-

[1] C-271/00 [2002] ECR I-10489.
[2] Regulation of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ 1971 L 149/2 of 5/7/1971, as amended.

sumenteninformation v Henkel[3], stating that only if a body governed by public law was acting in the exercise of sovereign powers, actions involving a body governed by public law fell outside the scope of the Brussels Convention. The proceedings were comparable to an application for an injunction under the Austrian Act against Unfair Commercial Practices (UWG) and should be considered as civil law matters.

Judgment of the Court of Appeal (Malta) of January 9th 2007 (No 2009/57)

Facts of the case

The appeal was filed by Zeturf Ltd against a decision declaring enforceable, following a request made by the French company GIE Pari Mutuel Urbain (PMU), a judgment of the Cour d'appel de Paris. PMU held a monopoly for taking horse bets in France and had - successfully – obtained a judgment of the Cour d'appel ordering Zeturf Ltd. to cease taking online bets on horse races organised in France[4].

The applicant invoked, inter alia, the inapplicability of the Regulation to the case in accordance with Article 1(1) of the Regulation, considering it to deal with administrative matters. The court referred to doctrine relating that there is no definition in the Brussels-Lugano regime of the term "civil and commercial matters" but the European Court of Justice has ruled that it is to be given an independent interpretation. In the judgment was mentioned that the legal systems of the civil law Brussels-Lugano States generally recognised a distinction between public and private law and it was clear that it was private law which includes "civil and commercial matters". The court referred to ECJ judgment Gemeente Steenbergen v Baten[5], which adopted an independent interpretation that differed from various concepts whilst at the same time tried to harmonise them. The most important element in determining whether the present case relates to "a civil (or) commercial matter" or to "(an) administrative matter(s)", was that one must consider the powers exercised by each of the parties. If these powers were in excess of or superior to the rights/powers normally exercisable by private persons in their relationship with each other, the matter could not be precisely considered as a civil or commercial issue.

The court stated that in the proceedings before the French Court, the company against which the appeal was filed did not act within the sphere of private law which regulated business,

[3] Case C-167/00 [2002] ECR I-8111.
[4] It should be noted that the decision of the Cour d'appel has been annulled by decision of the Cour de Cassation of 10 July 2007 by reason of the fact that the Cour d'appel had not examined in how far the public policy considerations, on which the monopoly for PMU in France was based, were also safeguarded sufficiently by the reglementation of the State in which Zeturf was established (Malta).
[5] Case 271/00 [2002] ECR I-10489.

whether civil or commercial, between private persons, but rather in the sphere of public law, in order to protect the monopoly in the interest of the French *ordre public*. It concluded that the subject matter of the judgment of the Cour d'appel de Paris did in reality fall within the realm of public law and was therefore excluded from the scope of the Regulation.

At first sight, it appears that the Maltese court took a more restrictive a view on the scope of the Regulation than the Austrian Oberste Gerichtshof.

Judgment of the Tribunal federal (Switzerland) of May 15th 2009 (No 2009/31)

Facts of the case:

Within the framework of the sale of a company owned indirectly by a Spanish holding company, A, an independent businessman and a British citizen residing in Geneva, was concerned by inquiry proceedings conducted by the Madrid national high court (Audiencia Nacional de Madrid). Under those criminal proceedings, the Spanish high court ruled that A, as a profit-making participant in the operation, had to pay an amount of 13 million dollars, with the further proviso that the criminal charges initially brought against him had been dropped.

On the basis of the ruling, the company in whose favour the ruling has been made asked the competent Swiss courts to order exequatur of the decision made in Spain. A appealed against the exequatur on the grounds that the Swiss judges were mistaken in considering that the obligation under which he was placed was a civil sentence coming within the field of the Lugano Convention.

Question concerning law:

Can a ruling involving sentencing made by a criminal court be considered as a decision of a civil or commercial nature within the meaning of article 1 of the Convention?

Reply to the question concerning law and grounds for the decision:

The federal court ruled that the Lugano Convention applies in civil and commercial cases, whatever the nature of the courts, i.e. it also applies to a civil ruling issued by a criminal authority. The court noted that, in its ruling, the Audiencia Nacional expressly declared that A was to be considered as a liable civil person, adding that the fact that the criminal charges brought against him had been dropped did not prevent civil proceedings from being taken against him. On the basis of these findings, the federal court ruled against the

appeal lodged by A against the decision granting exequatur of the decision made by the Spanish court.

New convention:

The list of exclusions set out in article 1 of the Convention was not changed during its revision and the solution would be the same within the framework of application of the revised Convention.

Judgment of the Cour de cassation (France) of December 18h 2007 (No 2009/40)

Facts of the case:
A company leased commercial premises in Geneva to a physical person residing in France. A Swiss court declared the lessee bankrupt, and the amounts due to the lessor were accepted as part of the bankruptcy procedure. After closure of the bankruptcy procedure, the lessor lodged a claim against the lessee for payment of the amounts due, before the French court competent for the area in which he resided. The lessee raised the point that the French court was not competent to hear the case, on the grounds that the action lay outside the scope of application of the Lugano Convention (article 1). When asked to examine the case, the Court of appeal declared that the French courts were not competent to hear the case, as the dispute lay outside the scope of application of the Lugano Convention, but came under the specific procedure set out in the Swiss federal law dated 11 April 1889 attributing in particular to the Office des poursuites (Debt collection office) the task of drawing up an order to pay, as from which the debtor can oppose the order and contest his return to better fortune.

Question concerning law:

Delimitation of the field of application of the Lugano Convention between the bankruptcy procedure *stricto sensu* and the actions and decisions indirectly linked to it.

Reply issued by the Court of cassation

The Court of cassation quashed the ruling issued by the Court of appeal on the grounds that *"an action to recover a debt accepted as part of the liabilities under a collective procedure concerning the debtor, brought before the courts by the creditor after closure of that procedure, does not stem directly from the bankruptcy and is not closely linked to the framework of the collective procedure"*. On the basis of this finding, the Court of cassation stated that the action in question does not lie outside the field of application of the Lugano Convention.

In adopting this solution, the Court complies with the autonomous interpretation given by the European Court of Justice to article 1 *(CJCE 14 Oct. 1976, case 29/76 Eurocontrol),* which requires making a distinction between bankruptcy procedures stricto sensu, and the actions and decisions linked to such procedures. For the latter also to lie outside the scope of application of the Convention, they must *"stem directly from the bankruptcy and be closely linked to the framework of a procedure involving liquidation of assets or court-appointed receivership" (CJCE, 22 Feb. 1979, Gourdain vs. Nadler, case 133/78).* This solution presents the advantage of not concentrating competence for a bankruptcy procedure in a single location. Nonetheless, the two conditions imposed by the Court of Justice to exclude an action stemming from bankruptcy law would seem difficult to implement, and hence to constitute a source of legal uncertainty, with the further proviso that regarding bankruptcy, it is difficult to grasp how actions can be independent, as they can have an effect on one another.

New Convention:

The revision of the Lugano Convention did not modify the terms of article 1. Hence the solution given within the framework of the revised Convention; thus, the solution would remain unchanged.

Article 1 (2) No 1: wills and succession

Judgment of the Bundesgericht (Switzerland) of December 18th 2008 (No 2009/30)[6]

Facts of the case

The plaintiff, living in Pakistan, sued against a Swiss Bank requesting information about the bank account of his deceased father. The request was based on the fact that the plaintiff was an heir of the deceased bank client; the bank refused to disclose the information as long as the other heirs, with whom the plaintiff was in disagreement, had not consented to the disclosure.

The Bundesgericht had to decide whether or not the proceedings concerned "wills and succession" (Article 1 (2) No 1 of the Lugano Convention). According to the Bundesgericht, rights against third parties acquired by the heir *causa mortis* fall within the scope of the Lugano Convention if those rights had been part of the deceased's property at the time of his or her death. In that case the existence and the content of the alleged rights were not governed by the law applicable to succession. As the court pointed out, the question whether a

[6] The case was reported orally by the Swiss delegate at the 16th Session (7/8 September 2009).

right to information existed had to be judged according to the law applicable to the contractual relations having existed between the Swiss bank and the deceased, and was therefore no matter of "wills and successions". The question whether or not the plaintiff was an heir was *in casu* only a preliminary question. The Bundesgericht conceded that the heir might have an additional right of information against the bank based on the law of succession, which would then not fall within the scope of the Lugano Convention, but underlined that this did not affect the applicability of the Convention to the contractual claim.

