FORTH 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 which was 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. A third report by the Netherlands, German and Swedish delegations[3] covered the decisions contained in the 9th fascicle. In September 2001 the Standing Committee decided that the fourth report, covering decisions in the 10th fascicle[4], should be drawn up by the United Kingdom, Luxembourg and Finnish delegations for the meeting of the Standing Committee in September 2002. The 10th fascicle[5] contains decisions pertaining to the Lugano and Brussels Conventions, handed down by the following courts:

Lugano Convention

Oberster Gerichtshof (Austria) : 4 decisions
Tribunal federal/Bundesgericht (Switzerland) : 4 decisions
Arbeitsgericht Wiesbaden (Germany) : 1 decision
Bundesgerichtshof (Germany) : 1 decision
House of Lords (United Kingdom) : 1 decision
Norges Hoyesterett (Norway) : 1 decision
Hogsta Domstolen (Sweden) : 1 decision.

Brussels Convention

EC Court of Justice : 2 decisions
Court of Appeal (United Kingdom) : 2 decisions
High Court of Justice (United Kingdom) : 2 decisions
Oberlandesgericht, Dusseldorf (Germany) : 1 decision
Oberlandesgericht, Munchen (Germany) : 1 decision
Landesarbeitsgericht, Munchen (Germany) : 1 decision
Oberlandesgericht, Koblenz (Germany) : 1 decision
Oberlandesgericht, Frankfurt (Germany) : 1 decision
Landgericht, Frankfurt (Germany) : 1 decision
Supreme Court (Ireland) : 3 decisions
Hof van Beroep, Antwerpen (Belgium) : 2 decisions

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[1] 1P Rax 2001, 262.
[2] 1P Rax
[3] 1P Rax
[4] 1P Rax
[5] Information pursuant to Protocol 2 to the Lugano Convention, Package No 10, September 2001 (quoted as Information No 2001/….); the decisions are also published on the home page of the ECJ under http://www.curia.eu.int/common/recdoc/convention/en/tableau/2000.htm.

Tribunal de 1 ere instance, Bruxelles (Belgium) : 1 decision
Corte di Cassazione (Italy) : 3 decisions
Oberster Gerichtshof (Austria) : 2 decisions
Hoge Raad (Netherlands) : 3 decisions
Gerechtshof's Gravenhage : 1 decision
Hojesteret (Denmark) : 1 decision
Cour d'appel d'Orleans (France) : 1 decision
Cour d'appel de Versailles (France) : 1 decision
Cour d'appel de Rouen (France) : 1 decision
Cour de cassation (France) : 1 decision
Cour d'appel de Luxembourg (Luxembourg) : 5 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. This should be borne in mind when reading this report.

As was the case with the first, second and third reports, this report will also concentrate on the decisions on the Lugano Convention (13 decisions)[6].

II Overview of the case law

Articles 1(2) and 6(4)

1. In its decision of 25 April 2002 the Norwegian Supreme Court had to consider whether the expression "wills and succession" for the purposes of Article 1, para 2 (1) of the Lugano Convention only covers disputes concerning succession rights or in other words only disputes which could not have arisen independently of succession. The question arose in a dispute between one heir and another heir and his wife concerning the effects of a settlement, including ownership of immovable property, between the administrator of a bankrupt estate of a deceased person and one of the two heirs. The other heir alleged that her rights as an heir of the deceased person had been violated by the settlement. The Court held that the exception in Article 1, para 2(1) of the Convention only applied to disputes concerning purely succession rights and that the Lugano Convention thus was applicable in the matter.

2. In the same decision the Court further held that Article 16(1)(a) of the Convention applied to a dispute concerning ownership of immovable property.

