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LIMITE

THIRD REPORT ON NATIONAL CASE LAW ON THE LUGANO CONVENTION

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I. Introduction

At its meeting on 13 – 14 September 1999 the Standing Committee of the Lugano Convention was presented with a report on national case law pertaining to the Convention, based on decisions communicated to the EC Court of Justice by signatory and acceding States in application of Protocol 2 to the Convention. That report written by the Greek, Swiss and Spanish delegations[1] covered the decisions contained in the first seven fascicles brought out by the Court of Justice (through its Library, Research and Documentation Centre). A second report by the Austrian, Italian and Norwegian delegations[2] covered the decisions contained in the 8th fascicle. In September 2000 the Standing Committee decided that the third report, covering the decisions in the 9th fascicle[3], should be drawn up by the Netherlands, German and Swedish delegations for the meeting of the Standing Committee in September 2001. The 9th fascicle contains 50 decisions pertaining either to the Lugano or the Brussels Convention, handed down by the following courts:

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[*] Our kind thanks go to Mrs Caren Reibold for her assistance in editing the report.

[1] IPRax 2001, 262.

[2] IPRax #.

[3] Information pursuant to Protocol 2 to the Lugano Convention, Package No. 9, July 2000 (quoted as Information No. 2000/...); the decisions are also published on the homepage of the ECJ under http://www.curia.eu.int/common/recdoc/ convention/en/tableau/2000.htm.

Lugano Convention:

Oberster Gerichtshof (Austria): 3 decisions
Tribunal fédéral/Bundesgericht (Switzerland): 3 decisions
Oberlandesgericht München (Germany): 1 decision
Cour de Cassation (France): 2 decisions
House of Lords (United Kingdom): 1 decision
Norges Høyesterett (Norway): 1 decision
Högsta domstolen (Sweden): 1 decision

Brussels Convention:

EC Court of Justice: 6 decisions
Cour d'appel de Bruxelles (Belgium): 2 decisions
Hoge Rat/Gerechtshof Amsterdam (Netherlands): 3 decisions
Bundesgerichtshof/Oberlandesgericht Karlsruhe (Germany): 2 decisions
Oberster Gerichtshof (Austria): 3 decisions
Court of Appeal (United Kingdom): 6 decisions
Cour de Cassation/Cour d'appel de Colmar/Cour administrative d'appel de Nantes/Cour d'appel de Paris (France): 11 decisions
Efeteio Thessalonikis/Areios Pagos (Greece): 2 decisions
Corte di Cassazione (Italy): 3 decisions

It should be pointed out that the EC Court of Justice (ECJ) is dependent on information on national case law provided by national authorities. Thus, the national decisions pertaining to the Lugano and Brussels Conventions that the Court has been able to disseminate do not necessarily constitute a complete compilation of such decisions by national courts of last instance. This should be borne in mind when reading this report.

Although the decisions cover a wide variety of questions, Article 5 (1) is the provision that is most frequently dealt with. The provisions disputed more than once are Article 1, 2nd para., Article 16 (1a) and Article 24. As was the case with the first and second reports, this report, too, will concentrate on the decisions on the Lugano Convention proper (12 decisions)[4].

II. Overview of the case law

1) Title I - Scope

Article 1, 2nd para. (1)

In a judgment by the Austrian Supreme Court *(E. v. O.)*[5] the main issue was whether the matter to be decided fell within the material scope of the Convention. The parties had agreed as part of a divorce settlement that the ex-wife (the defendant) should be the principal debtor and the ex-husband (the plaintiff) the deficiency guarantor for a bank loan. When the defendant failed to discharge her obligations to the bank, the bank claimed payment from the plaintiff. The plaintiff then claimed "right of recourse" against the defendant.

[4] Courts in the contracting States to the Lugano Convention have different traditions as to the disclosure of the considerations which led to their decision. A fair comparison of cases is thereby complicated.

[5] Austrian *Obergerichtshof*, 21 October 1999, http://www.curia.eu.int/common/recdoc/convention/en/2000/17-2000.htm, Information No. 2000/17.

In its brief remarks on the material scope of the Convention the Austrian Supreme Court based its decision on two ECJ rulings (*De Cavel v. De Cavel*[6] and *W. v. H.*[7]). These older decisions on the Brussels Convention were held to constitute an authentic interpretation of the identical provisions found in the Lugano Convention: corresponding to that case law, the term "rights in property arising out of a matrimonial relationship" (Article 1, 2nd para. (1)) was said not to refer solely to the property regimes specifically and exclusively envisaged by certain national legal systems in the case of marriage. Any proprietary relationships resulting directly from the matrimonial relationship or the dissolution thereof were also said to be excluded, in this exception, from the scope of the Convention. The plaintiff's claim, so the Supreme Court held, was based on a settlement reached by the spouses on the dissolution of their marriage[8]. The subject-matter of the case was therefore held to have correlations with property law resulting from the dissolution of the marriage and, as such, were not covered by the Convention.

Article 1, 2nd para. (4)

Article 1, 2nd para. (4) rules that arbitration is outside the scope of the Lugano Convention. Views differ as regards the meaning of this provision, which is identical to Article 1, 2nd para. (4) of the Brussels Convention. As already indicated in the Jenard Report[9], many, but not all disputes over arbitration clauses are excluded. The Schlosser Report[10] on the Convention relating to the accession of Denmark, Ireland and the United Kingdom to the Brussels Convention discusses the different interpretations of this provision and states that court proceedings only fall within arbitration proceedings when they are ancillary to those

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6 Slg. 1979 p. 1055 (143/78).