Another issue of scope – connected to Article 2 of the Lugano Convention – was raised by the fact that only the defendant, but not the applicant, was domiciled in Switzerland. In addition, the defendant had made use of the possibility to include the siblings of the applicant into the proceedings by way of a third party intervention, and to leave the continuation of the proceedings to those third parties, all domiciled in Pakistan. The Bundesgericht held that Article 2(1) of the Lugano Convention was applicable, following the ECJ judgment Owusu v Jackson[7] according to which the (Brussels) Convention solely required the defendant, but not the plaintiff, to be domiciled in a Contractual State as long as there was another international element involved.

Article 1 (2) No 4 of the Brussels Convention: arbitration

Judgment of the Bundesgerichtshof (Germany) of February 5nd 2009 (No 2009/37)

Facts of the case

The parties had concluded an arbitration agreement. Under the agreement, if the arbitration court had given a ruling in favour of one of the parties, the other party was obliged to deposit a security for the amount awarded to him or her, if so requested by the beneficiary of the arbitration decision. The parties had brought their dispute to the arbitration court, which had ruled that the applicant had to pay a certain amount of money to the defendant. A Dutch court issued a provisional measure ordering the applicant to make the deposit pending the enforcement of the arbitration ruling. The German court had to decide whether or not this Dutch provisional measure had to be declared enforceable under the Brussels Convention.

The Bundesgerichtshof held that the case in question did not concern arbitration in terms of Article 1 of the Brussels Convention. The Bundesgerichtshof referred to the ECJ judgment Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line[8] in which the European

[7] Case C-281/02 [2005] ECR I-1383.
[8] Case C-391/95 [1998] ECR I-7091.

Court of Justice had held that provisional measures were not in principle ancillary to arbitration proceedings but were ordered in parallel to such proceedings and were intended as measures of support, concerning the protection of a wide variety of rights. Their place in the scope of the Convention was thus determined not by their own nature but by the nature of the rights which they serve to protect. The Bundesgerichtshof found that Dutch judgment did not affect the arbitration award but was merely based upon the contractual obligations between the parties. The arbitration award was neither verified by nor incorporated into the judgment. Furthermore, the Dutch judgment did not enforce the arbitration award and did not, therefore, fall outside the scope of the Convention.

Title II – Jurisdiction

Article 5(1): Jurisdiction in matters relating to contract

A number of decisions had to deal with the application of jurisdiction rules in connection with publications or advertisements on the internet. Some of those decision concerned contractual matters (Article 5(1) or Article 15 of the Regulation or the corresponding provisions of the Conventions). Others dealt with Article 5(3) of those instruments. No uniform approach can be found. Whereas the Austrian Oberster Gerichtshof and the Svea hovrätt seem to focus on the fact that websites are accessible anywhere (see decision 2009/25 below), others (e. g. the German Oberlandesgericht Munich) tend to apply additional limitative criteria (see decision No 2009/33 below). Several preliminary questions are pending at the ECJ at the moment, which will hopefully give some guidance in this very difficult topic.[9]

Judgment of the Cour de cassation (France) of July 9th 2008 (No 2009/42)

Facts of the case:

A French company concluded an outline contract granting a Polish company exclusive distribution rights for its products in Poland and Slovakia. On hearing a claim lodged by one of the parties, a court of appeal applied Polish law, as stipulated in the contract.

[9] E. g. cases C-509/09, eDate Advertising v X, OJ 2010 C 134 p. 14 concerning (i. a.) Article 5(3) of the Regulation; C-585/08, Pammer v Reederei Karl Schlüter, OJ 2009 C 44 p. 40, and C-144/09, Hotel Alpenhof v Oliver Heller, OJ 2009 C 153 p. 26, concerning Article 15(1)(c).

Ruling and grounds for the ruling:

In view of article 5 § 1 of EC regulation No. 44/2001, the court of cassation quashed the ruling, noting that *"in cases not involving sales contracts or contracts covering services provided, the location of the obligation that is used as a basis for a claim concerning determination of legal competence, must be set in conformity with the law governing litigation obligations in accordance with the rules concerning conflicts for the courts before which such claims are brought".* As a result, it is the provisions set out in article 5-1 a) of the regulations that are applicable, and not that of article 5-1 b).

New convention:

The revision of the Lugano convention led, along the lines of regulation No. 44/2001, to adding to article 5 a place of competence concerning sales of goods. This means that the addition provides at least a partial solution to the difficulties linked to application of the *Bloos-Tessili* jurisprudence, by virtue of which the notion of "obligation used as a basis for the claim" must be determined under the rules governing conflict of laws for the judge hearing the case. In spite of the addition of a specific place of competence covering sales contracts, difficulties remain, as is shown by the ruling in question. In the light of the difficulties, and as suggested by certain delegations in their reply to the green book concerning revision of the Brussels I regulations, such revision could provide an opportunity to add other types of contracts to the list of contracts set out in article 5, and for which specific places of competence would be created (contracts covering exclusive procurement, contracts covering transport of goods, franchise contracts, representation contracts, etc.). Thus, taking into account the number of contracts listed for which specific places of competence would be determined, the reference to the notion of "obligation used as a basis for the claim" would no longer be of any use, with the further proviso that article 2 § 1 would be applicable to litigation concerning a contract not listed in article 5.

Article 5(3): Jurisdiction in matters relating to tort, delict or quasi-delict

a) Cases related to publications or advertising in the internet

Judgment of the Oberster Gerichtshof (Austria) of February 20th 2008 (No 2009/25)

Facts of the case

The applicant (domiciled in Austria) brought action in Austria against a company having its seat in Switzerland for infringements of competition laws. The Swiss company offered credit brokerage via the internet. The Austrian company applied to the Austrian Oberster Gerichtshof to determine a locally competent court as the Article 5 (3) of the Lugano Convention provided Austrian international jurisdiction but the local jurisdiction of an Austrian court could not be established.

The Austrian Oberster Gerichtshof dismissed the application. It declared that Article 5(3) Lugano Convention, corresponding to Article 5(3) of the Regulation, should be interpreted in line with the academic comments and court decisions concerning the latter provision. Following the case-law of the ECJ, the place where the harmful event occurred could either be the place of harmful conduct or the place of its effect.[10] As the Swiss company offered its services on its website which was accessible throughout Austria and not restricted to Switzerland as marketplace, the alleged harmful event occurred in Austria. Concerning the question of local jurisdiction the court held that Article 5(3) of the Lugano Convention not only provided international jurisdiction but also governed local jurisdiction, superseding national rules on local jurisdiction. As the website could be accessed anywhere, the applicant had the choice between all Austrian courts, which were equally competent.

Judgment of the Oberlandesgericht Munich (Germany) of December 6th 2007 (No 2009/33)

Facts of the case

The parties were competing companies, the plaintiff being based in Germany, the defendant in Austria. The plaintiff attacked several statements of the defendant as violating competitive laws ("unfair competition"/"unlauterer Wettbewerb"). These statements had been made in interviews published in the Austrian press; one of the Austrian newspapers publishing these

[10] Cf. ECJ judgment Bier v Mines de Potasse d'Alsace, case 21/76 [1976] ECR 1735.

statements could be purchased at a German railway station. Furthermore the statements were also referred to on the website of an Austrian newspaper.

The Oberlandesgericht held that Article 5 (3) Brussels I Regulation provided no international jurisdiction for German courts. According to the ECJ decision Shevill and others v Press Alliance[11], in case of an international tort committed through the press, the injury caused by the publication occurs in the state where the publication is distributed. However, the Oberlandesgericht held that a publication could only be regarded as being distributed in a State if the publication was regularly shipped into the said State by the publisher. It was not sufficient if stray numbers of a publication crossed borders[12]. Concerning the publication of the statements on the internet, the Oberlandesgericht Munich considered that the place of effect is situated in Germany only if the web presentation was intended[13] to have effect in that State. In the court's opinion the mere possibility of access to a website in Germany was not sufficient, because basically every website could be accessed there.

