

# SIXTH REPORT ON NATIONAL CASE LAW ON THE LUGANO CONVENTION

## I Introduction

In September 2003, the Standing Committee decided that the subsequent, i.e. the sixth report, covering the decisions contained in the twelfth fascicle issued by the Court of Justice (through its Library, Research and Documentation Centre) should be drawn up by the Icelandic, Polish and Portuguese delegations. The twelfth fascicle<sup>1</sup> contains decisions pertaining to the Lugano and the Brussels Convention, handed down by the following courts:

### Lugano Convention:

*Oberster Gerichtshof* (Austria): 1 decision  
*Tribunal fédéral/Bundesgericht* (Switzerland): 2 decisions  
*Oberlandesgericht Düsseldorf* (Germany): 1 decision  
*House of Lords* (United Kingdom): 1 decision  
*Cour d'appel* (Luxembourg): 1 decision  
*Høyesterett* (Norway): 1 decision  
*Hoge Raad* (Netherlands): 1 decision  
*Korkein oikeus* (Finland): 1 decision

### Brussels Convention:

*EC Court of Justice*: 6 decisions  
*Court of Appeal* (England and Wales, United Kingdom): 2 decisions  
*Court of Session* (Scotland, United Kingdom): 2 decisions  
*Oberlandesgericht, Köln* (Germany): 1 decision  
*Oberlandesgericht, Frankfurt/Main* (Germany): 1 decision  
*Bayerisches Oberstes Landesgericht* (Germany): 1 decision  
*Oberlandesgericht, Karlsruhe* (Germany): 1 decision  
*Bundesgerichtshof* (Germany): 3 decisions  
*Hof van beroep, Gent* (Belgium): 2 decisions  
*Corte di Cassazione* (Italy): 1 decision  
*Corte d'Appello di Torino* (Italy): 1 decision  
*Oberster Gerichtshof* (Austria): 3 decisions  
*Gerechtshof's Gravenhage* (Netherlands): 1 decision  
*Hoge Raad* (Netherlands): 2 decisions  
*Vestre Landsret* (Denmark): 1 decision  
*Cour de cassation* (France): 1 decision  
*Cour d'appel* (Luxembourg): 1 decision  
*Audiencia Provincial de Madrid* (Spain): 1 decision  
*Supremo Tribunal de Justiça* (Portugal): 1 decision  
*Efeteio Thessalonikis* (Greece) 1 decision

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<sup>1</sup> The decisions have also been published on the homepage of the EC Court of Justice under <http://www.curia.eu.int/common/recdoc/convention/en/tableau/2003.htm>

*Efereio Peiraios* (Greece) 1 decision

As in the previous reports, it should be stressed that as regards national case law, the European Court of Justice is dependent on information provided by national authorities. Therefore, national decisions pertaining to the Lugano Convention and the Brussels Convention that the Court has been able to disseminate do not necessarily constitute a complete compilation of such decisions passed by national courts. This should be borne in mind when reading this report.

## **II Overview of the case law**

### **Article 5(1) of the Convention**

In the decision dated 11 April 2002, the Norwegian Supreme Court (*Høyesterett, case no 2003/42*) expressed its opinion on the question of interpretation of Article 5(1) of the Lugano Convention, in matters relating to individual contracts of employment.

The facts of the case were as follows:

On 2 December 1997, Martin Openshaw, a British national residing in Scotland, was employed as a drilling master in a Swiss company Saipem AG, which later changed its name to Saipem Services AG, for work on board floating drilling platforms operated by the Italian company Saipem SpA. Saipem Services AG is a subsidiary wholly owned by Saipem SpA. The companies maintain a common branch office in Stavanger, Norway.

Openshaw was engaged as a drilling master on board drilling platform “Scarabeo 6” which was operated on the British continental shelf until the beginning of 1998. According to the employment contract, Openshaw’s wages and employment terms were those applicable to the company’s employees on the British continental shelf. At the beginning of 1998 the drilling platform was moved to the Norwegian continental shelf and a new contract was concluded on wages and employment terms, conforming to the terms customary for similar work on the Norwegian continental shelf. The contract contained a provision on obligatory transfer, and on 16 March 2001 Openshaw was notified that he was to be transferred to work outside Norway, and would cease to receive wages according to the Norwegian employment contract on 21 March 2001. A contract, which was submitted to

him, concerning the work on the Nigerian continental shelf, contained different provisions on wages and employment terms.