3. Finally the Court had to consider whether it was under Article 6 (4) of the Convention possible for the heir - who alleged that her rights as an heir had been violated by the settlement - to combine her action for repayment of rent relating to that property with her action concerning ownership of the immovable property. The defendants alleged that the dispute was not a matter relating to a contract, since the claimant had denied that there was a valid transfer of ownership of the immovable property from the deceased person to the heir. The Court held that an allegation that the transfer of the immovable property was invalid could not in a case like this render Article 6 (4) of the Convention inapplicable. If that was the case and the claims could not be combined, the consequence would be that the claims had to be brought in two

[6] Courts in the Contracting State to the Lugano Convention have different traditions as to the disclosure of the considerations which led to their decisions. A fair comparison of cases is thereby complicated.

different proceedings even though all claims had arisen out of the same contract. Thus Article 6 (4) was in any case applicable as far as the action was brought against the other heir.

4. As far as the action also was brought against the other heir's wife the Court observed that there was no contract between her and the deceased person. The immovable property had been transferred to her without compensation by her housebound. The latter had acquired the immovable property by a contract from the deceased person In a case like this, where the courts of the Contracting State, in which the immovable property is situated have exclusive jurisdiction as to the dispute concerning immovable property, it would having regard to so-called procedural economy be inappropriate not to allow the claimant to combine his claims concerning ownership and repayment of rents relating to that property.

5. Under Article 6 (4) of the Convention the law applicable to the question whether the actions may be combined was in this case Norwegian law. Since combination of the actions was allowed under Norwegian law, the Norwegian courts had jurisdiction as to all claims in the case.

Article 2

6. In a final judgment dated 12 October 2000 the British House of Lords (*Canada Trust Co and others v Stolzenberg and others* (No 2[7])) considered the date on which a person is "sued" for the purposes of the Convention's main rule of jurisdiction in Article 2, and the rule on multiple defendants in Article 6(1).

7. In this case the plaintiff wished to bring proceedings in England against multiple defendants, only one of whom, defendant S, was domiciled in England when the writ was issued. The writ was then served on all the defendants, except defendant S, who was served three months later by which time he had left England in an attempt to evade service and it was possible that at that moment he was no longer domiciled in England. Subsequently several of the defendants applied to the English courts to have the service on them set aside on the ground that the English courts had no jurisdiction over them. In respect of the defendants domiciled in Switzerland the plaintiff relied on Articles 2 and 6 on the basis that defendant S was domiciled in England at the time the writ was issued against him. These defendants argued that a person was "sued" for the purposes of these provisions on the day when the writ was served on him, and not on the day when it was issued. This contention was rejected at first instance and in the Court of Appeal, and these defendants then appealed to the House of Lords.

8. The House of Lords held that for the purposes of Articles 2 and 6 the word "sued" referred to the initiation of proceedings and accordingly the English courts took jurisdiction over a defendant, for these purposes, on the date that the writ was issued. The court gave the following reasons for this conclusion. First, such a conclusion was supported by the language of the Convention which used the expressions "sued", "bring proceedings" and "instituted proceedings" interchangeably. Secondly, it protected one of the major aims of the Convention, namely the achievement of predictability and certainty at all stages for all the parties involved. The time of lodging of the legal process with the court would be a matter of record in all national legal systems, whereas proof of valid service depended on evidence. Even if there were differences between legal systems as to how proceedings were initiated, the date of their initiation appeared to be a readily available point of reference. And thirdly, if the date of service was to be used as the operative date for the purposes of Articles 2 and 6, some defendants, like defendant S in this case, would be able to evade the service of process when

[7] 12 October 2000, the All England Law Reports [2000] vol 4, p 481.

they became aware of the incipient proceedings. That risk was particularly significant in a claim against a multiplicity of defendants.

9. Another issue decided by this case concerns the standard of proof to be applied by the English courts in considering whether a court's jurisdiction has been established for the purposes of the Convention. In Shevill v Presse Alliance[8] the Court of Justice held that it is for the national court to determine this standard of proof, provided that this does not impair the effectiveness of the Convention. The House of Lords, upholding the decision of the Court of Appeal, held that the plaintiff need only demonstrate a good arguable case that the jurisdictional facts on which he relies are present. This test is applied generally by the English courts to jurisdictional issues outside the context of the Convention.

