

**ELEVENTH REPORT ON NATIONAL CASE LAW
RELATING TO THE LUGANO CONVENTION**

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I. Introduction

In September 2008 the Standing Committee of the Lugano Convention appointed the delegates from Austria, Poland and Slovenia to draft the eleventh report on national case law relating to this convention. The report is based on the 17th package of judgments presented by the Court of Justice of the European Communities in accordance with Protocol No. 2 to the Convention.

The package contains 50 judgments, 14 of which relate to the Lugano Convention. Two judgements of the Federal Supreme Court of Switzerland, included in this package, have already been presented in the tenth report on national case law (2008/20 and 2008/21). These judgments are therefore not included in the eleventh report.

Following 12 judgments will be referred to as follows:

- Judgment of the Austrian Supreme Court (*Oberster Gerichtshof*) of May 21st 2007 (Case No 2008/16)
- Judgment of the Federal Supreme Court Switzerland (*Bundesgericht*) of October 9th 2007 (Case No 2008/18)
- Judgment of the Federal Supreme Court of Switzerland (*Bundesgericht*) of October 23rd 2006 (Case No 2008/19)
- Judgment of the Federal Supreme Court of Germany (*Bundesgerichtshof*) of November 6th 2007 (Case No 2008/23)
- Judgment of the Federal Supreme Court of Germany (*Bundesgerichtshof*) of November 28th 2007 (Case No 2008/24)
- Judgment of the Supreme Court of Spain (*Tribunal Supremo*) of March 14th 2007 (Case No 2008/25)
- Judgment of the French Cassation Court (*Cour de cassation*) of December 19th 2007 (Case No 2008/30)
- Judgment of the British House of Lords of January 23rd 2008 (Case No 2008/34)
- Judgment of the British High Court of Justice of July 25th 2007 (Case No 2008/35)
- Judgment of the Supreme Court of Norway (*Høyesterett*) of August 29th 2006 (Case No 2008/43)
- Judgment of the Supreme Court of Norway (*Høyesterett*) of November 23rd 2007 (Case No 2008/44)
- Judgment of the Portuguese Court of Appeal in Lisbon (*Tribunal da Relação de Lisboa*) of March 21st 2007 (2007/46)

II. Overview of the case law

Title I – Scope of the Convention

Article 1 Civil and commercial matters

Judgment of the Supreme Court of Spain of March 14th 2007 (No 2008/25)

The judgment of the Spanish Supreme Court refers above all to the Articles 1 and 27 of the Lugano Convention. The question of the Article 27 is discussed later in this report.

The judgment was given in the circumstances which will be briefly presented below.

The Family Court in Zurich gave separation judgment of the spouses F and L.

F submitted the application for enforcement of the aforementioned judgment in Spain, but the first instance court rejected the application. F had appealed to the District Court in Barcelona, which partly authorized the enforcement of the Swiss judgment in respect to this part of judgment that concerned the maintenance for F.

L decided to contest the judgment of the District Court under the Article 41 of the Lugano Convention by the appeal in cassation. He alleged among other things that the District Court infringed Articles 1 and 5 (2) of the Lugano Convention. According to L the Lugano Convention should not have been applied in the case because the court of origin awarded wife the compensatory pension (*una pensión compensatoria*), not the maintenance in fact, and the compensatory pension does not come within the scope of the Convention.

The Supreme Court had to examine whether the Lugano Convention should be applied in the case. During this examination, the reference to the case-law of the ECJ concerning the Brussels Convention was very important. It had to be taken into account that the ECJ imposed very restrictive interpretation of the matters excluded from the scope of the Convention. Making reference to the ECJ judgments 120/79 in the case of *De Cavel v De Cavel* and 220/95 in the case *Antonius van den Boogaard v Paula Laumen*¹, the Supreme Court decided that in the present case the judgment

¹ *Louise de Cavel v Jacques de Cavel* (120/79) [1980] E.C.R. 731, *Antonius van den Boogaard v Paula Laumen* (220/95) [1997] E.C.R. 1147.

ordering the payment of the specified sum of money by way of maintenance falls within the scope of the Convention. It is irrelevant whether the court ordered the payment of maintenance or the payment of compensatory pension. The fact that it is ancillary to the separation judgment is not the obstacle for the decision authorizing partial enforcement under the article 42 of the Lugano Convention.

The appeal in cassation was rejected.

New Convention

Taking into account that in the New Lugano Convention regulation of the scope of the Convention has not been changed in essence, it appears that the Court would give similar ruling.

Title II – Jurisdiction

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

(i) place of performance of the obligation

Judgment of the Supreme Court of Norway of August 29th 2006 (No 2008/43)

A German-based company (GC) and a Norway-based one (NC) entered (in 1995) into a contract according to which NC had to represent GC in Norway, Sweden and Denmark (commercial agency contract).

In 2005 NC sued GC in Norway for unpaid brokerage/provision. In order to determine the invoked jurisdiction of the Norwegian court of first instance the Supreme Court held that the agency contract in question had its closest connection to Norway rather than to Germany. In interpreting the term “closest connection” the Supreme Court took the Rome Convention of 1980 on the law applicable to contractual obligations into consideration as well, cf. Art 4 § 2 which regulates that the place of residence of the party of the characteristic contractual obligation determines the law applicable to the contract. This concept could be applied also to the question where the place of performance of a contract according to Art 5 § 1 of the Lugano Convention could be found. Accordingly the Court took this very concept into account as one decisive

factor by which law the contract was governed according to the rules of international private law.

Moreover it had to be taken into consideration that Norway was one of the countries in which representation was carried out by NC and that the brokerage was to be paid to a Norwegian bank. Finally the Supreme Court attached importance to the fact that the representation had already been lasting for 12 years which it valued as underlining the steady relationship between them..