Openshaw refused to accept the terms of that contract. He only accepted the transfer for work outside Norway on the condition that he would retain his wages and employment terms. Openshaw was subsequently laid off.

Openshaw began an action in the Stavanger City Court against the Norwegian division of Saipem Services AG. In his action, the plaintiff claimed that he was entitled to continue his employment, as well as to compensation for undue and unlawful termination of his employment.

Saipem Services AG requested the dismissal of the case on the grounds that the court did not have jurisdiction.

On 3 August 2001 the Stavanger City Court dismissed the action.

Openshaw appealed against the decision of the Stavanger City Court to the Gulating Court of Appeals, which on 14 January 2002 held that the Stavanger City Court had jurisdiction.

Saipem Services AG appealed the decision of the Court of Appeals to the Supreme Court. The company claimed the following:

The employment contracts concluded between the company and Openshaw were so-called international contracts, containing provisions on the employee's obligatory transfer. The contracts also contained provisions specifying that Swiss law was to be applied as regards any dispute, and that the court in Zurich was to have jurisdiction. However, the dispute in question concerns the employee's obligatory transfer, not the internal matters regarding employment terms on the Norwegian continental shelf. The case should consequently be dismissed from the courts of Norway. Openshaw was engaged for employment in Britain and commenced his work on the British continental shelf. When a duty of transfer is imposed, it cannot be maintained that he performs his work in a particular country, cf. Article 5 (1) of the Lugano Convention. It is therefore possible that he could take legal action against Saipem Services AG in Britain, cf. the final sentence of Article 5 (1) of the Lugano Convention, but not in Norway, since the Norwegian courts do not have jurisdiction.

Openshaw claimed the following:

Openshaw was employed by Saipem Services AG for work on board the drilling platform Scarabeo 6, which was, and still is, operated for Norsk Hydro on the Norwegian continental shelf. He is willing to work in Nigeria, but only on the same terms as on the Norwegian

continental shelf. Transfer involving significantly inferior terms is regarded equal to termination of employment.

There can hardly be any doubt that according to Article 5 (1) of the Lugano Convention, the courts in Norway have jurisdiction. It follows from paragraph 1.4 of the employment contract that the place of work is the drilling platform Scarabeo on the Norwegian continental shelf, and the work was actually performed there until the dispute arose. There are no provisions in the employment contract to the effect that Openshaw is to perform his work in different places.

The Supreme Court noted that in that case a British national residing in Scotland has brought legal action against a company with head office in Switzerland, the issue of jurisdiction is to be considered pursuant to the provisions of the Lugano Convention.

The Supreme Court agreed with the conclusion of the Gulating Court of Appeals that the provisions of the employment contract concerning the choice of court are not applicable, because the contract was concluded before the dispute arose (Art. 17 (5) of the Lugano Convention).

The Supreme Court assessed further whether the Court of Appeals based its decision on a correct interpretation of Article 5 (1) of the Lugano Convention.

The basic principle of that provision is that in cases involving a contractual relationship, a person domiciled in a Contracting State may be sued in the courts for the place of performance of the obligation in question. It also provides that “in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged.”

The Court of Appeals has concluded that the place of performance was in Norway, as the employee worked habitually on the Norwegian continental shelf. The duty of movement, provided for in the employment contract, made the employer entitled, subject to conditions provided for in further detail, to transfer the employee to another work location, including a country where the Convention does not apply. During the period of employment, effectuation of the duty of movement will therefore have the effect that the employee performs his work in different countries. It does not, however, prevent an employee from referring his claim to the court having the competence pursuant to the place where the work was performed in cases of individual employment contracts. The Court of Appeals held that the place where the employee “habitually carries out his work” is the Norwegian continental

shelf, and that the Stavanger City Court is his proper venue for litigation against the employer.