10. This conclusion has been criticised[9] on the basis that it may impair the practical effect of the Convention. For example an English court may consider that the necessary jurisdictional basis is probably absent perhaps on the ground that there may well be a valid choice of court agreement in favour of the courts of another Contracting State; however the court will continue with the proceedings, provided there is still a good arguable case that the validity of that agreement could be successfully questioned. It may subsequently decide that it has in fact no jurisdiction under the Convention because the agreement is valid, but it will still neveretheless give a judgment on the merits. The problem is that English law appears to preclude any further ruling on the issue of jurisdiction, once an initial finding on that issue has been made. It has been suggested in the light of this that a higher standard of proof should be applied to the determination of such issues, for example the balance of probabilities. In the Canada Trust Co case the House of Lords rejected such a test on the basis that its adoption would sometimes require the trial of the issue or at least the cross-examination of deponents to affidavits and that this would cause significant extra expense and delay for the parties to the litigation.

Article 5(1)

11. In a judgment of 28 June 2000, the Oberster Gerichtshof[10] in Austria, ruled that, for the purposes of applying and interpreting the provisions of the Lugano Convention, it is necessary to apply the case law of the Court of Justice of the European Communities and of the national courts of the Member States on matters concerning the Brussels Convention, so as to obtain uniform application of the Lugano and Brussels Conventions throughout the whole of the territorial area to which those two conventions apply.

12. It was decided that Article 5 (1) of the Lugano Convention, interpreted in accordance with the case law of the Court of Justice, does not apply to an action brought by the purchaser of a defective product against the manufacturer, when the latter was not the vendor from whom the purchaser had bought the product.

13. It was decided that purely financial loss is not covered by product liability. Apart from in the case of product liability, the purchaser cannot rely on Article 5 (3) of the Lugano Convention to sue the manufacturer of goods which are merely defective and which the purchaser has bought from another vendor.

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[8] Case C-68/93[1995] ECR1-415.

[9] Civil Jurisdiction and Judgments Briggs and Rees (3rd edition 2002 at p215).

[10] Published in: Österreichisches Recht der Wirtschaft 2001, pp. 21-22; Juristische Blätter 2001, pp. 185-188; Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht 2001, p. 32 (summary).

Article 6(1)

14. The British House of Lords (in *Canada Trust Co and others v Stolzenberg and Others* (No 2[11])) decided that for the purpose of the rule in Article 6(1) on multiple defendants (and also in relation to Article 2) a person is "sued" on the date a writ is issued, rather than the date on which it is served on him by the plaintiff[12]. The court also rejected the argument that a plaintiff could only rely on this article, if the "anchor defendant", that is the defendant who was domiciled in the jurisdiction in which the proceedings have been brought, had already been served before the other defendants. This conclusion reflected the fact that when a court is considering whether Article 6(1) should be applied, it does so on an *inter partes* basis. In the light of this the court held that the defendant's interests are protected because he has an opportunity to contest those proceedings and the order in which defendants have been served or whether one was served before the issue of proceedings against another is irrelevant.

Article 8(1)

15. In its decision of 3 January 2000 the Swedish Supreme Court[13] had to consider whether the court for the place where the policyholder is domiciled must exercise its jurisdiction under Article 8, para 1 (2) of the Lugano Convention in a dispute concerning the liability of an insurance association as underwriter of a marine insurance agreement because of damage to the rudder of the tanker M/T Barbro. Article 9 of Chapter 17 of the Swedish Maritime Code (sjölagen) provides that such a dispute shall be tried and decided by an average adjuster (particular average).