7 Slg. 1982 p. 1189 (25/81).

8 Austrian family law provides that in the case of divorce, the matrimonial property and all debts connected with such property have to be distributed amongst husband and wife in an equitable way. In principle, the distribution of the debts has only effects *inter partes* and does not affect the position of the creditor. A divorce by mutual consent is not possible if the parties do not reach an agreement on that point.

9 OJ 1979, C 59/1 p.13.

10 OJ 1979, C 59/71 p. 92.

arbitration proceedings. The ECJ accepted this interpretation in the *Rich v. Impianti* case[11]. In this case, the ECJ decided that the exclusion provided for in Article 1, 2nd para. (4) extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation. In a decision of 4 May 1999 the French *Cour de cassation (Piquet v. Sacinter)*[12] had to consider whether an arbitration clause in an individual contract of employment excluded the applicability of the Lugano Convention. A Belgian engineer had entered into an individual contract of employment with a Swiss company, the work to be carried out in France. The contract provided that in case of dispute it would be subject to arbitration in *Lausanne* and governed by the "concordat suisse sur l'arbitrage". The engineer was dismissed. He then sued the Swiss company for payment of damages, based on unjustified dismissal in the Labour Court at the place where he carried out his work. The Labour Court declared that it did not have jurisdiction. On appeal the Court of Appeal confirmed the Labour Court's decision. It based its decision on two grounds:

A. according to its Article 1, 2nd para. (4) the Lugano Convention is not applicable to arbitration, and B. being a valid arbitration clause according to Swiss law, which is applicable to the contract, this clause excludes the application of French labour protection provisions.

The French *Cour de cassation* held that the Lugano Convention was applicable[13]. In a concise judgment it stated that the arbitration clause could not be raised against an employee who in conformity with the applicable law has taken his former employer to the French competent courts and that by applying Article 5 (1) of this Convention the French courts had jurisdiction to decide on the matter. The *Cour de cassation* did not deal with Article 1, 2nd para. (4)

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11 Slg. 1991 p. I-3855 (190/89).

12 French *Cour de cassation*, 4 May 1999, Revue de l'arbitrage 1999, p. 292; La semaine juridique-édition générale 1999 p. 1010, 1999 IV 2132, 2000 II 10337, http://www.curia.eu.int/common/recdoc/convention/en/2000/28-2000.htm, Information No. 2000/28.

13 As concerns Article 54 of the Lugano Convention see p. 19.

specifically and did not explain why it referred the case to another Court of Appeal to decide on the merits. However, by referring directly to Article 5 (1) and referring the case to another Court of Appeal to decide on the merits it is unclear whether the *Cour de cassation* meant to refer to that court any decision on the validity or enforceability of the arbitration clause.

2) Title II - Jurisdiction

In its decision on 26 October 1999 the Swedish Supreme Court *(Thessalian Paper Industry Svensaka AB:s i likvidation konkursbo v. P.F. and L.O.)*[14] came to the conclusion that it is left to national law to decide whether circumstances to support the application of a specific ground of jurisdiction in the Convention has to be invoked by the parties or if a court can apply the provisions in Title II in the Convention *ex officio*.

In this case, a Swedish company brought proceedings against several defendants, inter alia against a person domiciled in Finland, defendant Y, claiming liability for a deficiency of repayments in accordance with Swedish company law. The plaintiff claimed that Swedish courts – in this particular case, the *Stockholm* District Court – had jurisdiction regarding defendant Y under Article 16 (2) of the Convention. The *Stockholm* District Court held that the proceedings did not involve matters on the constitution of legal persons or any other matter mentioned in Article 16 (2), and dismissed the application.

The view that Article 16 (2) was not applicable was upheld by all instances. The *Svea* Court of Appeal, however, came to the conclusion that the *Stockholm* District Court had jurisdiction over defendant Y under Article 6 (1), since the court had jurisdiction regarding the co-defendant under Article 2. It was undisputed that the actions against the co-defendants were connected as required by ECJ case-law (*Kalfelis v. Schröder*[15]).

Defendant Y appealed against the decision of the *Svea* Court of Appeal, arguing that Article 6 could not be applied by the Court of Appeal since it was not invoked by the plaintiff when the proceedings were brought.

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14 Swedish *Högsta domstolen*, 26. October 1999; Nytt Juridiskt Arkiv 1999 I p. 660, http://www.curia.eu.int/common/ recdoc/convention/en/2000/50-2000.htm, Information No. 2000/50.

15 lg. 1988 p. 5565 (189/87).

The Supreme Court rejected this argument. The Court found that the provisions in Title II are meant to be applied whether invoked by the parties or not. Any obligation for courts to take into account circumstances that have not been invoked by the parties, was however found to be left to national law, with the exception of the situations dealt with by Articles 19 and 20. These provisions compel courts to consider certain issues *ex officio*. Outside the scope of those provisions the Supreme Court held that the Convention did not lay down any obligations.

Article 5 (1) clause 1

In a final judgment by the Higher Regional Court in *München*[16], the plaintiff, the trustee in bankruptcy of a private limited company with its registered office in Germany (hereinafter referred to as the company) sued the defendant for damages. The defendant had formerly been the company's managing director and was domiciled in Switzerland. The decision focused on the managing director's internal liability to the company, especially pursuant to certain provisions of German law on public limited companies. In particular, the plaintiff claimed that the defendant had misrepresented the company's nominal capital and "stripped" the company's assets.