The Court of Appeals furthermore pointed to the provision 1.4 of the contract, which reads as follows: “The designated work location is aboard the vessel “Scarabeo 6” in the Norwegian Continental Shelf. Depending on operation requirements, the Company reserves the rights to transfer the employee to another work location during the employment period”. The work location is thus defined as the drilling platform “Scarabeo 6” on the Norwegian continental shelf. The employment contract does not specify any time limitations, and it is not limited to any particular project. If the employer does not exercise his option of transfer, Openshaw would have his fixed work location on board “Scarabeo 6” on the Norwegian continental shelf. It was also to be noted that in this particular case the employee actually worked on the Norwegian continental shelf for a relatively long period, under terms adapted to Norwegian conditions and Norwegian legislation.

The Supreme Court agreed with this interpretation of Article 5 (1) of the Convention. It noted, in particular, that the above-presented interpretation seems to be well in accordance with the judgment of the European Court of Justice of 27.02.2002 (*case C-37/00 Herbert Weber/Universal Ogden Services Ltd., ECR 2002, I-2013*) relating to the corresponding provision of Article 5 (1) of the Brussels Convention.

In the judgment referred to by the Norwegian Supreme Court, the European Court of Justice made a thorough interpretation of Article 5(1) of the Brussels Convention and set out detailed criteria for the establishment of the place of the habitual performance of work, within the meaning of Article 5(1) of the Brussels Convention. That position of the European Court of Justice in fact makes a summary of the previous ECJ’s rulings concerning the interpretation of the notion of the place of performance of work as grounds for the establishment of jurisdiction of courts to hear employment disputes. In the ruling the ECJ maintained its position that the place of performance of the obligation upon which the claim is based, as referred to in Article 5(1) of the Brussels Convention, must be determined not by reference to the applicable national law, but by reference to uniform criteria. Article 5(1) of the Brussels Convention must be interpreted as meaning that where an employee performs the obligations arising under his contract of employment in several Contracting States the place where he habitually works, within the meaning of that provision, is the place where, or from which, taking account of all the circumstances of the case, he in fact performs the essential part of his duties *vis-a-vis* his employer. In the case of a contract of

employment under which an employee performs for his employer the same activities in more than one Contracting State, it is necessary, in principle, to take account of the whole of the duration of the employment relationship in order to identify the place where the employee habitually works, within the meaning of Article 5(1). Failing other criteria, that will be the place where the employee has worked the longest. It will only be otherwise if, in light of the facts of the case, the subject-matter of the dispute is more closely connected with a different place of work, which would, in that case, be the relevant place for the purposes of applying Article 5(1) of the Convention.

### **Article 6(1) of the Convention**

The case where the jurisdiction was considered on the basis of Article 6(1) of the Lugano Convention was heard before a German courts and it was finally decided before the Highest Court of Germany (*Oberlandesgericht Düsseldorf - judgment dated 25 January 2001, no 2003/23 overruled by Bundesgerichtshof - judgment dated 23 October 2001*<sup>2</sup>).

The following facts were established in connection with that case:

Mr Düllberg, the plaintiff, pursued forward stock exchange transactions and on that account he participated in a German fund up to the amount of DM 26250. Forward transactions as such were realised by a German limited liability company, which was administered by defendant 1 in the case, domiciled in Düsseldorf. Defendant 2 was a trustee of a German company domiciled in Zurich, which managed the realisation of forward transactions. The plaintiff transferred the amount of DM 26250 to the trustee's account indicated in the subscription agreement.

By way of legal action, the plaintiff claimed the repayment of his deposit with interest. He argued that he was not capable of carrying out forward stock exchange transactions, and moreover that no such transactions were carried out. He also claimed that no information or clarifications concerning the risk of carrying out forward transactions were provided in the subscription prospectus to persons making deposits. Defendant 2 was also familiar with these issues. The plaintiff assumed that both defendants were jointly and severally liable, both in terms of contractual liability and liability in tort. Moreover, he

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<sup>2</sup> this decision is not contained in the twelfth fascicle

claimed that they were obliged to repay the appropriated amount resulting from unjustified enrichment.

The National Court in Düsseldorf (*Landgericht*) admitted the action. In the part of the reasons, which referred to its jurisdiction, the court pointed to Article 6(1) of the Lugano Convention as the basis of its jurisdiction. At the same time, it confirmed that the actions are closely connected within the meaning of Article 22(3) of the Lugano Convention. As far as the “basis” for the claim is concerned, the court stated that the duty of payment by the defendant 1 was based on liability in tort (§ 826 Bürgerliches Gesetzbuch). As to defendant 2, the court held that he was obliged to reimburse the sum paid by the plaintiff on the grounds of unjustified enrichment according to § 812 I 1 of the German Civil Code (Bürgerliches Gesetzbuch).