Other elements as e.g. the language of the contract (here German) and the fact that representation had to be carried out also in other countries (namely Sweden and Denmark) were deemed of minor importance.

New Convention

Art 5 § 1 was amended by the following:

“(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

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- in the case of the provision of services, the place in a State bound by this Convention where, under the contract, the services were provided or should have been provided.”

This amendment, pursuing the aim of clarifying widespread uncertainty in this respect, identifies the obligation whose place of performance serves as a basis for establishing jurisdiction in respect of such contracts independently, irrespective of the obligation whose performance is the subject of the dispute. It adopts the principle of the characteristic obligation, and consequently excludes a reference to the obligation to make payment, even when that obligation the subject matter of the application (cf Pocar-report No. 50).

As in the given case the court anyhow affirmed jurisdiction of the Norwegian courts (and the agency was carried out – inter alia – in Norway but not in Germany) the changes made by the new Convention are not likely to have lead to a different result.

Judgment of the British High Court of Justice of July 25th 2007 (No 2008/35)

The Judgement of the High Court refers both to the Article 5 (1) and 5 (3) of the Lugano Convention. Whole of the judgment will be described in the point of the report concerning the article 5(1) to retain the Court's course of reasoning.

The underlying facts can be briefly stated.

By an agreement executed in London, CMC had agreed to acquire a catalogue of musical sound recordings, associated intellectual property and various trade marks and licences from the administrative receivers of a United Kingdom music company (PC). The sellers gave no warranties in relation to the property sold under the agreement. However, German and Swiss companies (K) provided a number of warranties to the vendors and CMC, including warranties as to the fact that the authorisation contracts for the recordings were valid, that there were no collateral agreements relating to the rights of the music performers that were capable of being detrimental, and that various licence agreements were valid. Thereafter R took an assignment of the benefit of the agreement. And subsequently discovered the alleged existence of agreements or licences whose existence constituted a breach of the warranties and had the effect of reducing the commercial value of the catalogue.

CMC and R commenced proceedings in England claiming damages for breach of contract and misrepresentation. The defendants applied for a declaration that the court had no jurisdiction over the claims and for an order that the proceedings be set aside or stayed. The application was dismissed. The judge held that the obligation under warranties come into effect in London so London is a place of performance of warranties. Moreover according to the judge the loss by reason of misrepresentation occurred when the plaintiffs paid money and entered into the agreement which they did in London.

The defendants appealed against the decision of the judge to High Court of Justice.

A) **As regard to the contractual claim** they alleged that warranties were statements and promises as to a state of affairs existing at the time when the parties entered into the agreement. These statements or promises did not impose any contractual obligation capable of "performance", that is to say, they were not, and did not create, obligations that carried with them a performance obligation. Accordingly, England was not and could not be "the place of performance of the obligation in question" for the purposes of Art. 5 (1) of the Lugano Convention.

The High Court found the conclusion of the judge undermined by the appellants was correct. The place of performance of the obligation is the place where, (i) if it is executory, the obligation is to be performed; (ii) if it is negative, the obligation is to be honoured; (iii) if it is a warranty as to an existing condition or state of affairs, the condition or state of affairs is required by the contract to exist. The question that should be examined is where the place of performance might be according to the law applicable to the contract. It should be looked first to the terms of the contract to see whether that place has been specified. If it was not specified, the extract from the contract must be sought. This extract should point whether there is a place where compliance with the warranty is required.

In the agreement in question, the intellectual property rights were to be transferred by assignment at the time of completion. The claimants said that the place for compliance with the warranty was at the place of completion, which was in London. The High Court reached the conclusion that in the present case, the essence of the contract is the transfer of intellectual property rights and the essence of the warranty is that the rights being transferred by assignment on completion are characterised by the specific level of licensing but no more. Therefore, the compliance with the warranty is required at the time and place where the transfer of the assets is effected.

B) As regards the claim in tort, the defendants contended that the harmful event did not occur within the jurisdiction of the English courts as the agreement was not signed in England. The misrepresentation was made at the time when, and place where the plaintiff signed the document containing the alleged misrepresentation. This event occurred in Spain. The intellectual property rights are subsisted worldwide, to the extent that they were damaged, the damage was sustained in every country of the world. Accordingly, England could not be "the place where the harmful event occurred" for the purposes of Article 5 (3) of the Lugano Convention.

The High Court found that the judge did not misdirect himself on this issue as it applies to Article 5 (3). While examining this question the Court cited the following principles concerning the Article 5(3) of the Lugano Convention:

- (1) In considering whether a claim concerns a matter "*relating to tort delict or quasi-delict*" (tort), which has an autonomous meaning there is to be excluded all claims that properly fail under Art. 5(1)².

² *Athanasius Kalfelis v Bankhaus Schroder. Munchmeyer Hengstand Co and Others* (189/87) [1988] E.C.R. 5565.

- (2) Although a claim for misrepresentation is necessarily related to a contract it does not follow that it is a "*matter relating to a contract*" within the autonomous meaning in Art. 5(1): it depends upon the remedy which is sought. If the remedy sought is damages (as opposed to rescission), then the claim can be brought under Art. 5 (3).
- (3) The expression "*where the harmful event occurred*" covers two matters in respect of which a claimant need only satisfy one: (i) where the damage occurred; or (ii) where the event giving rise to the damage occurred³:
- (4) "Damage" means damage in the direct sense and not financial loss consequent on the initial damage arising elsewhere⁴:
- (5) In a case of misrepresentation or misstatement:
 - i. the damage is likely to occur at the place where the misstatement or misrepresentation is received and relied upon:
 - ii. the event giving rise to the damage is quite likely to be where the misstatement or misrepresentation originates:

The Court noted that while one of the defendants' principal submission was that the damage suffered by the claimants as a result of the misrepresentation was the transfer to them of damaged rights, the intellectual property rights were not damaged by the misrepresentation. The alleged misrepresentations did not cause the impairment of, damage to or diminution in the value of the transferred rights. The misrepresentations allegedly induced the claimants to enter into the agreement and to pay the price which presumably was greater than the price which would have been agreed had the parties known the true facts.