Without first going into the prior question of whether the dispute related to a contract of employment pursuant to clauses 2 and 3 of Article 5 (1), the court classified the special legal relationship between the German private limited company and its managing director as its organ as a "contract" within the meaning of the first clause of Article 5 (1). It acknowledged that the appointment of a managing director by a company was an act under corporate law. The court found that since the position of a managing director within a company involved wide-ranging obligations towards the company, such an appointment had, however, to be accepted by the managing director. There was all the more reason, so the court held, to apply

[16] Munich *Oberlandesgericht*, 25 June 1999, Zeitschrift für Wirtschaftsrecht 1999 p. 1558, Der Betrieb 1999 p. 1847, http://www.curia.eu.int/common/recdoc/convention/en/2000/22-2000.htm, Information No. 2000/22.

Article 5 (1) as there was usually a contract of employment between the company and its managing director, specifying that legal obligations stemming from his position as company executive should also to be complied with. The ECJ was also stated to have ruled that obligations to pay money arising from the relationship between an association and its members were to be regarded as "matters relating to a contract" within the meaning of Article 5 (1) of the Brussels Convention, which had exactly the same wording. Membership of an association created, between the members, links as close as those created between parties to a contract. Furthermore, the court drew attention to the ECJ's qualification of the links between the shareholders of a company as being of a contractual nature.

In conclusion, the court declared itself to have international jurisdiction under the first clause of Article 5 (1), if not already under Article 5 (3) so far as the action could be classified as tortious. The court held that the place of performance of the disputed contract, which was to be determined by reference to the principles of private international law, was Germany (registered office of the company).

In a decision of the British *House of Lords* of 17 February 2000 *(Agnew and others v. Lansförsäkringsbolagens AB)*[17], one of the issues at hand was the interpretation of Article 5 (1)[18]. The plaintiffs brought proceedings in England against an insurance company domiciled in Sweden, seeking a declaration that they were entitled to set aside a reinsurance contract on the grounds of misrepresentation and non-disclosure. The background to the proceedings is the following. The plaintiffs carried on reinsurance business in the London market and provided reinsurance for a risk entered into by the Swedish company, who had issued suppliers' and manufacturers' guarantee insurance in respect of obligations arising under a contract to supply a Norwegian company with underwater valves for use in oil fields. The claimants argued that they were induced to enter into the contracts by material misrepresentation and that the defendant, through its brokers, was guilty of material non-disclosure during the negotiation and the presentation of the risk, in London.

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17 British *House of Lords*, 17 February 2000, The All England Law Reports 2000 Vol. 1 p. 737, http://www.curia.eu.int/common/recdoc/convention/en/2000/40-2000.htm, Information No. 2000/40.

18 The issue whether the dispute fell under Articles 7 to 12 on jurisdiction in matters relating to insurance contracts is dealt with in a following section in this report.

In bringing the proceedings, the plaintiffs relied on Article 5 (1) of the Lugano Convention. The defendant argued that the proceedings fell outside the scope of Article 5 (1), contending that the ”obligation in question” had to be an obligation *under* a contract and that an obligation of disclosure in pre-contractual negotiations was not such an obligation.

The *High Court* and the *Court of Appeal* accepted jurisdiction under Article 5 (1). Also the *House of Lords* found that English courts had jurisdiction under Article 5 (1). Firstly, the *House of Lords* held that an obligation to disclose in pre-contract negotiations could constitute the obligation in question for the purposes of Article 5 (1). This conclusion was held to be consistent with the ordinary meaning of the language used in the provision. Furthermore, the policy and principle underpinning the provision was found to support that interpretation. Secondly, the *House of Lords* held that an obligation which, if not fulfilled, provided a right to set aside the contract was to be regarded as a contractual obligation. In this context it was pointed out that a distinction has to be made in relation to cases where an apparent contract was void *ab initio*.

The reasoning in the decision by the *House of Lords* takes as its starting point the language of Article 5 (1). In the opinion of Lord Woolf, this standpoint is examined in relation not only to the policy behind the Convention, but also in relation to case-law of the ECJ. Referring to i.a. *de Bloos v. Bouyer*[19] and the *Effer v. Kantner*[20] , Lord Woolf concludes that ECJ case-law does not take a stand on the issue whether pre-contractual obligations are within Article 5 (1). Neither should, according to this opinion, the *de Bloos* case and the use of the words ”…the obligation referred to in Article 5 (1) is still that which arises under the contract.” be interpreted as limiting Article 5 (1) to obligations arising under express terms of a contract.

[19] Slg. 1976 p. 1497 (14/769).
[20] Slg. 1982 p. 825 (38/81).

In dissenting opinions of Lord Hope and Lord Millett, conclusions to the contrary are made with regard to pre-contractual obligations. Lord Hope finds the references in ECJ judgment in *Groupe Concorde v. Suhadiwarno*[21] to "the intention of the parties" and to the place which has a real connection with the "true substance of the contract" to support the conclusion that when the court uses the words "contractual obligation" it has in mind obligations created by or arising under the contract. Lord Millett argued that an obligation relevant to the application of Article 5 (1) must be a contractual obligation, voluntarily undertaken by the party to the contract and contained in the contract itself. A breach of the duty to act in utmost good faith when the reinsurance contract was entered into could not be regarded to be a performance or a non-performance of an obligation created by the contract.