The Defendant 2 lodged an appeal against the judgment. He once again questioned the jurisdiction of the Düsseldorf court. He made a reference to the judgments of the European Court of Justice and argued that in the case at issue there was no close connection of actions, which would justify that jurisdiction.

The Higher National Court in Düsseldorf (*Oberlandesgericht*), which examined the appeal, confirmed the jurisdiction of the lower instance court. The appellate court based its considerations on Article 6(1) of the Lugano Convention, which stipulates that a person domiciled in a Contracting State may also be sued, where he is one of a number of defendants, in the courts for the place where any one of them is domiciled. It concluded that the grounds necessary to establish the jurisdiction of the National Court in Düsseldorf, resulting from Article 6(1) of the Lugano Convention, had been complied with. One of the defendants was domiciled within the jurisdiction of the court in Düsseldorf and there was also the necessary close connection between the actions addressing the two defendants within the meaning of Article 22, regardless of the fact that the plaintiff employed different claims as the basis of his actions. The Higher National Court in Düsseldorf expressed the opinion that in order to assume the existence of that connection it is sufficient if homogenous facts are the subject of a legal examination. There is always a risk involved that in the case of different jurisdictions, in spite of homogenous facts, irreconcilable judgments are passed. These judgments do not always have to concern the same issues drawn from the facts of the case, pursuant to the national (in that case, German) understanding of the established facts of the case. Even the mere possibility of having different answers to questions concerning preliminary issues (e.g. those referring to the validity of statements of

will be deposited according to the applicable law or to the effects of particular ways of behaving) justifies the jurisdiction pursuant to Article 6(1) of the Lugano Convention.

The Higher National Court in Düsseldorf also confirmed the considerations of the court of the first instance in respect of the unjustified enrichment. The appellate court in Düsseldorf held that the conditions of § 812 I 1 of the German Civil Code (Bürgerliches Gesetzbuch) were in the present case fulfilled and that the defendant 2 was obliged to reimburse the sum paid by the plaintiff.

The Higher National Court in Düsseldorf, towards the end of its considerations, admitted the possibility of lodging an extraordinary appeal against the judgment passed in that case, however only in a limited scope. He stated that on account of the paramount importance of the issue connected with the scope of application of Article 6(1) of the Brussels Convention and the Lugano Convention in the case of different grounds for the liability the possibility of carrying out an extraordinary appeal could be admitted.

The extraordinary appeal was lodged. The Highest Court of Germany (Bundesgerichtshof) in its decision dated 23 October 2001 did not agree with the position of courts of the first and the second instance.

By reference to the text of Article 1 of Protocol 2 on the uniform interpretation of the Lugano Convention Bundesgerichtshof emphasised that in this case the case law of the European Court of Justice, as shaped under the Brussels Convention, should be taken into account. It stated that the appellate court did not sufficiently take into account the case law of the European Court of Justice.

Bundesgerichtshof, which heard the extraordinary appeal, agreed with the view that jurisdiction of German courts in the case against the defendant 2), domiciled in Switzerland, should be assessed pursuant to Article 6 (1) of the Lugano Convention, which is in force between Germany and Switzerland.

For article 6(1) to apply, there has to be a connection between different actions, which allows a court to make a single judgment in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Basically, the Convention grants jurisdiction to courts of the State where the defendant is domiciled, and special jurisdiction provided for in Article 6 (1) is an exception that should be interpreted in a way which does not challenge the principle from Article 2. The plaintiff must not lodge an action against several defendants only for the purpose of avoiding jurisdiction of courts of the state where one of the defendants is domiciled. These principles



arise from the case law of the European Court of Justice with regard to the Brussels Convention (*judgment of 27 September 1988 in the case Kalfelis/Schröder, no 189/87, ECR 1988, 5565 and judgment of 27 October 1998 in the case Reunion europeenne, nr C-51/97 ERC 1998 I, 6511, 6548*) and are also applicable to Article 6 (1) of the Lugano Convention, which has exactly the same wording as Article 6 (1) of the Brussels Convention.