Judgment of the Svea hovrätt (Sweden) of February 4th 2008 (No 2009/62)

Facts of the case

The claimant was holder of author's rights concerning a photograph and resided in Sweden. He asked for damages out of the violation of those rights by the unauthorised publication of this photograph in a newspaper in Norway, and by publication of the photograph on the internet (the site being accessible from Sweden). The defendant was domiciled in Norway.[14]

The Swedish court considered that in case of the publication in the newspaper, the harmful act and its direct effect occurred in Norway. Therefore Swedish courts did not have jurisdiction under Article 5(3) of the Lugano Convention. However, the court ruled that the Swedish courts had jurisdiction with respect to the publication of the photograph in the internet. In fact, although the harmful act was then committed in Norway, it produced direct effects in Sweden because the photograph was accessible there.

[11] Case C-68/93 [1995] ECR I-415.
[12] The Oberlandesgericht refers to previous judgments of the Bundesgerichtshof, in particular judgment of 30 March 2006 – Arzneimittelwerbung im Internet, case I ZR 24/03, published in Neue Juristische Wochenschrift 2006 p. 2630.
[13] The court unfortunately does not give indications as to how such intention should be determined.
[14] This is inferred from the fact that the court applied Article 5(3) of the Lugano Convention (and not of the Regulation, e. g.).

b) Application of Article 5(3) in cases relating to antitrust law

Judgment of the Oberster Gerichtshof (Austria) of July 16th 2008 (No 2009/26)

Facts see above p. 3.

Once the Oberster Gerichtshof had determined that the decision came within the scope of the Regulation, it had – inter alia – to address the question whether Austrian courts had jurisdiction under Article 5(3) of the Regulation. According to the court, infringements of antitrust law are encompassed by the term tort as used in Article 5(3) of the Regulation. In determining whether the alleged harmful event had occurred in Austria the Oberster Gerichtshof pointed out that the mere impact of certain behaviour on the Austrian market was in itself insufficient. Rather, it had to be established if the impact led to Austria being regarded as the "place of effect of the harmful conduct", given that the anticompetitive behaviour was entirely performed outside Austria (i. e. in Germany). The court explained that this question was the subject of academic debate if the behaviour in question only bore effect on a secondary market without being aimed at it. Some academic opinions even called for special interpretation of the place of effect in the field of competition law. However, the court held that Austria was the place where the harmful event occurred without having to decide the aforementioned question. It regarded the alleged detrimental effects upon the assets of Austrian companies as sufficient to establish Austria as place of effect, as those losses had to be localised at the place where the person having suffered the loss has his or her seat. Furthermore, the Austrian Oberster Gerichtshof was of the opinion that the alleged behaviour had direct effects on the relevant primary market, including the Austrian.

c) Independency of claims based on tort and claims based on contract

Judgment of the Bundesgerichtshof (Germany) of May 27th 2008 (No 2009/32)[15]

Facts of the case

The plaintiff living in Germany sued a physician domiciled in Switzerland for damages. The plaintiff had been treated by the defendant in a Swiss hospital where the defendant had recommended a medication to be administered by the plaintiff himself in his place over a period of several months. The treatment caused severe side-effects, which – according to the

[15] The case had been presented orally at the 16th Session in September 2009.

submissions of the plaintiff – had not been explained to him by the defendant prior to the commencement of the treatment.

The Bundesgerichtshof held that Germany had international jurisdiction pursuant to Article 5 (3) of the Lugano Convention. First, it stated that the meaning of "tort" had to be interpreted autonomously (Benincasa v Dentalkit[16]). The court referred to the jurisdiction of the ECJ according to which Article 5 (3) of the Brussels Convention covered all actions which sought to establish the liability of a defendant and which were not related to a contract within the meaning of Article 5 (1) of the Brussels Convention (Tacconi v HWS[17], Engler v Janus Versand[18]). It pointed out that the plaintiff did not base his claim on a contract. The mere possibility of concurring claims in contract and tort did not establish a priority for the jurisdiction for matters of contract. According to the Bundesgerichtshof, the ECJ had made clear in its decision Kafelis v Schröder and others[19] that jurisdiction for claims based on torts and jurisdiction for those based on contractual relations could coexist. *A fortiori*, according to the Bundesgerichtshof, jurisdiction could be established pursuant to Article 5 (3) where no contractual claims were brought forward at all.

Concerning the place where the harmful event occurred, the court argued that in this case where a medical treatment had been prescribed in Switzerland, allegedly the duty to inform the patient about the risk had been violated there, the medicine should be administered by the patient himself in Germany and the side effects occurred in Germany, the place of effect of the harmful event was Germany, as the damage did not occur until the treatment led to an impairment of health.

d) Culpa in contrahendo

Judgment of the Corte di cassazione (Italy) of December 17th 2007 (No 2009/54)

Facts of the case

The Italian plaintiff sued the defendant, an Austrian company, for damages arising out of culpa in contrahendo, as the latter had – allegedly contrary to its obligations – refused to conclude a contract constituting a "società temporanea di impresa" (which would have been a precondition for the plaintiff being able to sell its products/services in the context of the construction of a passenger terminal in the port of Brindisi).

[16] Case C-269/95 [1997] ECR I-3767.
[17] Case C-334/00 [2002] ECR I-7357;
[18] Case C-27/02 [2005] ECR I-481.
[19] Case 187/89 [1988] ECR 5565.

The defendant first contested the applicability of Article 5(3), saying that the dispute fell within the scope of Article 5(1). This submission was rejected by the court with a reference to the ECJ judgment Tacconi v HWS[20]. Second, the defendant took the view that the alleged harmful event had taken place in Austria, this being the place where the conclusion of the contract had been refused. The court dismissed the argument as Article 5(3) also referred to the place of the *effect* of the incriminated action, which was, in the court's view, Brindisi (Italy), this being the place where the construction works, mandate for which the applicant said to have "lost" due to the defendant's refusal of concluding a contract, should have been performed.

Article 5 (6): Jurisdiction in matters relating to settlors, trustee or beneficiary of a trust

Judgment of the Court of Appeal of England and Wales of October 3rd 2008 (No 2009/51)

Facts of the case

This was an appeal against a judgment refusing jurisdiction for claims invoked by the three claimants against their mother, the first defendant and others, arising out of a trust created by their father. The declaration of trust was made by a Jersey corporation, and the trust was expressed to be governed by English law; the principal asset of the trust were certain shares in a corporation incorporated under the law of the Cayman Islands. The trust was administered in Liechtenstein. The first claim was that the defendant had received undue payments (more than her regular share) from the trust. The second claim was that the defendant had purported to appoint herself appointer under the trust when she was unable to do so.

The appeal raised the question of principle of the ascertainment of the domicile of a trust for the purposes of Article 5(6), and also questions on the interpretation and the application of the expression "sued …as … trustee or beneficiary".

The Court of Appeal pointed out that in order to determine whether a trust was domiciled in the Contracting State whose courts were seised of the matter, the court should apply its rules of private international law (Article 60(3) of the Regulation). The court stated that a trust was not like a commercial contract where it was only necessary to consider the content of the applicable law in exceptional circumstances. Trustees had to be intimately aware of their

[20] Case C-334/2000 [2002] ECR I-10489.

responsibilities under the general law applicable to the trust. Resort to the law governing the trust was central to their responsibilities. According to the court, problems arose in connection with the internal relationships of a trust, i.e. as between the trustees themselves, between persons claiming the status of trustees and between trustees on the one hand and the beneficiaries of a trust on the other. Disputes might occur among a number of persons as to who had been properly appointed as a trustee; among a number of trustees doubts might arise as to the extent of their respective rights to one another; there might be disputes between the trustees and the beneficiaries as to the rights of the latter to or in connection with the trust property, as to whether, for example, the trustee was obliged to hand over assets to a child beneficiary of the trust after the child had attained a certain age. Disputes might also arise between the settlor and other parties involved in the trust. It concluded that if a trust was governed by English law, it was domiciled in England, even though no other connection of the trust with England existed.

The judge pointed out that, Article 5(6) of the Regulation used substantially the same terms as Article 5(6) of the Brussels Convention. Article 5(6) of the Lugano Convention added the words "sued in his capacity as settlor, trustee or beneficiary". The Jenard-Möller Report on the Lugano Convention did not shed any light on the reason for the change.