On this basis it was the claimants' entry into the agreement that caused them to suffer and constituted their loss.

The appeal was dismissed.

New Convention

While preparing the new article 5 (1) of the Lugano Convention it was decided not to make any radical change to the existing text, but to adjust it so as to indicate, in the case of a contract of sale of goods or a contract for the provision of services, which

³ *Handelskwekerij G J Bier BV v Mines de Potasse d'Alsace SA* (21/76) [1976] E.C.R. 1735.

⁴ *Marinari v Lloyds Bank Plc and Others* (C-364/93) [1995] E.C.R. 2719.

obligation was the one which place of performance could provide a basis for a jurisdiction alternative to the forum of the defendant, while leaving the existing provision unchanged for all other contracts and for cases in which the specific rules described proved inapplicable (cf. Pocar-report No 49). Taking this into account and the fact that the article 5 (3) has remained unchanged, it appears that the Court would give similar ruling under the provisions of the New Lugano Convention.

(ii) *employment contract*

Judgment of the Portuguese Court of Appeal in Lisbon of March 21st 2007 (No 2007/46)

This judgment is discussed below in connection with the Article 8 (2) of the Convention.

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

Judgment of the Federal Supreme Court of Switzerland of October 23rd 2006 (No 2008/19)

The facts may be summarised briefly as follows: The plaintiffs brought an action in the court in Zurich (*Handelsgericht des Kantons Zurich*). Some of the plaintiffs were domiciled in Switzerland and others in Germany. The plaintiffs were all companies, producing or selling a certain product. The defendant, also a company, was domiciled in Germany and was a holder of a European patent, granted for several contracting states. The action comprised three claims connected with this patent. The plaintiffs demanded the declaration that they had not infringed the Swiss, the German or the French part of the patent with their product and that the defendant was not entitled to any claim against them.

The defendant brought a counterclaim against some of the plaintiffs.

The first instance court allowed the action of the two plaintiffs, domiciled in Switzerland. The court found no grounds for jurisdiction regarding the claims of three

plaintiffs domiciled in Germany. Regarding the fourth plaintiff domiciled in Germany, the court held that it had jurisdiction regarding two of the claims only.

The defendant appealed the decision of the first instance court and so did one of the plaintiffs, domiciled in Germany, whose action was not allowed.

The court of appeal (*Schweizerisches Bundesgericht*) refused the appeal of this plaintiff with the following explanation:

The plaintiff demanded the declaration of non-infringement of a foreign patent. He referred to the Article 5(3) of the Lugano Convention. According to this Article, a person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued in matters relating to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred. In such case, the rule on jurisdiction takes into consideration, that there is a special connection between the place of the court and the subject matter of the dispute and that the court of the place where the harmful event occurred is the most appropriate one to examine evidence and to decide the case. According to the case law of the ECJ, the place, where the harmful event occurs, may be the place of harmful conduct as well as the place of the effect. In case of infringement of a foreign patent, the place of the harmful conduct shall be the place relevant. An infringement of a patent occurs under the condition that a patent was granted for a certain state and an action took place in this state. The place where consequences arise as a place of violation of legally protected rights can only lie in this state. In the case considered, the infringement of a patent did not take place in the state where the action was brought in court and the law applicable would not be the law of the court. The connection to the subject matter of the dispute did not exist. The Swiss court did not have jurisdiction.

New Convention

In Art 5(3) of the new Convention only the words “*or may occur*” were attached at the end of the text, so it does not appear that this case would be decided differently under the terms of the new Convention.

Judgment of the Federal Supreme Court of Germany of November 6th 2007 (No 2008/23)

This case relates to damages arising out of a money investment by the plaintiff. The plaintiff who was domiciled in Germany signed – in his apartment in Germany – a contract about the investment of 100.000 German Marks with the investment firm GVP which had its seat in Switzerland. The defendant was portfolio manager of GVP and had his domicile also in Switzerland.

Using documents provided to him by GVP the plaintiff opened an account at a Swiss bank and entitled the defendant to dispose of this account on his behalf. Then the plaintiff, again using documents of GVP, paid the 100.000 Marks to the account.

As the investment did not develop in the way promised by GVP the plaintiff partly cancelled the investment (namely to a sum of 50.000 Marks). AS GVP did not react at all the plaintiff cancelled the investment as a whole and the power of attorney of GVP regarding the bank account. The bank paid back to the plaintiff a sum of some 21.900 Marks which was left on the account. The rest of the invested money was lost.

In December 2003 the defendant was convicted of embezzlement (Untreue) and fraud by the Landgericht Darmstadt. This conviction did however not refer directly to the damage inflicted on the plaintiff.

The plaintiff claimed from the defendant the recovery of his loss at the Landgericht Bamberg and based the jurisdiction of this court on Art 5 § 3 of the Convention. He based his claims both on embezzlement (Art 266 of the German Penal Code) and fraud (Art 263 Penal Code) committed by the defendant.

The Supreme Court pointed out that the defendant could invoke Art 5 § 3 if he conclusively alleges an unlawful action (“unerlaubte Handlung”) of the defendant committed in Germany.