The European Court of Justice – and that fact was overlooked by the appellate court – expressed the opinion that there was no sufficient connection for the application of Article 6 (1) of the Brussels Convention if under one action for compensation against two defendants, one of the claims is based on contractual liability, while the other one on liability in tort.

That legal view should be taken into account while interpreting Article 6 (1) of the Lugano Convention. That view is even more important for the examined case where one action lodged against different defendants comprises the claim based on liability in tort and the claim based on unjustified enrichment. The diversity of legal bases for the claim is here even more important than in the case of contractual and tort-related claims for compensation.

Thus, contrary to the opinion of appellate court, Bundesgerichtshof assumed that in the case in question, the existence of a close connection between actions against two defendants cannot be assumed, and consequently, German courts did not have jurisdiction to examine the claim against the defendant ad 2).

### **Article 16(5) of the Convention**

The interpretation of Article 16(5) of the Lugano Convention was considered by the House of Lords in its decision of 12 June 2003, in the case of *Kuwait Oil Tanker Company S.A.K. v. Qabazard (House of Lords, case 2002/36)*. In that judgment, the House of Lords stated that an English court has no jurisdiction to decide on the making of an order of garnishing a debt due to the judgment debtor if that order would lead to the enforcement of the judgment not in the territory of The United Kingdom, but in the territory of another state.

That conclusion was formulated pursuant to the following facts of the case:

The English court allowed the claims of the creditor (Kuwait Oil Tanker Company S.A.K.), who demanded the payment of the amount of USD 130 mln from the debtor (Mr Qabazard), and ordered the payment of that amount by the debtor. The appeal against that

judgment lodged by the debtor was dismissed. The execution against the debtor's property located in the territory of Great Britain made it possible for the creditor to regain some small part of the amount indicated in the judgment. The creditor found out that the debtor held an account in a branch of a Swiss bank and thus he applied to the English court to deliver an order to garnish the debt resulting from the fact of the debtor's holding an account in that Swiss bank. The application was dismissed on the grounds that money garnishment effected on the debtor's account held in a branch of the Swiss bank operating in Switzerland would actually make an enforcement of the judgment in Switzerland, and thus it is the Swiss courts that should take that decision.

In order to justify this position, the House of Lords referred to the report by Mr Jenard who, in respect of Article 16(5) of the Brussels Convention (which is in the same terms in the Lugano Convention), stated that "Article 16(5) provides that the courts of the State in which a judgment has been or is to be enforced have exclusive jurisdiction in proceedings concerned with the enforcement of that judgment. [...] The expression 'proceedings concerned with the enforcement of judgments' [...] means those proceedings which can arise from 'recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments. Problems arising out of such proceedings come within the exclusive jurisdiction of the courts for the place of enforcement. [...]."

The question of application of Article 16(5) of the Brussels Convention, which is worded identically to Article 16(5) of the Lugano Convention, was subjected to the interpretation of the European Court of Justice in case 220/84, *AS/Autoteile Service GmbH v. Malhé* (case 220/84 ECR 1985, 2267) and in case *Reichert/Dresdner Bank* (case 261/90 ECR 1992, I-2149). Those ECJ's decisions were referred to by the House of Lords in their judgment.

In order to justify the position that only a court in a state where a judgment is to be enforced is competent to apply the measures aimed at the enforcement of a judgment, the House of Lords referred to the ECJ's judgment dated 21.05.1980, passed in the case *Denilauler/Snc Couchet Frères* (case 125/79, ECR 1980, 1553). Though that judgment was not directed to the interpretation of Article 16(5) of the Convention, the observations it contained, according to the House of Lords, would apply with added force to execution. In that judgment, the European Court of Justice stated that "the courts of the place or, in any event, of the Contracting State, where the assets subject to the measures sought are located, are

those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures ordered.”