The interpretation of "trustee" made in this case depended on an autonomous Regulation concept, but since the origin of Article 5(6) lied exclusively in the accommodation of the trust as known in common law countries, that autonomous interpretation must be strongly influenced by the concept of "trustee" in those countries. In the light of the necessarily restrictive approach to the interpretation of Article 5(6) the judge didn't see basis for extending Article 5(6) to such persons as appointors, or protectors, or to any other person with fiduciary powers who did not come within the normal meaning of the expression "trustee." To so interpret and extend Article 5(6) would be contrary to the approach which the ECJ required national courts to take in the interpretation of Article 5. As a consequence, jurisdiction for the first claim – concerning the defendant’s share and therefore her capacity as a beneficiary - could be founded on Article 5(6) of the Regulation, where as the second claim was without the scope of Article 5(6).

<u>New Convention:</u>

In Article 5 (6) of the revised Convention only the words “in his capacity” were removed. It might not change the practice under the new Convention and similar decision is to be expected.

Article 6

Judgment of the Court of Appeal of England and Wales of February 28th 2008 (No 2009/48)

Facts of the case

The main question of the case was whether Article 6 of the Judgments Regulation 44/2001 permits the appellant, German company (DWG) to be sued in England because the claim against it was so closely connected with the claim against its English parent company that it was expedient to hear and determine the claims together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The first instance judge held that it did but gave the German company permission to appeal. This company contended that the judge's decision was wrong because the claim against it was not closely connected with the claim against its English parent company.

The object of the Regulation showed in the judgment was Preamble 11, which says that „jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations“ with „a different linking factor."
On second place - Article 6 contains a number of those exceptions and provides that: "a person domiciled in a Member State may also be sued…where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

The court stated that Article 6(1) required one to identify the anchor claim and the claim against the person domiciled in another Member State, and see whether they are so closely connected so as to make it expedient to determine them together. The claim in each case must be the whole claim; the claim for breach of contract involves consideration of the breach relied on, causation and loss. It is not enough to look at the contract itself and see whether it is closely connected with the subject matter of the claim against the non-domiciled party. The appeal was dismissed and one of the arguments for this was the application of paragraph 15 of the preamble: "In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States“.

Article 8 – Jurisdiction in matters relating to insurance

Judgment of the Oberlandesgericht Karlsruhe (Germany) of September 7th 2007 (No 2009/32)

Facts of the case

The applicant requested legal aid for suing an insurance company which was located in Switzerland before German courts. The applicant had been involved in a car accident in France; a car insured by the respondent had collided into the applicant's car.

The Oberlandesgericht found that Germany had no international jurisdiction according to Article 8(1) No 2 of the (current) Lugano Convention. It referred to the identical wording in the Brussels Convention which was generally accepted as not providing a *forum actoris* for the person who suffered the damage. The court pointed out that recent developments[21] relating to Articles 11(2), 9(1)(b) of the Regulation had no effect on the interpretation of the Lugano Convention. In interpreting the Lugano Convention of 1988 subsequent changes of EC laws – such as the car insurance directive[22] - could not be taken into account.

New Convention:

As the revised Convention contains provisions equivalent to those of the Regulation relating to insurance, under the new regime the outcome of this case would probably have been different. However, the reasoning of the ECJ was based, inter alia, on the wording of car insurance directive[23]. It is not sure to what extent the Lugano Contracting States which are no EU Member States share the objectives of the EU legislator in the absence of regulations such as the car insurance directive.

[21] Cf. ECJ decision FBTO Schadeverszekeringen NV v Odenbreit, C-463/06 [2007] ECR I-11321. The ECJ held that the reference in Article 11(2) of the Brussels I Regulation to Article 9(1)(b) of that Regulation was to be interpreted as meaning that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State.

[22] Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (OJ 2000 L 181, p. 65), as amended.

[23] Directive 2000/26/EC as amended; see para. 29 of the judgment C-463/06 [reference fn. 21 above].

Article 13 Lugano Convention/Article 15 of the Regulation – Jurisdiction in matters relating to consumers

Judgment of the Bundesgerichtshof (Germany) of September 17th 2008 (No 2009/36)

Facts of the case

The plaintiff who was domiciled in Germany decided to buy two flats in Greece while he was on a journey there. He and the owner agreed to entrust the transaction to the defendant, a Greek lawyer speaking German. However, the sale of the flats failed and the plaintiff sued for damages in Germany. He submitted that the defendant had directed his activity to Germany as he (the defendant) was indicated on the website of the German embassy, of a German real estate agent and of three German legal expenses insurances as a German-speaking Greek lawyer.

The Bundesgerichtshof held that it had no jurisdiction under Article 15(1)(c) of the Regulation. The court stated that the accessibility of a merely passive website was in itself not sufficient to establish jurisdiction. It referred to the joint declaration of the Council and the Commission on Article 15 according to which an actual offer for a distance contract and a conclusion of a contract at distance was required. These requirements were obviously not met in the actual case. The defendant did not even have an own website, he was merely mentioned on the websites of third persons. Furthermore court emphasised that Article 15(1)(c) of the Regulation had to be interpreted restrictively due to its establishing an exception to the general principle contained in Article 2 of the Regulation (Shearson Lehmann Hutton v TVB Treuhandgesellschaft[24]; Gruber v Bay Wa AG[25]). Therefore the provision was not applicable where the consumer, during a holiday stay abroad, coincidentally entered into a contract with a person who pursued commercial or professional activities there.

[24] Case C-89/91 [1993] ECR I-139.
[25] Case C-464/01 [2005] ECR I-439.

Judgment of the Cour de cassation (France) of 28th January 2009 (No 2009/46))

Facts of the case:

A German bank concluded a loan contract with two French lawyers and a French real estate investment company, with a clause stipulating that the sole competent courts were those of Hamburg. The borrowers brought a claim concerning the bank before a French court, which accepted the Bank's restriction of competence. The borrowers lodged an appeal against the ruling, on the grounds that the provisions set out in articles 13, 14 and 15 of the Brussels Convention concerning competence in matters of contracts concluded by consumers were applicable.

Question concerning law: Notion of consumer in the absence of a stipulation in the contract concerning the professional purpose of the loan.

The court's ruling: *"Having noted that the letters and documents exchanged when the file was being drawn up show (...) that the purpose of the loan was to refinance the financial commitments entered into, in particular within the framework of the professional activity exercised [by the claimants,] the court of appeal correctly deduced that the loan lay outside the field of application of articles 13 et seq. of the Brussels Convention and that the clause in the contract declaring that the sole competent courts were those of Hamburg was applicable"*.

New Convention: The notion of consumer has not been reviewed within the framework of the revised Convention; thus the solution issued would not have been different within that framework.

Judgment of the Corte di Cassazione (Italy) of May 14th 2007 (No 2009/52)

Facts of the case

The applicants were domiciled in Belgium and introduced an action against the Italian branch of Club Med. The defendant submitted the dispute should have been brought to the Belgian courts (Article 15(1)(c) of the Regulation).

The case is unusual only in that it was actually the professional and defendant who invoked the *forum actoris* ground of jurisdiction, introduced to protect the consumer. The Corte di cassazione dismissed the defendant's objection pursuant to Articles 15(2) and 16(1) of the Regulation.

Article 5(1) of the Lugano Convention concerning an individual contract of employment/Article 19 of the Regulation

Judgment of the Cour de cassation (France) of March 12th 2008 (No 2009/41)

Facts of the case:

A fixed-term employment contract under Italian law was concluded between a racing cyclist and a company governed by Italian law. The contract stipulated that the cyclist had to take part in competitions for at least 120 days a year and train thoroughly. The Italian company terminated the contract prior to its expiry and the racing cyclist brought a claim concerning such termination before the courts competent for the area in which he resided.

Question concerning law:

Application of article 5 1) of the Brussels Convention (article 19 2) a) of the Brussels I Regulations and the Lugano Convention).

Reply to the question concerning law and grounds:

The Court stated that the French courts were justified in declaring that they were competent to hear the case. It backed up its ruling by noting that *"the court of appeal, which noted, in the exercise of its sovereign powers regarding assessment of the elements of fact and proof brought before it, that at the time of termination of the contract (...) [the claimant] had completed in France most of the races on the company's behalf and had trained in that country near his home, to which he returned after each professional trip to another country, thus complying in full with the provisions set out in the modified Brussels Convention, as interpreted by the European Court of Justice, according to which, when the employee's obligation to carry out the agreed activities is executed in more than one contracting State, the location in which he usually carries out his work is the location at or from which, taking into account the circumstances of the specific case concerned, he in fact meets the most part of his obligations towards his employer"*.