As far as the plaintiff based his action on embezzlement committed by unauthorised disposal of the plaintiff’s Swiss bank account the court negated jurisdiction of German courts according to Art 5 § 3: According to constant jurisprudence of the ECJ on the homonymic Art 5 § 3 of the Brussels Convention (e.g. Nr. C 21/76 *Mines de Potasse* and C 220/88 *Dumez France*) Art 5 § 3 required a connection between the claims in question and the courts of other states than the state of domicile of the defendant which is close enough to justify jurisdiction of these courts in the interest of orderly judicature and appropriate conduct of the proceedings. The plaintiff was then

entitled to choose the courts of either the state where the harmful action was carried out or of the state where the damage occurred. The right of choice might not be extended beyond this justifying connection in order not to undermine the primary jurisdiction according to Art 2 of the Convention (here the Court referred to EJC C 168/02 Kronhofer). Taking this into account the words “place where the harmful event occurred in Art 5 § 3” must not be interpreted in an extensive manner as comprising any place where detrimental consequences become sensible of a fact already causing damage which indeed came into existence in another place (again reference to ECJ C-168/02 Kronhofer). In the given case the offence of embezzlement to the detriment of the plaintiff was carried out in Switzerland at the seat of GVP which was also the working place of the defendant and the immediate damage to the plaintiff occurred in his assets on the bank account in Switzerland (and not – as the plaintiff had argued – in his “general economic wellbeing in Germany”).

However, insofar as the action was based on an alleged fraud of the defendant, the Supreme Court endorsed jurisdiction of the German courts. The decisive fraudulent act occurred in the apartment of the plaintiff in Germany namely the conclusion of the investment contract.

New Convention

It does not appear that this judgment would be decided differently under the terms of the new Lugano Convention as the reference to “*the place where the harmful event occurred*” was not changed in the new text.

Judgment of the British High Court of Justice of July 25th 2007 (No 2008/35)

The judgment was discussed above in connections with the Article 5 (1) of the Convention.

Article 6(1) Special jurisdiction in case of related proceedings – number of defendants

Judgment of the Federal Supreme Court of Switzerland of October 9th 2007 (No 2008/18)

In the case, decided on 9th October 2007, the plaintiffs were domiciled in Germany and the defendants in Switzerland. The first defendant, an insurance company, was registered in Zurich (Kanton Zurich) and the second one, an attorney and a notary, had an office in Lugano and lived in another place Kanton Ticino. The plaintiffs brought proceedings in Zurich, Switzerland (*Handelsgericht des Kantons Zurich*).

Regarding the second defendant, the court of first instance held that it had jurisdiction on the basis of article 6(1) of the Lugano Convention, which determines, that a person, domiciled in a state, bound by the Convention, may also be sued, where he is one of a number of defendants, in courts for the place where any one of them is domiciled. The court held that this provision is also applicable when all defendants are domiciled in the same state. Further, the court held that in the case considered the claims are closely connected.

The second defendant appealed against the decision of the court on jurisdiction.

The court deciding on the appeal (*Schweizerisches Bundesgericht*) referred to the case law of the ECJ. It held that the possibility of different judgements alone is not enough to base jurisdiction on the article 6(1) of the Lugano Convention. According to the case law of the ECJ, the factual and the legal basis of the claims concerned has to be the same. The court held that the condition, defined in the article 6(2) of the Lugano Convention, that proceedings shall not be instituted solely with the object of removing the defendant from the jurisdiction of the court which would otherwise be competent in his case, also has to be taken into consideration when applying the provision of article 6 (1). If the claim against the first defendant is manifestly inadmissible, the plaintiffs can not invoke jurisdiction under article 6(1).

The question, how far the court should go, when checking facts relevant for the decision on jurisdiction, was then dealt with. Usually, the facts relevant for the decision on jurisdiction are also relevant for the decision on merits (*doppelrelevante Tatsachen*). The Lugano Convention does not determine how to proceed in case of such facts. Therefore, the court concluded that provisions of national legislation connected with this question are to be applied. The court also looked at the national case-law and then concluded, the court of first instance should have taken up a position on certain questions, concerning jurisdiction, but did not do so. The case was therefore returned to the court of first instance to be decided again.

New Convention

In the new Convention, the phrase “*provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings*” has been added at the end of Article 6(1). According to the Pocar report, the case law has been codified on this point.

On the other side, in the article 6(1), the new Convention does not codify the requirement that proceedings shall not be instituted solely with the object of removing the defendant from the jurisdiction of the court which would otherwise be competent in his case. According to the Pocar report, this decision is based on the argument, that close relation between the claims, together with the requirement that the court before which the matter was brought be the court of the domicile of one of the defendants, is sufficient to avoid the misuse of the rule.

On one hand, the court has taken into account the condition, that the claims shall be closely connected. On the other hand, the court has also held, that the condition, that proceedings shall not be instituted solely with the object of removing the defendant from the jurisdiction of the court which would otherwise be competent in his case, has to be taken into consideration. Anyway, it is by no means clear that, on the facts of this case, the application of the new convention would have led to a different outcome.

Judgment of the French Cassation Court of December 19th 2007 (No 2008/30)

The judgment of Court of Cassation of December concerns the appeal in cassation against the judgment given by the Court of Appeal in A. that had established jurisdiction of the French courts over the following case:

The real estate development company (SCI) was established by X (holder of 5 shares) and Y (holder of 95 shares). In 1995 the company was ordered to pay the debts to the association of the co-owners of one of the buildings made by it (S). Due to the fact that it had occurred impossible to recover the debts from the SCI, the S brought an action against the partners of the SCI. The defendant Y domiciled in Switzerland challenged the jurisdiction of the French courts under the Article 6 (1)

Lugano Convention. After Y's death his heirs resumed the challenge of the French courts' jurisdiction.

The appellants in the present case alleged that the Court of Appeal had misdirected itself in establishing its jurisdiction on the basis of the multi –defendants while there were no debt which repayment could have been effectively demanded against X. X could not have been sued and in consequence Y should have been sued in the courts for the place where he was domiciled - in Switzerland.