The judgment by the House of Lords does not change the hitherto prevailing direction in the interpretation of Article 16(5) of the Convention. The similar attitude was expressed in the ECJ’s judgment dated 26 March 1992, in case *Reichert/Dresdner Bank* (case 261/90 ECR 1992, I–2149). In that judgment the European Court of Justice stated that Article 16(5) grants an exclusive jurisdiction to judicial authorities of the state in which the judgment has been or is to be enforced, for the purpose of carrying out proceedings under which the recourse to force, constraint or distraint on movable or immovable property, in order to ensure the effective implementation of a judgment may take place.

### **Article 17 of the Convention**

In the case heard before Austrian *Oberster Gerichtshof* (judgment of 29 January 2002, no 2003/16) the question at dispute was the effectiveness of the agreement which granted jurisdiction to the Austrian court. The agreement was concluded between a company seated in Austria and a natural person domiciled in Uzbekistan. The consequence of the assumed absence of effectiveness of the jurisdiction agreement was the absence of jurisdiction of Austrian courts to examine the dispute.

The Austrian Supreme Court considered the effectiveness of the jurisdiction agreement, i.e. whether there were sufficient conditions for the application to of Article 17 of the Convention where at least one party was domiciled in a Contracting State and a suitable form was applied, or whether it was necessary to satisfy other grounds, which do not result directly from a literal wording of Article 17.

In order to deliver a decision, the Austrian court analysed the existing national decisions of Austrian courts, as well as the German and the Italian case law.

According to the opinion of the Supreme Court of Austria, in order to establish the jurisdiction of a court under Article 17 of the Lugano Convention it is not sufficient that the party domiciled (seated) in one of the Contracting States agrees with the party domiciled in a non-Contracting State to the Lugano Convention that the court competent to hear disputes

will be the court for the place where the first party is domiciled. Moreover, Article 17 of the Lugano Convention can only be applied to such situations, if either the domicile of one of the parties, or the agreed territorial jurisdiction of the court, from the point of view of an Austrian judge, is in the territory of another Contracting State. It means that the parties to the prorogation agreement cannot establish the territorial jurisdiction of the court in the Contracting State where they are domiciled or seated.

The Austrian Supreme Court admitted that although such a position makes a very limited interpretation of Article 17 of the Convention, it corresponds to the opinions of the German Supreme Court and the Italian Supreme Court (*Corte di Cassazione*).

Therefore, in the light of the opinion expressed by the Austrian Supreme Court, Article 17 of the Lugano Convention should only be applied if, from the point of view of an Austrian judge, either the domicile (seat) of one of the parties, or the agreed territorial jurisdiction of the court are not in Austria but in the territory of another Contracting State.

The interpretation of Article 17 of the Convention was also considered by the Swiss Supreme Court in its judgment dated 7 August 2001 (*Bundesgericht judgment of 7.08.2000, no 2003/21*).

The Swiss Supreme Court based its considerations upon the following facts of the case:

The plaintiff (and defendant in the appeal proceedings) was a Swiss railway joint-stock company „TransRail”. The defendant (and plaintiff lodging the appeal) in that case was a German limited liability company dealing with forwarding and navigation.

The plaintiff is a forwarding agent of the former Soviet Union’s railway. In 1998 it concluded a co-operation agreement with the defendant, which contained, *inter alia*, the provision saying that:” Disputes arising out of this agreement have to be amicably settled. Otherwise the arbitration rules applied in the defendant’s country have to be observed by both parties”.

In 1999 the parties concluded an agreement concerning the further development of their co-operation, where some of the provisions of the 1998 co-operation agreement were changed. It introduced, *inter alia*, the provision worded as follows: “Commercial contacts between the two companies shall be subject to the Swiss law. The court which shall have territorial jurisdiction in respect of both parties is the Swiss Court in St. Gallen CH-9000.”

Since the German navigation company failed to comply with the obligation, the plaintiff began an action in the Circuit Court in St. Gallen, in which it demanded the payment. The Circuit Court in St. Gallen referred the case to the Commercial Court of the St. Gallen Canton, which limited the hearing of that case to the question of jurisdiction only. The Commercial Court dismissed the plea of the absence of its jurisdiction, raised by the defendant in first instance-the German company, and accepted the action in order to hear it. The proceedings resulted in delivering the decision that was unfavourable to the defendant, who appealed against it by raising, *inter alia*, that the Commercial Court in St. Gallen was not competent to hear that case.