New Convention:

Article 19 2 a) of the revised Lugano Convention remains unchanged, so the solution would also remain unchanged.

Article 16(1) of the Lugano Convention/Article 22(1) of the Regulation – Jurisdiction in proceedings relating to immovable property

Judgment of the Oberster Gerichtshof (Austria) of December 11th 2007 (No 2009/24)

Facts of the case

An Austrian condominium association (Wohnungseigentümergemeinschaft) sued the defendant, a co-owner domiciled in Germany, for payment of administrative costs.

The court first referred to the jurisdiction of the ECJ according to which only actions seeking to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* and to provide the holders of those rights with the protection of the powers which attach to their interest were covered by the term rights *in rem* in immovable property (Reichert und Kockler v Dresdner Bank[26]; Gaillard v Alaya Chekili[27]). The court affirmed that the term right *in rem* had to be interpreted autonomously. Contrary to contractual rights, rights *in rem* were enforceable against anybody. The Oberster Gerichtshof recalled that whether claims relating to the administration of condominium associations constituted rights *in rem* in terms of the Regulation was controversial. It pointed out that according to Austrian law (section 27 of the Wohnungseigentumsgesetz), the condominium association had a statutory lien in the co-ownership share for administrative costs. To activate and realize this statutory lien a registration of a legal action was required. However, contrary to a priority notice, the registration was not constitutive but merely effected a pre-existing right that had been created by operation of (property) law. Therefore the action in question was within the scope of Article 22(1) of the Regulation.

Article 17 of the Lugano Convention / Article 23 of the Regulation

Judgment of the Corte di Cassazione (Italy) of June 14th 2007 (No 2009/53)

Facts of the case

The plaintiff domiciled in Italy sued the defendant domiciled in Germany for breach of a contract on exclusive sale/distribution of certain products in Italy (agreement no 1). The defendant contested the jurisdiction of the Italian court, invoking agreement no 2, concluded after agreement no 1, which attributed exclusive jurisdiction to the German courts. The defendant submitted that jurisdiction concerning disputes arising out of agreement no 1 had been at-

[26] Case C-115/88 [1990] ECR I-27.
[27] Case C-518/99 [2001] ECR I-2771.

tributed to German courts in accordance with Article 17(1)(c) of the Brussels Convention, and that both contracts were related, so that the express prorogation clause in agreement no 2 also included disputes arising out of agreement no 1.

The Corte di cassazione did not follow the defendant's argument. First it recalled the ECJ decisions Estasis Salotti v Rüwa[28], Segoura v Bankdarian[29], Sanicentral v Collin[30] and Benincasa v Dentalkit[31]. The court concluded that for reasons of legal certainty, Article 17 of the Convention had to be interpreted restrictively and that the prorogation clause was not dependant on the conditions set out be the law governing the contract (i.e., *in casu*, German law). With respect to the argument that the contracts were related, the Corte di cassazione held that it only had a limited scope of review, given that the appreciation of the facts was mainly a matter of the previous courts. However, the court drew an analogy with arbitration clauses and held that, in line with the court's jurisprudence in relation to arbitration clauses, a prorogation of jurisdiction should be considered to refer only to disputes arising out of the contract in which it is contained. Therefore, however wide the interpretation of the prorogation clause in agreement no 2, it could by no means extend to agreement no 1[32].

Judgment of the Cour de cassation (1° chambre civile) (France) of December 16th 2008 (No 2009/44)

Judgment of the Cour de cassation (chambre commerciale) (France) of December 16th 20008 (No 2009/45) ***(as this ruling was made concerning the same problem as that covered by the aforementioned ruling, and as it gives a similar solution, only the first ruling is examined).***

Facts of the case:

On the orders of a purchaser, a Swiss bank opened an irrevocable letter of credit in favour of the seller to finance the purchase of vehicles that were to be resold to a Libyan company. The transport was carried out under bills of lading mentioning the credit establishment as the recipient. On its arrival in Libya, the shipment was seized at the request of one of the pur-

[28] Case 24/76 [1976] ECR 1831.
[29] Case 25/76 [1976] ECR 1851.
[30] Case 25/79 [1979] ECR 3423.
[31] Case 269/95 [1997] ECR I-3767.
[32] The case also involved the application of Article 5(1) of the Brussels Convention. In fact, in accordance with the ECJ judgment Tessili v Dunlop (case 12/76 [1976] ECR 1473) and De Bloos v Bouyer (case 14/76 [1976] ECR 1497), the place of performance of the disputed obligation had to be determined in accordance with the choice of law rules of the forum. The rules of the (applicable) Rome Convention pointed to German law governing the obligation (section 269 of the German Bürgerliches Gesetzbuch [civil code]). However, the legal question to be examined by the Corte di cassazione was not strictly speaking one of application of Article 5(1) of the Regulation, but of an allegedly wrong application of the applicable German law by the Italian judge.

chaser's creditors, and then by the payment authorities as security for the port fees. The transport company, whose registered office is in France, brought a claim against the bank for payment of the demurrage before a French court, in conformity with the clause contained in the maritime bill of lading. The French court concerned declared that it was competent. When asked to hear an appeal as to the competence of the aforementioned court, the court of appeal declared that the court concerned was not justified in declaring that it was competent, due to the absence of special acceptance by the third party holder of the clause concerning selection of the place of competence, and that the mere holding of a bill of lading by such a third party holder does not establish that the clause concerning selection of the place of competence has been accepted.

Question concerning law:

In the field of maritime bills of lading, is enforceability of a clause attributing jurisdiction subjected to the condition that the third party holder has agreed to that clause by the time of delivery of the goods at the latest, or on the contrary, can the mere fact for the third party of holding a maritime bill of lading be sufficient to impose on him the clause attributing jurisdiction decided by the parties to the bill of lading? This question has given rise to discussion under French law, to the extent that there was a divergence of jurisprudence within the Court of cassation: on the one hand, the first civil chamber decided that *"the insertion of a clause attributing competence to a jurisdiction in another country into an international contract forms part of that contract" (cass. first civ., 12 July 2001)*; while on the other hand, the trade chamber stated that only the essential provisions were enforceable on the recipient, even if he had not given any confirmation of accepting them, as only those provisions were part of the economy of the contract. The other clauses, including the clause attributing jurisdiction, could only be invoked if he had accepted them by the time of delivery of the goods at the latest *(Cass. Trade, 7 Dec. 2004).*

Reply issued by the Court of cassation and grounds for the decision:

In both rulings, the Court of cassation decided that a clause attributing jurisdiction, agreed between a transport company and a shipper and inserted in a bill of lading, produces its effects with regard to third parties holding the bill of lading, provided that, when receiving the said bill of lading, they take on the shipper's rights and obligations under the national law applicable. If not, it is advisable to ensure that they agree to the clause, with regard to the requirements set out in article 17 of the Lugano Convention (No. 2009/42) or article 23 of the Brussels I Regulations (No. 2009/43). In adopting this solution, the Court of cassation com-

plies with the jurisprudence of the European Court of Justice *(CJCE, 9 Nov. 2000, case C-387/98, Coreck Maritime).*

New convention:

The terms of article 23 of the revised Convention do not modify the conditions of enforceability and validity of a clause attributing jurisdiction. If, following revision of the Brussels I Regulations, application of that text regarding third party States were to be adopted, it would be necessary to adapt the provision set out in article 23 of the Brussels I Regulations to suit that context; this would present the advantage of unifying all the jurisprudence in the international field and thus make the applicable law more coherent.

Article 18 of the Lugano Convention/Article 24 of the Regulation – Entering an appearance

Judgment of the Bundesarbeitsgericht (Germany) of July 2nd 2008 (No 2009/35)

Facts of the case

The plaintiff having its seat in Germany sued for the payment of contributions to a pension fund pursuant to a collective agreement. The defendant, who was domiciled in Spain, did not enter an appearance in the oral hearing at the Landesarbeitsgericht. He had, however, made written submissions on the substance of the case prior to the mandatory hearing aiming at an amicable settlement ("Gütetermin") without contesting the jurisdiction of the German courts.