X was former board member of the SCI facing personal judicial bankruptcy. This resulted in deprivation of right to manage his property and excluded his capability to be the director of the SCI. He was serviced the court judgment while facing personal judicial bankruptcy although according to the appellants he could not have been sued under the executory title against the SCI. However, the Court of Appeal declared that the service on X as well as the representation of the SCI by X was correct and decided that the S. had the executory title which was acceptable and well-founded in order to pursue the enforcement against the partners of the SCI.

The Court of Cassation rejected the appeal in cassation.

The Court of Cassation sustained the decision of the Court of Appeal stating that the French courts has jurisdiction in the present case under the Article 6 (1) of the Lugano Convention. The claim was also brought against the court-appointed liquidator of X (Z - having domicile in France). Moreover, the extinction of debt of X to S, which had not been declared during the personal insolvency proceeding, was a substantive issue that did not deprive X of the status of defendant. However personal insolvency proceedings made him unable to manage and to dispose of his property he remained the right to represent the SCI before the court, especially the decision of the court could have been serviced on him. The Court of Appeal duly assumed that S had executory title which entitled it to demand the settlement of a debt from the partners of the SCI.

New Convention

As far as the Article 6 (1) of the New Lugano Convention is concerned, the ECJ has held that Article 6 (1) requires that the actions brought by the plaintiff be related in such a way that dealing with them separately might result in irreconcilable judgments

(Cf. Pocar Report, No 69). While preparing the text of the new article 6 (1) of the Lugano Convention the case-law on this point was codified as follows:

*“A person domiciled in a State bound by this Convention 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**”.*

Despite of that fact, it does not seem probable that under the Article 6 (1) of the New Lugano Convention, the Court of Cassation give other verdict.

Article 8 – Jurisdiction in matters relating to insurance

Judgment of the Portuguese Court of Appeal in Lisbon of March 21st 2007 (No 2007/46)

Judgment of the Portuguese Court of Appeal concerns the article 5(1) and 8(2) of the Lugano Convention. The circumstances of the case are as follows:

The appellants in the case examined by the Court of Appeal in L. were the company B and the Norwegian insurance society C that had been claimed for compensation by the Portuguese citizen A. The plaintiff worked for the company B as a fix term employee on the ship registered on Bahamas. The fix term contracts were concluded in England. A. had met with an industrial accident on board and issued proceedings before the Portuguese labour tribunal against the company B and insurance society C.

The first instance court found that the Portuguese courts have jurisdiction in the case under the Portuguese Code of Labour Procedure. According to the judge of that court Article 5 (1) of the Lugano Convention couldn't be applied because it relates to the individual contracts of employment but does not relate to the industrial accidents.

The company B. and society C. brought an appeal against the judgment of the first instance court. The Court of Appeal declined jurisdiction in favour of the English courts. The court found that the jurisdiction of the English courts arose from the article 5 (1) and article 8 (2) of the Lugano Convention and from the relevant

provisions of the Brussels I Regulation. According to the Court it is obvious that the article 5 (1) of the Lugano Convention does not refer directly to the industrial accidents. However, according to Portuguese case-law, liability in case of the industrial accident is the liability arising out of the contracts of employment. With accordance to the article 8 (2) of the Lugano Convention the Norwegian insurance society can be sued in the English court because it is the court for the place where the policyholder (the company B) is domiciled.

New Convention

The New Lugano Convention introduces new regime as regard to the jurisdiction over individual contracts of employment (the Articles 18-21 of the New Convention that replace the Article 5 (2) of the “Old” Convention). This new regime is parallel to regime of the jurisdiction over individual contracts of employment in the Brussels I Regulation.

The regulation of Article 8 (2) of the Lugano Convention was considered as granting greater protection for the policyholder than for the insured or the beneficiary. On the other hand, it is still difficult for a private person to sue a company in a different country, in the courts of the company’s State of domicile. These considerations have led to the insertion of the insured and the beneficiary alongside the policyholder in Article 9 (1) (b) of the New Convention, thus putting them on an equal footing (Cf. Pocar Report, No 74). Taking into account the regulation of the New Convention, the jurisdiction of the Portuguese court would not be excluded in the case in question. According to the Article 9 (1) (b), an insurer domiciled in a State bound by this Convention may be sued in the case of actions brought by the beneficiary, in the courts for the place where the plaintiff is domiciled.

Article 16 (1) - Jurisdiction in proceedings relating to immovable property

Judgment of the Supreme Court of Norway of November 23rd 2007 (No 2008/44)

A tenancy agreement about a holiday home in Spain was concluded between two parties domiciled in Norway.

The landlord sued his contractual partner at his domicile for unpaid rents and expenses arising out of the contractual relationship such as cleaning costs, cf. article 2 of the Convention.

Moreover he claimed damages from his tenant arising out of the fact that the defendant unlawfully changed the doorlock of a another house or apartment which was situated on the same plot of land as the holiday home but was not subject to the tenancy agreement. In detail the damages were said to result from the fact that the landlord's daughter wanted to use the house or apartment for vacation purposes and – as it was not accessible to her – he had to rent another object for the daughter.

The Supreme Court confirmed that, as far the claims for rent and expenses were concerned, there was (remark: of course) – exclusive jurisdiction of the Spanish courts according to Art 16 § 1 lit a of the Convention (cf. Art 22 Brussels I) and rejected this part of the lawsuit. It invoked ECJ C-241/1983, Rösler vs Rottwinkel) and stated that (what seems to be a matter of course) Art 16 § 1 lit a (second alternative) comprises all obligations arising out of the tenancy including unsettled rents, expenses and damages in connection with the contract). As a result the Court denied competence of the Norwegian courts.