Article 5 (1) clauses 1 and 2

In a decision of 20 January 1999 the Austrian Supreme Court[22] considered whether a self-employed commercial agent could sue his principal at the place of jurisdiction for the contract of employment (second clause of Article 5 (1)) in an action in which he claimed payment of commission, compensation for termination of an agreement, submission of a statement of accounts and preparation of an abstract of accounts. The court found that the ECJ was not directly entitled to interpret the Lugano Convention. Pursuant to Protocol No 2 to that Convention, ECJ decisions handed down prior to 16 September 1988 (= date the Lugano Convention was signed) were to be regarded as authentic interpretations. The court went on to say that the case law of the other Contracting States was also to be taken into account. Lastly, in interpreting the Convention, due account was to be taken of the principles deriving from ECJ case law on parallel provisions of the Brussels Convention. The methodological principles applicable to interpretation of the Brussels Convention could also, so the court held, be drawn upon for the interpretation of the Lugano Convention.

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21 Slg. 1999 p. I-6307 (440/97).

22 Austrian *Oberster Gerichtshof*, 20. January 1999, Juristische Blätter 1999 p. 745, http://www.curia.eu.int/common/ recdoc/convention/en/2000/14-2000.htm, Information No. 2000/14.

The court held that exceptions from the basic rule in Article 2 were to be interpreted narrowly. Pursuant to the second clause of Article 5 (1), actions arising out of employment contracts could be also brought at the place where the work was habitually carried out. The term "contract of employment" was said generally to be given an autonomous interpretation. The interpretation of Article 6 of the 1980 Rome Convention on the law applicable to contractual obligations was also to be taken into account. Contracts of employment were held to be agreements between the employer and the employee covering a dependent, subordinate activity. As stated by the ECJ in the *Mulox v. Geels*[23] case, the contract of employment created a lasting bond which integrated the employee into the organisational framework of the employer's business in a specific way. According to the lower court's findings this did not apply to the plaintiff's situation. His dependence on the defendant was not such, either in personal or commercial terms, as to amount to personal dependence. There was therefore no dependent, subordinate relationship, so that the action could not be based on the second clause of Article 5 (1).

By way of supplementation, the Austrian Supreme Court looked at the question whether the action could be based on the place of performance for other contractual disputes (first clause of Article 5 (1)). According to ECJ case law, the place of performance was to be determined by the law applicable to the contract. However, this did not mean that a separate place of performance had to be determined for each separate claim. If a claimant based his action on several obligations arising under the same contract, the court had to be guided by the maxim *accessorium sequitur principale*. The court said that in order to avoid a multiplicity of fora, in cases where various obligations were at issue, it would be the principal obligation which would determine its jurisdiction. In the case in point, the principal obligation was held to be the obligation in regard to the payment of a sum of money (and not the claim for submission of a statement of accounts or for preparation of an abstract of accounts).

Since the defendant was domiciled in Finland and the place of performance was also in Finland, the Austrian court declined international jurisdiction.

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[23] Slg. 1993 p. I-4075 (125/92).

Article 5 (3)

In a decision of 2 August 1999 the Swiss Federal Court *(P.H. v. B.T.)*[24] was seized of a case where the plaintiff was seeking a court declaration negating the existence of a certain claim. The plaintiff, the director of a bank in an advisory capacity, had been in correspondence with the *Zürich* regional prosecutor's office and made a witness statement to it. The defendant alleged that it had been harmed by this action, which it considered to be tortious and claimed damages from the plaintiff. The plaintiff sought a declaration that he was not liable to the defendant, or at least not through any tortious act.

The court took as its starting point the ECJ decision in the case *Tatry v. Rataj*[25]. According to that decision, an action seeking a declaration that the plaintiff is not liable for causing loss had the same cause of action as proceedings brought by the opposing party seeking to have the plaintiff declared liable for loss; therefore where a tort claim was in dispute the proceedings for a declaration that the plaintiff is not liable were to be brought in the same place as the disputed claim would have to be brought.

The court conceded that problems might arise if no single place of commission could be identified, e.g. if the event giving rise to the injury occurred in one place but the injury occurred elsewhere. The court thought it might be problematic that under these circumstances, it would be the plaintiff (the presumed wrongdoer), rather than the victim, who would have the option allowed by Article 5 (3) of suing either in the place where the injury occurred ("Handlungsort") or in the place where the event giving rise to the injury occurred ("Erfolgsort"). At any rate, there was in the court's opinion no problem in the case in point, because the court seized thereof was particularly close to the source of the evidence and facts of the case.[26]

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[24] Swiss *Bundesgericht*, 2. August 1999; Entscheidungen des Schweizerischen Bundesgerichts Bd. 125 III p. 346, http://www.curia.eu.int/common/recdoc/convention/en/2000/19-2000.htm, Information No. 2000/19.

[25] Slg. 1994 p. I-5439 (406/92).

[26] The court also concluded that the wrongdoer as the plaintiff does not have to provide evidence supporting jurisdiction as he is the one who denies the factual basis of the victim's claim. In such cases the averments of the alleged victim suffice to create jurisdiction.