The Bundesarbeitsgericht had to examine whether by putting forward written submissions prior to the "Gütetermin" the defendant had entered an appearance without contesting jurisdiction (Article 24 of the Regulation). According to the case law of the ECJ concerning Article 18 of the Brussels Convention (Elefanten-Schuh v Jacqmain[33]) those submissions fell within the scope of that provision, which under national procedural law were considered to be the first defence addressed to the court. This interpretation could be applied to Article 24 of the Regulation. The Bundesarbeitsgericht held that, given the characteristics of proceedings before labour courts, no such submission had been made. In proceedings before labour courts the principle of oral presentation was given substantially more weight than before civil courts. Therefore only an oral defence (on the substance) would suffice as entering an appearance[34].

[33] Case 150/80 [1981] ECR I-1671.

[34] The Bundesarbeitsgericht has confirmed this jurisprudence in judgments given on 24 September 2009 in three parallel cases (8 AZR 304/08, 8 AZR 305/08 and 8 AZR 306/08). In addition, those 2009 decisions concerned

Article 21 of the Lugano Convention/Article 27 of the Regulation – "Same Parties"

Judgment of the Court of Appeal of England and Wales of January 21th 2008 (No 2009/47)

Facts of the case

A, H and C ("the seller companies") were companies incorporated in Cyprus and holding investments in Russian companies, i. a. in M. In 2004, they sold their shares in company M to the defendants, also incorporated in Cyprus. It is disputed between the parties whether or not the defendants were under an obligation to transfer those shares immediately to a third (Russian) company, E. In June 2006, the seller companies introduced proceedings in England, seeking a declaration that such obligation existed. In Nov/Dec. 2006, the seller companies assigned their claims to K. On 14 February 2007, the defendants introduced action against the seller companies and against K in Cyprus, seeking a declaration that no obligation to transfer the shares to E existed. On 16 February 2007, K was permitted to substitute the seller companies in the English case. The defendants asked the English proceedings to be stayed as there was a prior case against K pending at the courts in Cyprus.

In essence, the Court of Appeal had to decide whether assignee and assignor had to be regarded as "the same parties" under Article 27 of the Regulation.[35]

The Court of Appeal referred to the ECJ judgments Tatry v Maciej Ratij[36] and Drouot Assurance et al. v Consolidated Metallurgical Industries[37] wherein the ECJ had stated that the term "the same parties" had an autonomous meaning; Article 21 of the Brussels Convention (Article 27 of the Regulation) must be understood as requiring that the parties to the two actions be identical; the question of whether the parties were the same did not depend on the procedural position of each of them in the two relevant proceedings; the rules set out in Articles 21 and 22 (now 27 and 28) were designed to preclude, as far as possible, the possibility of the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the state in which recognition was sought. The Court of

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the interpretation of Article 19(2)(a). The Bundesarbeitsgericht held that the place where the employee habitually carries out his work, in case of a ferry travelling regularly between different Member States, was the country under whose flag the ship was registered, and not the place where the employee regularly boarded the ship.

[35] A similar problem (albeit concering Article 34 No 3 of the Regulation) had been raised in a case underlying the preliminary question of Hooge Raad (Netherlands) in case C-534/08 - KLG Europe Eersel B.V. v Reedereikontor Adolf Zeuner GmbH. The preliminary question was, however, withdrawn.

[36] Case C-406/92 [1994] ECR I-5439.

[37] Case C-351/96 [1998] ECR I-3075.

appeal considered that in the case it had to decide, K (the assignee) was to be considered "the same party" with respect to the claims invoked by the seller companies (the assignors), as their had been a good arguable case that the assignment was effective, and as therefore the interest K had in the claims was the same in both proceedings.

Judgment of the Tribunal fédéral (Switzerland) of November 19th 2008 (No 2009/29)

Facts of the case:

Y, a company governed by Italian law, took delivery of goods ordered from X, a company governed by Swiss law. X brought a case against Y before a Swiss court to claim payment by Y of the outstanding balance of the sales price. Y immediately contested the competence of the Swiss court to hear the case. Following the summons, Y summoned X to appear before an Italian court under a claim for damages arising from defects in the equipment delivered.

Taking the summons into account, X, in its further conclusions, asked the Swiss court to note that as regarded Y, it was no longer under any obligation or debt within the framework of execution of the sales contract, on any grounds whatsoever. The Swiss court ruled in favour of the request lodged by the company governed by Italian law, stating that it was advisable to suspend the ruling concerning the last claim made by the company governed by Swiss law, while ruling that it was competent to hear the case concerning the claim for payment of the outstanding balance of the sales price. The company governed by Swiss law brought a claim before the Swiss federal court to obtain reversal of the decision to the extent that it ordered a stay of proceedings.

Question concerning law:

Is there pendency of case within the meaning of article 21 of the Lugano Convention between a claim that a company no longer owes any amounts stemming from execution of a sales contract and a claim for damages for defective execution of a contract? If so, is the court before which a claim was brought initially, and before which a further claim is brought subsequently, after a claim has been lodged with another court, under an obligation to stay the proceedings concerning that claim?

Reply to the question concerning law and grounds for the decision:

The Swiss federal court ruled that the first judges were correct in considering that:

- There was no pendency of case between the claim for payment of the outstanding balance of the sales price on the one hand, and the claim for damages arising from defects in the equipment delivered on the other hand;
- There was pendency of case between the claim lodged by the company governed by Swiss law on the grounds that it was no longer under any obligation or debt within the framework of execution of the sales contract, on any grounds whatsoever, on the one hand, and that lodged by the company governed by Italian law concerning damages arising from defective execution of the contract, on the other hand; on these grounds, and to the extent that the said claim was made known to the Swiss court after it had been brought before the Italian court, the Swiss judges were correct in deciding to suspend the ruling concerning the said claim.

To put forward grounds for its decision, the federal court noted that, according to the jurisprudence of the European Court of Justice, there is identity of cause and object between two claims if they could lead to irreconcilable decisions within the meaning of article 27 of the Convention, with the further proviso that the object of a claim is linked to its purpose, whereas identity of cause lies in the alleged facts. In the present case, the claim concerning the outstanding balance of the sales price, and that concerning damages for defective execution of the contract, constitute two separate claims. The Court added that two court rulings cannot be seen as being irreconcilable on the grounds that one could recognise one party's right to obtain payment of the outstanding balance of the sales price, whereas the other could recognise the other party's right to compensation for damages. Lastly, the Court noted that this is not the case between the claim lodged by the company governed by Swiss law requesting a ruling that it was no longer under any obligation or debt within the framework of execution of the sales contract, on any grounds whatsoever, and that lodged by the company governed by Italian law concerning compensation for damages arising from defective execution of the contract. Considering that the Swiss court had been asked to hear a case of denial after a case had been brought before the Italian court, the federal court found that the Swiss court was correct in deciding to suspend its ruling on the case.

New convention:

Article 27 of the revised convention does not modify the rule set out in article 21. The revision of the Brussels I regulations will provide the Union with an opportunity to find a solution to the problem of "torpedo" delaying claims and perhaps consolidate the *Gubisch* jurisprudence of the European Court of Justice concerning the definition of pendency of cases.

Article 24 of the Lugano Convention/Article 31 of the Regulation – Provisional matters

Judgment of the Oberster Gerichtshof (Austria) of July 16th 2008 (No 2009/24)

Facts of the case see above p. 3.

As the Oberster Gerichtshof considered having jurisdiction under Article 5(3) of the Regulation, it did not have to rule on Article 31, strictly speaking. However, it briefly discussed the requirement of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the contracting state (referring to the ECJ judgment Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line[38]). The court pointed out that the requirement of a real connecting link had not yet been clearly defined and that it remained unsolved in how far this requirement had to be met in cases other than those concerning provisional performance of a contractual obligation. According to the court this requirement did not restrict interim measures to cases where the alleged anticompetitive conduct was performed in the country of the court seised ("domestic conduct"). After discussing and affirming jurisdiction under Article 5(3), the court returned to Article 31 of the Regulation and based its jurisdiction on provisions of Austrian law without further reference to the "real link" requirement. It (somehow inconsistently) held that there was no need for a preliminary decision of the ECJ concerning Article 5(3) as jurisdiction under Article 31 could *in casu* be based on domestic Austrian law (but without elaborating further on the "territorial link" requirement).