Regarding the damage claim the court was of the view that this claim was only indirectly connected to the object of the tenancy. It lay admittedly on the same place of land but was not rented by the tenant and still at the disposal of the landlord and his family. Such a claim did therefore not fall under Art 16 § 1 lit a of the Convention so that the competence of the Norwegian courts should be assumed and this part of the lawsuit had to be accepted (without saying this expressly the Court obviously invoked Art 2 of the Convention in this respect).

New Convention

Art 16 § 1 lit a (now Art 22 § 1) was only subject to editorial changes. § 1 lit b (short term tenancies) was changed more substantially but is not applicable to the given case. Therefore the changes made by the new Convention could not have lead to a different decision.

Article 16 (2) - Jurisdiction in proceedings concerning companies or other legal persons or associations

Judgment of the Austrian Supreme Court of May 21st 2007 (No 2008/16)

This decision of the Austrian Supreme Court – which indeed received some public interest in Austria - deals primarily with the jurisdiction according to art 16 § 2 of the Lugano Convention (actions relating to the validity of companies or legal persons or to the validity of their decisions - cf. Art 22 § 2 of Brussels I and of the new Convention). It refers, however, also to art 5 § 3 of the Convention (tort) and Art 6 § 1 (connected claims).

The plaintiff was an Austrian ski coach who was working for an Austrian sporting association (the first defendant) which was member of an international sporting association (the second defendant) whose seat is in Switzerland. The second defendant decided to suspend the activities of the plaintiff on account of purported doping offences. The first defendant was – due to its membership – bound by this decision.

The plaintiff launched his action against the two defendants before an Austrian court. The action aimed at two different goals. Firstly at the discontinuance of proceedings of the second defendant against the plaintiff which raised the preliminary question of the validity of the suspending-decision. Secondly at compensation by the two defendants of the damages inflicted on the plaintiff by the decision of suspension in particular because the first defendant terminated the contract with the plaintiff due to suspending decision because it could no longer use the services of the plaintiff in international events.

The proceedings against the second defendant were suspended by the court so only the purported claims against the first defendant were subject to the decision in question.

1.) *Request for discontinuance of proceedings of the second defendant entailing the preliminary question of the validity of the suspending-decision:*

When determining jurisdiction for this portion of the action the Supreme Court invoked Art 16 § 2 of the Convention. It pointed out that this jurisdiction is exclusive and excludes any other jurisdiction on the matter. Art 16 § 2 should be interpreted in a rather restrictive manner but, nevertheless, as including disputes about associations as well as commercial companies (NB: in Brussels I this issue is clarified in the text of Art. 22 § 2 compared to Art 16 § 2 of the Brussels Convention).

According to the Supreme Court the action of the plaintiff aimed at eliminating (with effect only inter partes) the decision of the second defendant which suspended professional activities of the plaintiff (more exactly: which ordered the member associations of the second defendant, including the first defendant, to suspend or prohibit some activities of the plaintiff). Such an action would qualify exactly as an action according to Art 16 § 2 of the Convention which would require a uniform solution by the court(s). Hence the court ruled that there was exclusive jurisdiction of the Swiss court.

2.) *Request for compensation:*

At first the Supreme Court pointed out that – according to the principle of strict/narrow interpretation of Art 16 - the compensation request could not be deemed to fall under exclusive jurisdiction according to this provision. So the court examined whether Art 5 § 3 of the Convention provided for a forum of the plaintiff (namely either at the place where the harmful event occurred or at the place where the damage was inflicted on the plaintiff).

The court determined that there was, in the given case, no need to decide whether there existed a contractual relation between the plaintiff and the second defendant which would, according to the jurisprudence of the European Court of Justice, preclude the application of Art 5 § 3. This due to the principle that the “place where the harmful event occurred” could only be understood as the place where this event directly harmed the aggrieved party (here the court referred, inter alia, to the ECJ judgment 220-88 in the case of Dumez/Hessische Landesbank). The court held that the immediate damage of the plaintiff originated from the fact that the member organisations of the second defendant (including the first defendant) excluded the plaintiff from the participation in sporting events. Only as a consequence of this the first defendant terminated the contract with the plaintiff. This termination could not be deemed as the immediate/direct damage of the plaintiff inflicted by the decision of the

second defendant according to Art 5 § 3 of the Convention so that the plaintiff could not claim successfully jurisdiction (of Austrian courts) derived from this provision. With respect to the

As the first defendant had its seat in Austria the court also dealt with the jurisdiction according to Art 6 § 1 of the Convention (in German: “Gerichtsstand der Streitgenossenschaft”). It held that, as far as the claim according to point 1 above (request for discontinuance of proceedings of the second defendant) was concerned, this jurisdiction was at any rate precluded by the exclusive jurisdiction according to Art 16 of the Convention. As to the second claim (compensation) the court did see no joint preliminary questions to be clarified both with respect to the action against the first defendant and to the one against the second defendant. This due to the fact that the first defendant anyhow shared the view of the plaintiff that the suspending decision of the second defendant was unlawful and void and that a dissolution of the contract between the plaintiff and the first defendant was not a necessary consequence of that decision. Insofar the court did not deem necessary joint proceedings against the two defendants in order to avoid irreconcilable decisions by different courts.

On that grounds the Austrian Supreme Court ruled that jurisdiction in the given case exclusively laid with the Swiss Courts.

New Convention:

In Art 5 § 3 of the Convention only the – just clarifying words (cf Pocar-report Nr. 60 – 63) “*or may occur*” were attached at the end of the text which should be of no effect on the decision of the court.

At the end of Art 6 § 1 the new Convention adds the phrase “*provided the claims are so closely connected that is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings*”. As the court anyhow denied this jurisdiction (also applying the concept of irreconcilableness) this alteration of the text would be of no relevance for the decision.