As regards Article 5 (3) Lugano Convention, views differ as to whether the court is required to examine whether a tortious act was actually committed in a case where the defendant denies commission. To the extent that such examination is demanded, this is designed to avoid jurisdiction being procured on the basis of arbitrary allegations made by the plaintiff. But where a supposed tortfeasor has brought an action seeking a court declaration negating the existence of a cause of action, this will not be necessary in the opinion of the Swiss Federal Court, for, if that were not the case, a supposed tortfeasor denying commission of a tort would not be able to benefit from the jurisdiction envisaged in Article 5 (3).

Finally, the court also dealt with the question of where the event giving rise to the injury, i.e. the plaintiff's alleged tortious statements, occurred. It ruled that this was the place where statements were made orally to third parties or where written statements were dispatched.

I. Articles 7 and 11

In the above mentioned decision of the *House of Lords* of 17 February 2000 *(Agnew and others v. Lansförsäkringsbolagens AB)*[27] the interpretation of "matters relating to insurance" was dealt with in addition to the questions regarding Article 5 (1). The issue was whether a reinsurance contract is covered by the protective provisions in Title II, Section 3 of the Convention.

One of the objections to English courts having jurisdiction put forward by the defendant was that the case was a matter related to insurance under Article 7. Thus, the insurer could according to Article 11 only bring proceedings in the courts of the Contracting State where the defendant was domiciled.

[27] British *House of Lords*, 17 February 2000; The All England Law Reports 2000 Vol. 1 p. 737, http://www.curia.eu.int/ common/recdoc/convention/en/2000/40-2000.htm, Information No. 2000/40. The background to the dispute is described on p. 7.

The *House of Lords* was unanimous in rejecting this defence and held that the provisions in Section 3 of the Convention had as the primary objective to protect the weaker party in a insurance contract. The reinsured could not conventionally be regarded as a weaker party and did not, according to the *House of Lords*, need social protection against reinsurers. Moreover, insurance and reinsurance were considered to be conceptually different and serving different purposes. This outcome is consistent with the standpoints made in the Schlosser Report[28] on the 1978 Accession Convention, which has been confirmed by ECJ in *Group Josi v. UGIC*[29].

Article 8, 1st para. (1, 2)

In a decision of the French *Cour de cassation (Consorts Bonello v. Crèdit Commercial de France Suisse et autre)*[30] the interpretation of Article 8,1st para. (2) was at stake. In this case a testator had been granted a loan by a Swiss bank which was guaranteed by a life insurance policy with a Swiss insurance company. When the testator died, the heirs, with residence in France, summoned both companies before the *Nice* District Court stating that the bank's claim to repayment of the loan was not justified and that the insurance company had no right to refuse its guarantee. The heirs were of the opinion that they could go to the court where they were domiciled on the ground of Article 8, 1st para. (2) of the Lugano Convention. The *Nice* Court and the *Aix-en-Provence* Court of Appeal both declined jurisdiction on the basis of Article 8 of the Brussels Convention.

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28 OJ 1979, C 59/71 p. 117.

29 Slg. 2000 p. I-5925 (412/98).

30 French *Cour de Cassation*, 22 February 2000, Bulletin des arrêts, Chambres civiles, 2000 I No. 55, http://www.curia.eu.int/common/recdoc/convention/en/2000/34-2000.htm, Information No. 2000/34.

The *French Cour de cassation* held that the appeal could not be based on the ground that the courts had applied Article 8 of the Brussels Convention although Article 8 of the Lugano Convention was applicable with regard to the domicile of the Swiss insurer, as the terminology of these provisions is identical. The question decided here has probably never been raised before in Brussels and Lugano Convention cases but may become of particular interest in the near future. Without explicitly saying so the *Cour de cassation* decided that the mere fact that a court had applied the wrong international instrument may not give rise to an appeal, if the correct ground of jurisdiction has been applied. Before long, the European Commmunity and Lugano States will be confronted with four or even five different international instruments on jurisdiction and enforcement. From 1 March 2002 the Brussels Convention will be replaced by the Brussels Regulation on jurisdiction and enforcement[31], which will be binding from that date upon fourteen EU Member States. Denmark - which has a special position under the EU Amsterdam Treaty - will not be subject to this Regulation and will remain under the Brussels Convention until a new Convention between Denmark and the EU/other member states of the EU, revised along the lines of the Brussels Regulation, will come into force. In the meantime, the Lugano Convention, too, will be revised in the same way. Until such time as every actual Lugano Convention State will have ratified the new Lugano Convention, the jumble will remain in place especially since the drafting of clear disconnection clauses almost seems impossible in legal terms and wholly impossible in political terms.

The *Cour de cassation* rejected the appeal, stating that on the basis of Article 8, 1st para. (2), courts have jurisdiction at the place where the policy-holder is domiciled only for the benefit of the person who has contracted with the insurer. Heirs may exercise claims formerly owned by the testator but they are not policy-holders as referred to in the mentioned provision.

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31 OJ 2001, L 12/1.

This point of the decision discusses the meaning of Article 8, 1st para. (2) of the Lugano Convention. This part of Article 8 is identical to the same part of Article 8 of the Brussels Convention, which, until now, has not given rise to any question of interpretation. The Jenard Report [32]only commented that the policy-holder is the person who has contracted with the insurance company, and that this forum actoris jurisdiction lies with the courts for the place of the policy-holder's domicile at the time of instigating the case. The decision of the *Cour de cassation* determined the right of the policy-holder to summon the insurer before the courts of the place where he is domiciled, a right which is not open to universal heirs. Whether this opinion is acceptable to all European Union States and all Lugano States, is not certain.