16. The Swedish Supreme Court held that the above mentioned provision of the Lugano Convention gives the shipowners the right to sue the insurance association in the court for the place where the shipowners have their seat. The provision meant an advantage for the shipowners who are usually regarded as the weaker party. The Court held further that Article 8 para 1 (2) of the Lugano Convention requires that a party shall have a possibility to institute court proceedings in order to get a judgment, which is entitled to enforcement in the other Contracting States. Since the Lugano Convention prevailed over Swedish national law the shipowners had the right to sue the insurance association in the court for the place where the shipowners had their seat, even though no particular average had been rendered in the dispute

Article 17

17. In two cases before the German and Austrian courts judgments were given on the basis of Article 17 of the Lugano Convention.

18. In the first case, the applicant, domiciled in Austria, brought an action, before the Austrian courts, for compensation for a loss resulting from a delivery which did not conform to the terms of an exclusive distribution contract. The defendant claimed that the original contract did not include a jurisdiction clause, and that the jurisdiction clause had been added, by the applicant, without his knowledge or consent.

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[11] 12 October 2000, the All England Law Reports [2000] vol 4, p 481.
[12] This issue has been dealt with in more detail in an earlier section in this report: see paragraphs 6 to 10 above.
[13] Swedish Högsta domstolen, 3 January 2000, Nytt Juridiskt Arkiv, 2000 1p. 3. Information No 2001/55

19. The court of first instance ruled (and this ruling was confirmed by the Oberster Gerichtshof[14] in Austria, on 29 August 2000) that the concept of jurisdiction is an autonomous concept within the Lugano Convention. In order for a valid jurisdiction clause to exist, it is necessary for the wills of the parties to be in agreement on the principle and content of that clause, and that meeting of wills must be clearly and unequivocally manifest. It is for the courts to examine the question of whether such a meeting of wills exists, and they do so in accordance with the procedural rules of the Lugano Convention and not in accordance with national rules.

20. The Oberster Gerichtshof, finding that the jurisdiction clause relied on by the applicant was not included in the original contract and that it was impossible in point of fact to determine the moment when the said jurisdiction clause was added and thus to determine whether or not there was consent between the parties, made the applicant bear the consequences of this lack of proof by dismissing his action.

21. The other case concerns the procedural conditions of a jurisdiction clause contained in a pro forma, drawn up in advance by the bank and bearing only the bank's stamp.

22. In the case in question, the bank granted a loan to a German company which had its registered place of business in Germany but whose manager was a person domiciled in Switzerland. The wife of the manager of the company, who was acting as guarantor in respect of the said loan, received by post the guarantee form, drawn up in advance and bearing only the stamp of the bank. She signed it and returned it to the bank.

23. When the company became insolvent, the bank claimed payment of the guarantee before the courts specified in accordance with the jurisdiction clause. In order to avoid paying the guarantee, the guarantor claimed that the court seised of the matter did not have jurisdiction because the said clause was invalid. Under the terms of the jurisdiction clause and pursuant to Article 17 (2) of the Lugano Convention, the court of first instance declared that it had jurisdiction.

24, The Oberlandesgericht confirmed the first judgment and ruled that the jurisdiction clause was valid. It held that since the only thing that mattered was that an agreement between the parties determining jurisdiction should exist in writing, in whatever form, the fact that there was no signature by the responsible individual in the bank was regarded as irrelevant.

25. Reviewing the decision by the Oberlandesgericht, the Bundesgerichtshof[15] in Germany, ruled on 22 February 2001 that the disputed jurisdiction clause did not comply with the procedural conditions set by the Lugano Convention. It held that since Article 17 of the Lugano Convention and Article 17 of the Brussels Convention were identical, it was necessary to refer to previous judgments by the Court of Justice of the European Communities. That Court's strict interpretation requires that each party should give its consent in writing and that that consent must be shown clearly in the text, the author of which must be identifiable from that text.

[14] Reference: 1 Ob 149/00v.

[15] Published in: Betriebs-Berater 2001, pp. 959,060; Wertpapier-Mitteilungen 2001, pp. 768-769.