The content of Art 16 § 2 can now be found in Art 22 § of the new Convention. The text was subject to some alteration. In particular the words “*of the validity of*” were inserted before “*decisions of their organs*”. This however does not mean a change in substance as the new wording just confirms the interpretation of former Art 16 § 2

that the reference to “*the decisions of their organs*” was intended to be linked to the first part of the preceding phrase (cf Pocar-report No. 96).

So it does not appear that this judgment would be decided differently under the terms of the new Lugano Convention.

Article 21 - Lis pendens - related actions

Judgment of the British House of Lords of January 23rd 2008 (No 2008/34)

Judgment of the British House of Lords concerns mainly the article 21 of the Lugano Convention but interesting reference to the article 27 (2) of the Lugano Convention was also made. The circumstances of the case were complex thus it seems essential to present them in detail:

The appellants in the case examined by the House of Lords were the administrators of the estate of M. who before his death was in partnership with S. (next bankrupt) dealing in antiquities. Following M.'s death the appellants took proceedings against S. and various court orders were made. In 2003, in breach of those orders, S. sold a rare statue to the second respondent for US\$3 million. The second respondent was a Swiss company G. whose sole proprietor and sole officer was the first respondent, N. of Swiss nationality. By the described proceedings, begun by claim form issued out of the High Court on 16 December 2004 (**the English proceedings**), the appellants claim US\$3 million against the respondents.

On 15 December 2004 the appellants sought and obtained a worldwide freezing order against the respondents, restraining them from disposing of their assets up to a value of US\$3 million. On 16 December 2004, the High Court issued the appellants' claim form against the respondents. In issuing the form, the staff at the Court Registry of the High Court erroneously stamped it "Not for service out of the jurisdiction". This was a plain mistake because the claim form had expressly been rendered eligible for service out of the jurisdiction by a statement upon it. On 18 December the appellants filed requests for attachment with the Zurich court and attachments were duly granted *ex parte*. On 21 December 2004 N. was served by the authorities in Zurich with the *ex parte* attachment orders together with order of 15 December and (untranslated) particulars of claim in the English proceedings. All the documents required by the order of 15 December 2004 to be served were translated

till the end of the year. Included in these documents was the claim form, erroneously stamped "Not for service out of the jurisdiction" (and the German translation of the form including the stamp). On 19 January 2005 the Zurich court (deputed to effect service on N. under the Hague 1965 Convention) handed her a package of documents for which she signed a receipt. By then, however, unknown to anyone else, the judge or his clerk had in fact inspected the documents, removed from the package the English language claim form because of the words erroneously stamped upon it, and resealed the package without it. N had learned about that and on 3 February 2005, the respondents themselves issued proceedings against the appellants in Switzerland (**the Swiss proceedings**), claiming negative declaratory relief in respect of exactly the same facts as those the subject of the English proceedings. Moreover no documents had been served on G. because of an error on the part of the Swiss Post Office. Having learned about these facts, the appellants sought orders designed to ensure that the English proceedings had priority over the Swiss proceedings under article 21 of the Lugano Convention. The first instance court gave judgment allowing the appellants' application, and declaring that the High Court had become seised of the proceedings as against the respondents on 19 January 2005. The Court of Appeal allowed the respondents appeal and stayed the proceedings pursuant to article 21 of the Lugano Convention.

The question for the House of Lords was whether, in the light of the Swiss proceedings, the English court must itself decline jurisdiction over the English proceedings and impose a stay. This in turn depended upon which court was first seised of proceedings within the meaning of article 21 of the Lugano Convention.

While examining this issue the House of Lord made reference to the ECJ case-law.⁵ The ECJ held in *Zelger v Salinitri* that a court's obligation under article 21 to decline jurisdiction in favour of another court only arises if it is established that the parallel proceedings have been "definitively brought before a court in another state" and that it is for each state to determine when this is:

... the Court "first seised" is the one before which the requirements for proceedings to become definitively pending are first fulfilled, such requirements to be determined in accordance with the national law of each of the courts concerned. English law has determined that proceedings become "definitively pending" only when they are

⁵ *Zelger v Salinitri* (129/83) [1984] ECR 2397

served on the defendant. Under Swiss law, however, proceedings are held to be "definitively pending" as soon as they are issued.

The question was purely one for domestic law, just as the question of when an English court is seised of proceedings is purely one for domestic law (and the question of precisely what documents have to be served to achieve effective service out of the jurisdiction under the Hague Convention is purely one for domestic law). The Court found it clear that (i) but for the error made by the Swiss judge or his clerk in removing the claim form from the package of documents it would have been served, (ii) the documents in fact served included both the German translation of the claim form and (served again in English and this time in German translation too) the particulars of claim which set out in altogether greater detail than the claim form itself the nature of the appellants' case, and (iii) the respondents accordingly suffered no prejudice from the omission of the English language claim form from the package of documents served but rather used the omission as the opportunity to seek to achieve first seisin in Switzerland. Further, the essential faults here were those of the Swiss authorities.

In this regard the Court also considered the Article 27 (2) of the Lugano Convention: A judgment shall not be recognised... (2) where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence. The Court stated that in the case in question the respondents were served with an equivalent "document": They had not only the German translation of the omitted claim form but the detailed particulars of claim (in both English and German) as well.

As a result the House of Lords found that the service effected on the respondents on 19 January 2005 should be declared valid and effective in the light of the English Law therefore the English court was first seised of proceedings within the meaning of article 21 of the Lugano Convention. House of Lords set aside the judgment of the Court of Appeal and restore the order of the judge at first instance.

New Convention

The New Lugano Convention puts in place completely new regime whereby the "time of seisin" is defined autonomously on the grounds of the Convention instead of by the

law of the member states themselves (the Article 30 of the New Convention). Therefore, the courts will not be examining this question in the light of national laws but with accordance of the Article 30 of the New Convention. Despite of that, it does not seem that the House of Lord gave different ruling under the New Convention.