Article 16 (1)

There was interpretation of Article 16 (1) in a ruling given by the Austrian Supreme Court *(H. v. K.)*[33]. The plaintiff sued the defendant in respect of a contract which both parties described as a "lease agreement". The object of the contract was the lease of exhibition space outside Austria. In addition, the contract settled how electricity, heating and ancillary costs such as telephone units were to be charged. The plaintiff also promised assistance from her PR department and offered to publish the defendant's brochures in-house. The plaintiff provided the defendant with addresses from her customer files for an envisaged mail-shot.

The Austrian court based its ruling on the ECJ's decision in the *Rösler v. Rottwinkel*[34] case. Having due regard to the circumstances of the individual case - so the court held - the crucial point in a mixed contract was whether the contract was at least primarily a lease/tenancy agreement. The court held that the lower instance had been right not to accord any particular importance to services provided by the plaintiff (advertising, mail-shot) over and above the payment of rent.

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32 OJ 1979, C 59/1 p. 31.

33 Austrian *Oberster Gerichtshof*, 29 September 1999, http://www.curia.eu.int/common/recdoc/convention/en/2000/16-2000.htm, Information No. 2000/16.

34 Slg. 1985 p. 99 (241/83).

In conclusion the Austrian Court qualified the agreement between the parties as a tenancy within the meaning of Article 16. Since the immovable property was situated outside of Austria the court declined jurisdiction.

Article 24

A Swiss commercial court made an interim injunction ordering the defendant to deliver certain goods to the plaintiff on the basis of a contractual agreement. The plaintiff was ordered to pay a security. The defendant appealed, claiming that Article 24 had been infringed. The Swiss Federal Court *(SodaStream Ltd. v. Urs Jäger AG)*[35], which ultimately rejected the appeal, dealt first with the parties' agreement on jurisdiction. According to the wording of that agreement, the English courts were to have jurisdiction in any proceedings arising out of the contract. An agreement conferring jurisdiction within the meaning of Article 17 was said to have the effect of derogating from the rules of the Convention; the Federal Court concluded that this extended to provisional measures, so that the Swiss court did not have jurisdiction to impose the interim injunction under the Lugano Convention.[36]

The Federal Court then stated that under Article 24 provisional measures could also be based on national jurisdiction rules. The question whether, and under what circumstances, a jurisdiction agreement between parties could also derogate from national jurisdiction rules, was, in the Federal Court's opinion, to be governed by national law. This ruled out any derogation if the court applied to was the only one able to order immediately enforceable interim measures in time. This was held to be the case.

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[35] Swiss *Tribunal Fédéral,* 17 September 1999, Arrêts du Tribunal Fédéral Suisse Vol. 125 III p. 451, http://www.curia.eu.int/common/recdoc/convention/en/2000/20-2000.htm, Information No. 2000/20.

[36] Kropholler, Europäisches Zivilprozeßrecht,1998, 6th ed., Art. 17 foot-note No. 109.

The court then raised the question whether, and under what circumstances, provisional measures under Article 24 could be granted if they were not designed solely to safeguard rights that might be at risk, but to provide temporary satisfaction. The court emphasised first of all that ECJ case law on parallel provisions in the Brussels Convention should be taken into account when interpreting the Lugano Convention. Since Article 24 referred to provisional, including protective, measures, the court found that the provision could not be held to refer solely to protective measures.

Referring to the ECJ's decisions in *Reichert v. Dresdner Bank*[37], *van Uden v. Deco-Line*[38] and *Mietz v. Intership Yachting*[39] the court then pointed to the risk that ordering interim performance might, by its very nature, prejudice the decision on the merits. The court held that an order for interim performance could not be regarded as a provisional measure within the meaning of Article 24 unless two conditions were met. First, the court with jurisdiction on the merits was not (to put it briefly) to be in the position of ordering interim measures in time. Secondly, the defendant had to be guaranteed repayment of the sum awarded if the plaintiff was unsuccessful as regards the merits of his action. The court held that both these conditions were met in the case at issue.

Articles 24 and 31

Article 24 remains an interesting and difficult provision of the Brussels and Lugano Convention, as can also be seen in the case decided by the Swiss Federal Court *(S. v. X. en liquidation)*[40]. The Civil Court of *Oslo* had ordered S. to pay to X. a sum of money in point 1) and 2) of the operating part of the judgment. Point 3) stated that a delay of two weeks was granted for the performance of the obligations under 1) and 2), this delay running from the day of the pronouncement of the judgment. The defendant S. appealed against this decision.[41]

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37 Slg. 1992 p. I-2149 (261/90).

38 Slg. 1988 p. I-7091 (391/95).

39 Slg. 1999 p. I-2277 (99/96).

40 Swiss *Tribunal Fédéral*, 8 February 2000, Arrêts du Tribunal Fédéral Suisse Vol. 126 III p. 156, http://www.curia.eu.int/common/recdoc/convention/en/2000/18-2000.htm, Information No. 2000/18.

41 The law report in which the decision is published does not mention the domicile of S. and X. The decision implicitly indicates that both parties did not have a residence in Switzerland.