Judgment of the Court of Appeal of England and Wales of April 4th 2008 (No 2009/49)

Facts of the case

The creditor (M) (the respondent in the appeal) obtained a judgment by Commercial Court in London in proving that he had a 10% interest in the debtors' (CCIC and CCOC) own 10% interest in an oil concession for the exploitation of an oil field in the Yemen, and ordering the

[38] Case C-391/95 [1998] ECR I-7091.

debtors to pay some 50 million dollar. Both debtors were incorporated in Lebanon. After initially objecting to the jurisdiction of the Commercial Court, the debtors later fully participated in the proceedings. The debtors, who were part of a substantial group based in the Lebanon, did not pay the judgment debt, and commenced proceedings in the Yemen for a declaration that they are not liable to the judgment creditor, and in Lebanon and Greece for declarations that the judgment is not enforceable.

Case 2009/49

The Commercial Court appointed a receiver in relation to CCOC's interest in revenues from the concession, made a freezing order restraining CCOC from disposing of its interest in the Concession and from selling oil from the concession area otherwise than in the ordinary course of business, and ordered CCOC and CCIC to make an affidavit of assets. Those measures are objects of the appeal.

As far as the Regulation is concerned, CCOC submitted first that it was domiciled in Greece. Consequently, a basis for jurisdiction in the Regulation was required. The fact that the English court had jurisdiction over the merits did not give jurisdiction to deal with enforcement matters, and the jurisdiction in Article 31 to order provisional and protective measures did not apply in the absence of a territorial link with England. Second, regardless of domicile, CCOC considered the orders to be incompatible with the provision in Article 22(5) of the Regulation giving exclusive jurisdiction to the courts of the State in which the judgment had been or is to be enforced even if this State was a third country ("reflexive effect").

The Court of Appeal held that neither freezing order, nor receivership order, were measures of enforcement under English law. Article 22(5) being therefore inapplicable it was irrelevant whether or not the provision had a reflexive effect.

The Court of Appeal thought there was insufficient evidence that CCOC was domiciled in Greece (Article 4(1) of the Regulation), but ruled that even if it were, the orders of the Commercial Court were ancillary to the decision on substance, and aimed at ensuring that the decision might be enforced. As the Commercial Court had jurisdiction on the substance, it could also take such provisional or protective measures as it esteemed necessary (ECJ judgment Van Uden Maritime v Firma Deco-Line[39]). In the Court of Appeal's view, this includes both pre-judgment and post-judgment orders. In addition, the Court of Appeal affirmed that jurisdiction would also follow from Article 31 of the Regulation as there was a sufficient link with England.

[39] Case C-391/95 [1998] ECR I-7091.

Judgment of the Court of Appeal of England and Wales of June 6th 2008 (No 2009/50)

Facts of the case:

See case 2009/49 above. In the same context, M obtained an anti-suit injunction ordering CCIC and CCOC not to commence or to continue proceedings against M relating to the case as mentioned above, in any courts other than English or EU courts, including in particular the Yemeni proceedings. CCIC is also domiciled in Greece; CCOC's claim to be domiciled in Greece was rejected by the decision in case 2009/49.

This appeal involves the question whether the English court had jurisdiction following judgment to grant an anti-suit injunction against foreign judgment debtors (in a case where the Regulation was applicable as one of the defendants was domiciled in a Member State).

The view of the first instance was that jurisdiction to grant the injunctions was established because the application was designed to protect the underlying action (at the Commercial Court London). CCIC submitted, in essence, that the claim for an anti-suit injunction (including an interim injunction) had a substantive effect and must be supported by a substantive cause of action. The jurisdiction for issuing an anti-suit injunction must therefore be based on a ground of jurisdiction independent from the jurisdiction for the action brought to the Commercial Court London. No such ground for jurisdiction existed for the anti-suit injunction under the Regulation.

The Court of Appeal did not follow this argument. It ruled that if an English court had jurisdiction for the main cause of action, it also had jurisdiction *in pesonam* to make ancillary orders in protection of its jurisdiction and its processes, including the integrity of its judgments. It recalled that an anti-suit injunction binds only the party enjoined, *in personam*, and was effective only in so far as that party is subject to the jurisdiction of the English courts so that the order could be enforced against him. Where a party was properly sued before an English court, an anti-suit injunction was not a separate claim requiring its own basis of jurisdiction. In alternative forum cases, such as the present, it was not necessary for the applicant to rely on a cause of action establishing a separate right not to be sued. The right to apply for an injunction was not of itself the cause of action but was ancillary and incidental to the existing proceedings. The judgment debtors' submission to the English jurisdiction in those proceedings was basis for the imposition of the anti-suit injunction, and the claim for the injunction did not require any amendment, and any separate basis of jurisdiction under the Brussels I

Regulation. However, the Court of appeal restricted the injunction as it was common ground between the parties that the anti-suit injunction should not have covered the Lugano States (so that the debtors may bring action to courts of the EU Member States or other Contracting States of the (1988) Lugano Convention).

Title III – Recognition and Enforcement

Article 27(1) of the Lugano Convention / Article 34(1) of the Regulation

Judgment of the Sąd Najwyższy (Poland) of September 4th 2008 (No 2009/61)

Facts of the case

The creditor, a German resident, had obtained a judgment a German court ordering the debtor who was domiciled in Poland to pay a certain sum provided that the creditor performed her obligation ("Leistung Zug um Zug" – reciprocal performance by the creditor and the debtor). The debtor had entered an appearance in the German court for the sole purpose of contesting the jurisdiction of the German court, but had not made any intervention on the merits. In accordance with the German code of civil procedure (Zivilprozessordnung), the court had ruled on jurisdiction and on the merit in one procedure and decision. The creditor sought declaration of enforceability of the German decision in Poland. The judgment had first been declared enforceable in accordance with the Regulation. This decision had been annulled by the Sąd Najwyższy as the Regulation was not applicable ratione temporis, and the recognition and enforcement was governed by the Lugano Convention. Furthermore, the court emphasised that the differences between the two acts can affect the outcome of the case, since they adopt different degrees of rigor in relation to so called public order clause (due to the addition of the word "manifestly" in Article 34(1) of the Regulation). The appeal court, reconsidering the case, declared the German decision enforceable, considering there was no ground for refusal under Article 27(1) of the Lugano Convention either. The debtor filed an appeal on cassation.

The court held that it was not contrary to public policy that the German court had not made a separate decision on jurisdiction before making its decision on the merits. The procedure applied by the German court was compatible with provisions of the Lugano Convention. Those provisions did not provide special protection for the party which, because of challenging the jurisdiction, had not disputed the merits of the case. Article 18 of the Convention

stated that a court of a Contracting State before whom a defendant entered an appearance should have jurisdiction. This provision was not applicable where the appearance was entered solely to contest the jurisdiction, or where another court had exclusive jurisdiction. 'Entering appearance solely to contest the jurisdiction' is interpreted as every situation where the lack of jurisdiction was one of the invoked defences, regardless of whether, and what, other defences were used. Therefore, it could not be said that invoking a defence regarding the merits of the case always had to worsen the situation of the party, exposing it to the risk of unwillingly assuming the jurisdiction of the court. Issuing of a separate ruling that affirmed the jurisdiction is not required by Article 18 of the Lugano Convention nor by the German civil procedure. In addition, it was clear that there was no ground for refusal of recognition under Article 27(2) of the Lugano Convention as the debtor clearly had a possibility to participate in the proceedings also on the merits.

The court also rejected the debtor's argument that there was a violation of Article 16(5) of the Convention due to the judgment's ordering simultaneous reciprocal performance of the obligations. The court indicated that enforcement against property of a debtor was to be carried out wherever that property was located. In this case the debtor's place of residence and property is located in Poland; consequently the judgment should be enforced there.

Judgment of the Cour de cassation (France) of October 22nd 2008 (No 2009/43)

Facts of the case:

A company governed by British law requested exequatur in France of a ruling made by a British court not mentioning grounds, but mentioning a reference to an article authorising the court hearing the claim to issue a ruling in favour of the claimant and covering solely the nature of the reparation or compensation claimed. The exequatur request was rejected by a first court on the grounds that the absence of motivation for a ruling was contrary to the rules of the international public order of procedure, and that a mere reference to an article cannot make up for such lack of motivation.