Article 27(1)

26. In this case, the question before the Swiss Federal Court (BGE 126 III 534) was whether a judgment emanating from the English High Court of Justice, awarding the plaintiff in excess of £700,000.- on the basis of a gambling debt, could be refused recognition under Article 27 No. 1 of the Convention. The issue arose for two reasons. First, in March of 1920, the Swiss Constitution was amended to prohibit the operation of any casinos on Swiss territory. Second, Article 513 of the Swiss Code of Obligations provides that gambling debts will not be enforced in the Swiss courts. As a result, in two decisions dating from 1935, the Federal Court had found that the non-enforcement of gambling debts represented a strong public policy in Switzerland, such that even when Swiss conflicts law required the application of foreign law on the gambling contract, that law would not be applied to the extent it allowed for the enforcement of a gambling debt.

27. These decisions remained good law for quite some time. However, during the 1990s, the constitutional prohibition of casinos was abolished and the Code of Obligations amended so as to allow the enforcement of those gambling debts that have been incurred in one of the new federally licensed casinos. As a result, the Federal Court found that the non-enforcement of a gambling debt can no longer be considered a violation of Swiss public policy today. Thus, the judgment of the English High Court could not be refused recognition and enforcement under Article 27 1.

Articles 27(2)

28. Article 27(2) of the Lugano Convention and certain related issues have been the subject of two Austrian decisions.

29. In the first case, on 15 February 1999 the Austrian court of first instance (Bezirksgericht, Villach) dismissed an action seeking a court order enforcing a German executory judgment dating from 1996, on the grounds that the procedures for the serving of the document instituting proceedings required under the Austro-German Convention had not been complied with.

30. On 1 July 1999 the appeal court (Landesgericht, Klagenfurt) confirmed the first decision. Finding that it was not the bilateral convention but rather the Lugano Convention, which had just come into force between Germany and Austria, which was applicable to the case in question, the appeal court ruled that, in accordance with Article 46 the document instituting proceedings had been served, but that no evidence had been produced to prove that the document had been served in accordance with the provisions of Article 27 of the Convention. Because of this, and because of the fact that this problem had not yet been the subject of a judgment by the Oberster Gerichtshof, Austria, the court ruled that it was possible to bring an action.

31. On 12 July 2000 the Oberster Gerichtshof[16] decided that the payment order (Mahnbescheid) constituted a document instituting proceedings and the enforcement order

[16] Published in: Jus-Extra 2000 No 191, p. 51 (summary); Österreichisches Recht der Wirtschaft 2001, p. 154 (summary).

(Vollstreckungsbescheid) constituted a judgment in default of appearance within the meaning of Article 27 (2) of the Lugano Convention. In the absence of any document initiating proceedings which establishes the specific circumstances, under Article 48 (1) of the Convention it is sufficient if there is a certificate indicating that the document has been duly served and giving the date of service.

32. The second case concerns an action before the Austrian courts seeking the enforcement of a German court decision fixing the amount of debts.

33. The Austrian court of first instance (Bezirksgericht, Villach) dismissed this action on 24 January 2000. Taking the view that the Lugano Convention was applicable, it decided that serving the document initiating proceedings by posting it on the court notice board did not meet the conditions for being 'duly served'.

34. On 13 April 2000 the appeal court (Landesgericht, Klagenfurt) overturned the first decision and ruled that the action for review before the Oberster Gerichtshof was admissible on the grounds that, although evidence had been produced to prove that the document instituting proceedings had been served, a judgment given in default of appearance should in any case be regarded as equivalent to a writ of execution.

35. In its judgment of 20 September 2000, the Oberster Gerichtshof[17] in,Austria, ruled that the possibility of bringing a claim, in a State, against a judgment given in default of appearance, did not meet the requirement, set out in Article 27 (2) of the Brussels Convention, that the defendant must be given sufficient time to arrange for his defence before such a judgment is given. Although the posting of the document instituting proceedings on the court notice board may meet the 'duly served' criterion, it does not meet the 'in sufficient time' criterion, unless, owing to special circumstances, the debtor himself is responsible for the fact that the document was unable to reach him. Moreover, an action seeking the fixing of an advocate's fees after the adjournment of the proceedings in which the advocate has represented the debtor party constitutes a document instituting proceedings.