A year after, X., then in liquidation, requested the President of the *Geneva* District Court to authorise sequestration to the detriment of S., referring to the Oslo judgment. The President gave authorisation on the same day, but after opposition by S., he revised his decision one month later. On appeal the *Geneva* Cantonal Court decided in favour of X. and reconfirmed the authorisation of sequestration. S. submitted the case to the Swiss Federal Court, which annulled the contested decision of the Appellate Court.

The decision of the Federal Court can only be understood after studying Article 271, 1st para. (4) of the Swiss Act on Payment Collection and Bankruptcy. The first paragraph of this Article enumerates the grounds for the seizure of property, sub 4 of this paragraph provides a right of seizure for debts of a foreign domiciled debtor. In such a case seizure may be granted if (1) the claim has a *sufficient link* with Switzerland, or (2) if it is based on an *enforceable judgment*, or (3) on an *acknowledgement of debt* by the debtor.[42]

The Federal Court firstly stated that X.'s claim was not based on an acknowledgement of debt by S. and did not have a sufficient link with Switzerland, which lead to the question whether the claim resulted from a decision which is enforceable as referred to in Article 271, 1st para. (4) of the mentioned Swiss Act. According to some authors, the Federal Court continued, this condition of enforceability is fulfilled if the decision is enforceable in the State where it was delivered, even if according to Swiss law or an international convention like the Lugano Convention that decision is not open to an exequatur. Most authorities on the Convention are of a different opinion, to which the *Geneva* Cantonal Court implicitly associated itself when it examined whether the Norwegian judgment is enforceable as regards Article 31, 1st para. of the Lugano Convention.

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[42] The wording of Article 271 of the Swiss Act on Payment Collection and Bankruptcy:
„(1) Der Gläubiger kann für eine fällige Forderung, soweit diese nicht durch ein Pfand gedeckt ist, Vermögensstücke des Schuldners mit Arrest belegen lassen:
1. ...
2. ...
3. ...
4. wenn der Schuldner nicht in der Schweiz wohnt, kein anderer Arrestgrund gegeben ist, die Forderung aber einen genügenden Bezug zur Schweiz aufweist oder auf einem vollstreckbaren gerichtlichen Urteil oder auf einer Schuldanerkennung im Sinne von Artikel 82 Absatz 1 beruht;
5. ...
(2)..."

Expert reports make it clear that even according to the law of the State of origin, the Norwegian judgment is not enforceable. It is not even comparable with a judgment enforceable in anticipation or a provisional decree, while it has not been declared provisionally enforceable pending an appeal, nor does it contain a provisional order for money preliminary to the proceedings on the merits. The Swiss first and second instance courts did not study any of these qualifications. They considered that the requesting party had made it sufficiently clear that part 3) of the Norwegian judgment gave the possibility of provisional seizure upon the expiry of the period of time provided for in the judgment, now that it had transpired that the defendant did not appeal on that point and that appeal as such did not ex lege suspend the execution. Norwegian authorities are of the opinion that, according to Norwegian law, the Oslo judgment, even without having "force exécutoire", may be used to guarantee the claim by allowing the winning claimant to request provisional seizure or a sequestration over all the defendant's goods in Norway and in any other State which private international law or conventions allow this to be done. Basing its decision on these reports the Geneva Cantonal Court seems to have accepted that the *Oslo* judgment, although not executory on the merits, nevertheless entitles X. to ask for a provisional seizure of S.' property even if it is located in another State.

The Swiss Federal Court nevertheless rejected this decision and accepted S.' argument. It considered that although Article 25 of the Lugano Convention does not exclude the recognition and enforcement of provisional measures which could justify a sequestration order under Article 271, 1st para. (4), of the said Swiss Act, importance has to be given to the fact that the Norwegian courts had not ordered any freezing of property as a consequence of the *Oslo* judgment. The Cantonal Court wrongly gave executory power to point 3) of the *Oslo* judgment, which clearly does not mean that the judgment would be provisionally enforceable on the merits, but only that it allows the winning party to request provisional measures within two weeks after the pronouncement of the judgment. As the *Oslo* Court did not deliver a decision which can be enforced, and did not order a provisional seizure, the request for sequestration could only be rejected.

This rather complex case deals with the problem under which circumstances an application for a provisional measure may be made to a court which does not have jurisdiction over the substance of the matter. Article 24 of the Lugano Convention entitles Swiss courts to grant provisional measures provided for under Swiss law, like sequestration, even if under that Convention the courts of another Contracting State have jurisdiction to decide on the merits. However, in the case of Article 24, the conditions, the content and the effects of such measures are determined by the national law (in this case the Swiss Act on Payment Collection and Bankruptcy). But do these national requirements need to be in line with the requirements of the ECJ? In applying Article 271, 1st para. (4) of the Swiss Act on Payment Collection and Bankruptcy, the Federal Court dealt with two aspects:

a) As concerns the recognition and enforcement of foreign judgments, Article 31 of the Lugano Convention requires that if a foreign judgment is enforceable under the Convention, then it must be - provisionally or definitively - enforceable in the State in which it has been rendered. The Norwegian judgment here discussed did not include any decision as to its enforceability, nor was it considered by any other courts of that State to be enforceable or provisionally enforceable.

b) Secondly the Federal Court dealt with the Article 271-requirement of a sufficient link with Switzerland, now that the requirements of an enforceable judgment and of an acknowledgement of debt were missing. The judgment of the Federal Court to deny X. the right of a provisional measure such as the appointment of a sequestrator, because the claim had no sufficient link with Switzerland, in principle falls into line with the ECJ decision in the *Van Uden v. Deco-line* case[43]. In the *Van Uden* case it was decided in the fourth paragraph of its operative part that Article 24, in general, requires a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought. The Federal Court`s decision that it is *only* the national law of the state where the court is situated, which determines the conditions for an interim or provisional measure is certainly not in line with the *Van Uden* case.