Title III – Recognition and Enforcement

Article 27(1) - Public policy

Judgment of the Supreme Court of Spain of March 14th 2007 (No 2008/25)

The appellant in the case 2008/25 of the Spanish Supreme Court (referred to earlier) argued also that authorization of enforcement is contrary to public policy. The notification about the judgment was made according to the rules providing for the presumption that the interested party knows the content of the judgment due to his “judicial position” arising from the fact that the judgment was given in default of appearance. This, according to the appellant, was contrary to the right to defense which is constitutionally guaranteed and protected.

The content of the Swiss judgment and enclosed documents showed that during the proceedings in Switzerland, L did not appear on the court hearings in spite of the summons to appear and he did not justify his absence. It was not possible to try to notify him of the judgment more than two times. Finally, according to the relevant provisions of the Swiss law stating that the notification is assumed effective if the person that should be notified prevents notification through his own fault, it was assumed that the notification to L was effective. L was aware of separation proceedings. He was domiciled in Zurich while the proceedings was instituted. He was duly notified about that and summoned before the court in accordance with the Swiss law, he attested by an acknowledgement of receipt service of the court documents and then he did not attend in the proceedings and by withdrawing from the Consular Evidence Register and registering for residence in Barcelona he had put himself in a situation in which the judgment was given in default. According to the Spanish Supreme Court it should be answered did the action of the Swiss judicial

authorities based on the legal presumption of notification fulfilled the requirement for public policy or not, instead of the correctness of the notification to be examined.

Resolving this question, the Supreme Court made subsequent reference to the ECJ case-law⁶. It is not for the ECJ to define the content of the public policy of a Contracting State, it is nevertheless required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State. In consequence a concept of the public policy is strictly national and ought to operate only in exceptional cases only for exceptional application. The ECJ specified that the recourse to the public-policy clause of the Lugano Convention can be envisaged only where the recognition or enforcement of the judgment would be at variance to an unacceptable degree with the legal order of the State, in which the recognition or enforcement is sought, inasmuch as it infringes a fundamental principle.

Generally it can be said that the Supreme Court stated, that the public policy in Spain must be identified with the rights and guaranties enacted in the Article 24 of the Spanish Constitution. The right to the judicial protection without depriving of the right to defense and the right to appeal have the constitutional relevance as the defenselessness becomes real and effective, not only nominal or formal. This excludes the constitutional protection in the situation of the loss caused by the party's oneself dilatoriness, negligence, lack of interest. The Supreme Court did not find in the case the bases to apply the Article 27 (1) of the Lugano Convention.

The appeal in cassation was rejected.

New Convention

Taking into account that in the New Lugano Convention regulation of the public policy has not been changed, it appears that the Court would give similar ruling.

⁶ *Dieter Krombach v André Bamberski* (C-7/98) [2000] E.C.R. 1935; *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento* (C-38/98) [2000] E.C.R. 2973; *Horst Ludwig Martin Hoffmann v Adelheid Krieg* (Case 145/86) [1988] E.C.R. 645.

Title IV - Relationship to the Brussels Convention and to other conventions

Article 57

Judgment of the Federal Supreme Court of Germany of November 28th 2007 (No 2008/24)

Two Italians married in 1970 in Switzerland where they also established their joint domicile. Two children were born in this wedlock. In 1985 the respondent (husband) left Switzerland due to a criminal proceeding instituted against him. Since then there was no further contact between wife (applicant) and husband.

In 1994 the wife requested divorce before a Swiss district court. As the domicile of the husband was unknown the court serviced the application for divorce and the writ of summons by public notice in the Official Journal of the respective canton (namely Graubünden).

The husband did not participate in the proceeding and a judgement by default was rendered by which divorce was granted and alimony was attributed to the former wife and to one of the children.

In 2005 the former wife applied before a German Court to declare enforceable the Swiss judgement as far as alimony was concerned. She based her application on the Hague Convention of 2.10.1973 on Recognition and Enforcement of Decisions relating to Maintenance Obligations.

In its decision the Supreme Court stated that recognition and enforcement in such a case could be based both on the Lugano Convention and on the Hague Convention (Art 57 § 1 Lugano) and the applicant was free to choose between these instruments as the Hague Convention did not claim prevalence over other instruments.

Both instruments demanded the proper and timely service on the defendant of the document instituting proceeding. The courts before which recognition is sought had to determine the correctness of the service in their own responsibility without being bound by the estimation of the court of origin.

According to both Swiss and German civil procedure law service by public notice required an unknown residence of the defendant. Residence was, however, not already “unknown” in the legal sense if applicant and court did not know about it but only after applicant and court had undertaken all possible and sensible investigation in order to determine residence.

In the given case the Supreme Court questioned this important prerequisite because the respondent had claimed that he had informed his children about his actual domicile (in Bavaria) in 1992. So the Court ordered the court of second instance to take evidence on this allegation.

Finally the Supreme Court pointed out that in order to determine correctness and in particular timeliness of a fictive service (e.g. public notification) regard should be had to the question whether the defendant had tried to elude from an ordinary service (especially by concealing his residence) and on the other hand to the question whether the plaintiff was negligent in determining the actual residence of his or her opponent.

New Convention

As Art 57 § 1 of the Convention (= Art 67 § 1 of the new Convention) was not changed in substance it does not appear that this judgment would be decided differently under the terms of the new Convention.

III. Final considerations

The 11th report on national case law shows an upward tendency in respecting the principles established or clarified by the European Court of Justice. The system of exchange of information, set up under the Protocol No. 2 on the uniform interpretation of the Convention, and the work of the Standing Committee have certainly contributed to preventing divergent interpretations. Case law, not only on the two Brussels instruments, but also on the Lugano Convention, will be an important factor to be taken into account during the process of the ongoing revision of the Brussels I regulation.