Articles 28 and 54

36. This case before the Swiss Federal Court (BGE 127 III 186) concerned the recognizeability of a judgment given by the English High Court of Justice, which had been rendered by default. Since the parties' contract had included an arbitration clause, the question arose whether recognition of the judgment could be refused for violating a valid arbitration clause. Siding with one opinion represented in the scholarly literature, the Federal Court found that this was not a ground for non-recognition under Article 28 of the Convention. However, the Court nevertheless found the English judgment to be unrecognizeable. The reason for this is no less interesting than the Court's dictum on the issue of recognition of a judgment violating an arbitration clause: in the Court's view, the application of Article 54b(3) requires that there be some way to ascertain the head of jurisdiction on which the rendering court based its authority to adjudicate. This, of course, was not possible since the English court's decision was a judgment by default. Interestingly, however, the judgment creditor, on appeal from the decision not to recognize the English judgment, had produced a certification by a Master of the Supreme Court of England and Wales, to the effect that the English court had based its jurisdiction on Article 17 of the Convention and that service had been properly made.

[17] Published in: Jus-Extra 2000 No 191, p. 51 (summary); Österreichisches Recht der Wirtschaft 2001, p. 154 (summary).

Nevertheless, the Swiss Federal Court was of opinion that this certification did not suffice for the purposes of recognition because it did not fulfill the requirements of a judgment under Article 25; the reason for this was that the defendant could not have participated in the proceedings leading up to the Master's certification.

Article 57 and Protocol No 3

37. A dispute before a German employment tribunal concerned a German association with its own legal personality which had negotiated collective agreements under Norwegian law with a construction company employing employees seconded from Norway to German shipyards.

38. The association asked the employer to apply certain provisions of the collective agreements to seconded employees in Germany.

39. In its judgment of 15 April 1998, the German employment tribunal (Arbeitsgericht Wiesbaden)[18] declared that it had jurisdiction. The tribunal found, first of all, that the Lugano Convention was applicable in Germany and Norway, and that the defendant was domiciled in a Contracting State. It decided that only the jurisdiction rules of the Lugano Convention were applicable, and not the national rules.

40. The tribunal also found that, under Article 57 and Protocol No 3 (1) on the application of Article 57, the Lugano Convention does not generally affect the legal acts of Member States, and in particular Council Directive 96/71/EC of 16 December 1996 on the secondment of employees.

41. Consequently, the jurisdiction rule referred to in Article 6 of that Directive takes precedence over the provisions of Article 6 of the Lugano Convention, by virtue of which the courts of the State to whose territory the employee is or was seconded have jurisdiction.

Article 1a of Protocol 1

42. In a case concerning an application for an order for the enforcement in Switzerland of a German final judgment of 1 August 1997, the Swiss Federal Court[19], on 19 October 2000, gave a ruling on the scope of the Swiss reservation contained in Article 1 a of Protocol 1 of the Lugano Convention. It decided that the reservation ceased to be effective on 31 December 1999 and therefore no longer prevented the recognition and enforcement of judgments given before that date.

43. It confirmed the judgment of the Swiss Obergericht of 18 August 2000 and interpreted Article 1 a as meaning that the grounds for refusing enforcement were valid for the whole of the period of validity of the Swiss reservation, but only for that period, with the consequence that since the expiry of the Swiss reservation any foreign judgment, even if given before 31 December 1999, can be enforced in Switzerland.

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[18] Published in: Die deutsche Rechtssprechung auf dem Gebiete des Internationales Privatrechts im Jahre 1998 No 143.

[19] Entscheidung des Schweizerischen Bundesgerichts B D, 126 111, pages 540 to 543

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