[43] Slg. 1998 p. I-7091 (391/95).

It would have been desirable if in its decision the Federal Court had gone into detail with regard to the question whether the specific requirements of the Swiss law concerning the real connecting link correspond to the requirements of the ECJ case law.

3) Title III - Recognition and Enforcement
Article 28 (1) in conjunction with Article 16 (1a)

In a decision by the Norwegian Supreme Court *(Dansommer AS v. Bardsen)*[44] regarding enforcement of a Danish judgment in Norway, the question of the scope of application of provisions on exclusive jurisdiction for proceedings which have as their object tenancies of immovable property, was raised. The parties had concluded an agreement whereby the plaintiff should grant leases over a house, belonging to the defendant, to foreign tourists. The contract gave the right of entire disposal of the house to the plaintiff during a set period of time for a specified sum of money. The defendant had no right to use the house during this period. The plaintiff's rights under the contract would remain unchanged even if the house was sold.

The judgment was handed down by a court in Aarhus, Denmark, ordering the defendant to pay a sum of money to the plaintiff, in accordance with conditions specified in the contract, due to the defendants failure to comply with the agreement. The court assumed jurisdiction relying on an explicit provision in the contract stating that the court in Aarhus had jurisdiction over all disputes that might arise from the contract. The judgment debtor – the defendant in the original proceedings – objected to the judgment being declared enforceable and claimed that the contract was a tenancy of immovable property. Under Article 16 (1a) of the Convention, such proceedings can only be brought before the courts of the Contracting State in which the property is situated, notwithstanding an agreement to the contrary. Enforcement should thus be refused according to Article 28. The plaintiff argued that the agreement was not a tenancy, but an agreement obliging the plaintiff to grant leases over the house.

[44] Norwegian *Hoyesterett*, 6 August 1999, Norsk retstidende 1999 p. 1206, http://www.curia.eu.int/common/recdoc/ convention/en/2000/47-2000.htm, Information No. 2000/47.

The Norwegian Supreme Court came to the contrary conclusion, and found the dispute to fall within the scope of Article 16 (1a). The agreement was concluded with the owner and arose out of the owners obligations under the contract. The fact that the plaintiff never intended to live in the property, but to lease it to others, did not change the status of the agreement. A reference was made to two cases from the ECJ, *Hacker v. Euro-Relais*[45] and *Rösler v. Rottwinkel*[46]. Regarding the first-mentioned case, in which Article 16 (1) was found not to be applicable, the Norwegian Supreme Court underlined that the agreement in that case was a mixed agreement, and included obligations unrelated to the lease of immovable property. The situation was thus different compared to the present case.

Article 54

In the above mentioned[47] decision of 4 May 1999 the French *Cour de cassation* also had to decide on Article 54 of the Lugano Convention. The individual contract of employment under discussion was concluded in 1986. On appeal it was decided that the Lugano Convention did not apply since it became binding between France and Switzerland only after February 1992. However, the *Cour de cassation* ruled that the Lugano Convention was applicable in view of Article 54, since the Convention has been in force from the first of January 1992, while the Labour Court was seized in July 1995. This *Cour de cassation* decision is in line with the *Sanicentral* decision[48], in which interpretation was given of Article 54 of the Brussels Convention which is identical to Article 54 of the Lugano Convention. In this decision the ECJ held that "by its nature a clause in writing conferring jurisdiction and occurring in a contract of employment is a choice of jurisdiction; such a choice has no legal effect for so long as no judicial proceedings have been commenced and only becomes of consequence at the date when judicial proceedings are set in motion. … The effect of Article 54 is that the only essential factor for the rules of the Convention to be applicable to litigation relating to legal relationships created before the date of coming into force of the Convention is that the judicial procedure should have been instituted subsequently to that date, …"

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45 Slg. 1992 p. I-1111 (280/90).
46 Slg 1985 p. 99 (241/83).
47 See foot-note No. 12.
48 Slg. 1979 p. 3423 (25/79).

The French *Cour de cassation* did not deal with the fact that the *Sanicentral* case concerned an employment contract prorogation clause, while the ECJ's decision discussed here concerned an employment contract arbitration clause. *However,* with regard to Article 54 this question is not of importance.

III. Final considerations

The review of the case law of national courts on the Lugano Convention requires some brief concluding remarks:

National courts tend to follow the case law of the ECJ on parallel provisions of the Brussels Convention. This tendency is revealed not only by the solutions adopted in various decisions, but also by frequent reference in the text of decisions to judgments of the ECJ.

In its decision of 20 January 1999 the Austrian Supreme Court makes specific reference to Protocol No 2 of the Lugano Convention.

National courts are sometimes confronted with cases and problems that have never been dealt with by the ECJ. In deciding such cases, national courts tend to seek solutions which are in line with the case law of the ECJ.

Some courts also draw on the case law of other national courts and on domestic and foreign legal commentaries in their deliberations.[49]

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[49] See e.g. the decision of the Swiss Federal Court, cited in foot-note No. 40.