Question concerning law:

Application of article 27(1) of the Brussels Convention (article 34(1)) of the Brussels I Regulations and the revised Lugano Convention). Determining the field of application of public order in application of these articles.

Reply to the question concerning law and grounds for the reply:

The Court of cassation confirmed the ruling issued by the first court on the grounds that "it is contrary to the international public order of procedure to recognise a ruling made in another country and not mentioning any grounds, without production of documents whose nature enables them to be used as equivalents to the grounds thus lacking"; (...) that after having noted that a simple reference, in the ruling made by a court in another country, [to the article concerned] cannot meet the obligation to give grounds for a ruling, [the first court] sovereignly considered that the summons and its appendices did not constitute equivalents to such motivation, any more than the mentions of the certificate made out subsequently in application of article 12 of the 1982 civil jurisdiction and judgement act.

New convention:

The addition of the adverb "manifestly" referring to the fact of going against the public order of the Member State concerned, during the revisions of the Brussels I regulations and the Lugano Convention, would not seem to modify a ruling made on the basis of the revised texts. Within the framework of the revision under way concerning the Brussels I Regulations, the jurisprudence in question shows the usefulness of conserving grounds for refusal to execute due to the fact of going against the public order of the Member State concerned, as conservation of such grounds provides guarantees as to protection of parties' rights in the European judicial area.

Article 27 (2) of the Lugano Convention/Article 34(2) of the Regulation

Judgment of the Bundesgericht (Switzerland) of January 7th 2008 (No 2009/27)

Facts of the case

The applicant submitted that the Belgian decision could not be recognised in Switzerland according to Article 27(2) of the Lugano Convention because the defendant in the Belgian proceedings was not granted sufficient time to enable him to arrange for his defence. The Swiss company was served with the document which instituted proceedings 28 days before the day of the hearing. According to Belgian procedural laws there should have been 38 days betweens summons and the hearing.

The Bundesgericht held that the Belgian decision had to be recognized in Switzerland. The question of sufficient time was not to be judged by the national procedural laws of the State

of origin. Instead, the court in the State of enforcement had to decide – under its own discretion - whether the defendant had sufficient time to arrange for his defence, taking into account the circumstances of the case. In this case 28 days were considered to be sufficient.

New Convention:

The wording of the new Article 34 (2) is the same as that of the old Article 27 Lugano Convention expect for the words "unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so" (irrelevant in this context). Therefore no different outcome of the case is to be expected under the revised Convention.

Judgment of the Tribunal fédéral (Switzerland) of July 1st 2008 (No 2009/28)

Facts of the case:

A company lodged a claim covering execution in Switzerland of a ruling issued by a British court by default.The claim was rejected by the Swiss court on the grounds that the debtor had not been given notice of the summons concerning the case via the required channels or in good time, to enable him to attend the trial. Indeed, notice of the summons concerning the case had been handed over in Lebanon to one of the debtor's wives, by a Lebanese bailiff acting on the instructions of a Lebanese lawyer, who had been empowered in turn by the claimant's British counsel. Such notice was thus not given via the required channels, as Lebanon only accepts notice in its territory of legal deeds issued in other countries, if such deeds are forwarded via the required diplomatic channels.

Question concerning law:

How can the regularity of a summons concerning a case be assessed if notice is given in a State that is neither the State of origin, nor the State of execution, and if the Lugano Convention contains no criteria in the matter?

Reply to the question concerning law:

When notice is given in a State that is neither the State of origin, nor the State of execution, the regularity of the notice has to be assessed initially in the light of the international law applicable to legal writs from the State of origin served in that other State. Failing specific international rules, it is necessary to apply the general principles concerning legal notice from one State served in another State. In the present case, as Lebanon does not authorise serving of legal writs issued in other countries, such writs can only be served by the local authorities, on the basis of a request sent via diplomatic channels, failing which the sovereignty of

that other State is violated; this means that the notice of the summons concerning the case is null and void and that the ruling issued by the British court cannot be recognised.

New Convention:

The new article 34 of the revised convention does away with the requirement as to regularity of notice; thus the only requirement concerning notice is that the defendant must be informed of the summons or an equivalent writ concerning a case in good time and in a way that enables him to organise his defence. This means that henceforth, the grounds of non-recognition due to irregularity of the notification procedure can only be invoked in the event that the said irregularity has prevented the defendant from attending the hearing to present his defence (cf. explanatory report concerning the revised Lugano convention, § 135). Nonetheless, in the present case, we could reflect on the solution that would be applied under the situation as described. In fact, the irregularity put forward is such that the writ in question has to be considered as being inexistent, because the irregularity concerned was substantial. If the defendant fails to appear at the hearing, the question to be examined is whether, in application of the revised Convention, it would be possible for a court to consider that in such a case, the defendant was unable to present his defence in good time, which constitutes grounds for non- recognition.

Judgment of the Supremo Tribunal de Justica de Lisboa (Portugal) of October 18th 2007 (No 2009/59)

Facts of the case

The case illustrates the application of Articles 53(2), 54 and 55 of the Regulation in the context of Article 34(2) of the instrument. The judgment, a default decision (Versäumnisurteil), had been given by a German court. The document instituting the proceedings was served to the defendant by public notification in accordance with section 186 of the German Zivilprozessordnung. The defendant, domiciled in Portugal, had not appeared in the German proceedings.

The request for declaration of enforceability was made in Portugal initially without the certificate. The Supremo Tribunal ruled that it followed from Article 54 and Annex V of the Regulation that it had to verify that the document instituting the proceedings had been served to the defendant. Even though the certificate did not indicate the day of service of the document instituting the proceedings, service could be demonstrated by other means. However, in the case it had to decide, the Supremo Tribunal was not satisfied with the evidence brought by

the applicant and upheld the decision of the previous instance which had annulled the declaration of enforceability for the reason set out in Article 34(2) of the Regulation. It considered that the applicant had neither proved that the document instituting the proceedings had been notified, nor that the defendant could have commenced proceedings challenging the judgment of the German court and failed to do so.

Title IV Other provisions

Article 54 of the Lugano Convention

Judgment of the Sąd Najwyższy (Poland) of July 17th 2008 (No 2009/60)

Facts of the case

The applicant contested a decision refusing declaration of enforceability of a German default judgment pursuant to Article 34(2) of the Regulation. The proceedings in Germany had been instituted in 2003, the judgment given in February 2004. Applicant had motivated her further appeal invoking violation of Article 34(2) of the Regulation.

The Sąd Najwyższy considered the appeal on cassation to be unfounded as it was filed on the basis a violation of the Regulation, which was not applicable in this case *ratione temporis*. In fact, recognition and enforcement was governed by the Lugano Convention (Article 54(1) of the Lugano Convention). Under Polish law, an appeal on cassation could be effective only if its motives correctly identify defectiveness of the decision of the court of the previous instance. The Sąd Najwyższy was not empowered to make independent specification of pleas or to hypothesize which provisions should constitute the grounds for cassation.

The Sąd Najwyższy also recalled Article 37 of the Lugano Convention (adversary nature of the appeal proceedings). However, this requirement did not require an oral hearing of the parties. It was sufficient if they had the opportunity to make written observations.

Finally, the Sąd Najwyższy considered that under Article 46 of the Lugano Convention the applicant which applies for recognition of enforceability of a default judgment is obliged to present an original version or a certified copy of a document showing that the document instituting the proceedings (or equivalent) was delivered to the defendants, who failed to attend the hearing. In this case, the documents had not been duly delivered as there were problems with the indications of the forenames and surnames of the defendants. The requirements

concerning delivery of documents needed to be, in court's opinion, obeyed rigorously since they have the character of a guarantee of the defendants' rights.

III. Final remarks

Overall, most decisions refer to ECJ interpretation of the Brussels Convention/the Regulation and apply principles set out there. The vast majority of cases now fall under the Regulation (which is not surprising as the instrument has been in force since March 2002).

Not all "new" legal problems are made subject to preliminary rulings – national courts also use existing ECJ jurisdiction as a starting point and deduce answers to such questions from those ECJ rulings. E. g. the question whether an "interim measure" can be given even after the final decision of the case in order to secure the enforcement of that decision might have been worth looking at in more detail.

IV. Table of Contents