The Supreme Court of Switzerland, which examined the appeal, stated that the jurisdiction of the Commercial Court of St. Gallen was based on the agreement concluded in 1999 between the plaintiff and the defendant (which amended the 1998 co-operation agreement). According to that agreement the court competent in respect of both parties of that agreement was a court seated in St. Gallen – i.e. only judicial courts seated in the Canton of St. Gallen. The defendant, however, claims that such a statement is contrary to the law, which is in force in Switzerland, and that the court competent to hear that case is an arbitration court (which would result from the original co-operation agreement of 1998). According to the Supreme Court, if the parties of the proceedings are domiciled in different Contracting States to the Lugano Convention and they identify the courts of one of the Contracting States as competent to hear disputes, which might result from a particular legal relationship, then the agreements concluded between the parties with regard to the jurisdiction of the court should, as a principle, be examined pursuant to Article 17 of the Lugano Convention.

Prior to the examination of the jurisdiction of a particular court, however, it should be decided according to which law this jurisdiction should be interpreted.

However, although in the Swiss academic writing it has been pointed out that the Lugano Convention regulates not only the form but also the contractual element of an agreement of the parties concerning international and territorial jurisdiction, and as such it prevails over the application of the national law, the Swiss lower instance court, by way of

the application of *lex fori*, pointed to the Swiss law as the law relevant for the purpose of examining that issue.

However, what was most important for the court, was not the question of form, nor the very agreement concluded between the parties, but the dispute over the interpretation of parties' agreements.

In 1999 the parties chose the Swiss law as the law relevant for the purpose of carrying out a substantial examination of disputes. Therefore, according to the Supreme Court, the interpretation of the provisions concerning jurisdiction, contained in the agreement, carried out pursuant to autonomous principles should be rejected; Article 17 of the Lugano Convention does not contain interpretation principles. Thus, the disputed agreement concerning the jurisdiction of a court should be interpreted pursuant to the *lex causae* principle, that is, according to the Swiss law.

The Supreme Court focused on the examination of a concerted will of the parties of the agreement, which should be assessed pursuant to the wording and the purpose of the agreement, taking all the attendant circumstances into account. Pursuant to the decisions of the Swiss Supreme Court, in case of an objective interpretation of contradicting contractual rules for jurisdiction relating to the same legal relationships, the starting point should be, as a principle, the assumption that later agreements (in that case the 1999 agreement) take precedence over, or even abate, the former ones. According to the Court, this solution is applied only if the circumstances of the case do not suggest that it should be assessed according to differing presumed wills expressed by the parties, which also was subject to the Court's assessment in the present case.

In conclusion, the Supreme Court decided that there were no circumstances, if the objective interpretation was applied, that would allow establishing that the agreement concerning jurisdiction, which the parties concluded in 1999, is not absolute. It should be assumed that the conclusion of that agreement gives the possibility of withdrawing from the former arbitration clause. After the parties agreed upon the territorial jurisdiction of the St. Gallen court – while the agreement they concluded does not mention the jurisdiction of the arbitration court as well – it should be assumed that judicial courts seated in St. Gallen will be competent to hear disputes.

**Protocol 1 Article I paragraph 2 in connection with Article 17 of the Convention**

In a judgment dated 25 April 2002, “la Cour d’Appel” of Luxembourg (*Cour d’appel no 2003/40*) applied paragraph 2 of article I of Protocol n. 1 of the Lugano Convention. To our knowledge, this is the first time that a decision applying this provision has been reported under protocol n. 2 of the Lugano Convention.

In this case the plaintiff (M), whose registered office was in the Grand Duchy of Luxembourg, brought proceedings in Luxembourg against a company (E), whose registered office was in Austria. Later, the plaintiff asked for the intervention in the proceedings of another firm (Z) with registered office in Belgium. The court of first instance declared itself competent but considered both requests non admissible; the first on the basis of its obscurity and the second for lack of object.

M was suing E for damages related to a defective performance of a contract of sale of goods because this company (E) had allegedly delivered old material that was not functioning.

In the appeal proceedings, E pleaded the existence of a choice of court agreement in favour of an Austrian court, and, consequently, the lack of jurisdiction of the court that had decided the case. The alleged choice of court agreement was, in fact, a statement in the invoices that E sent to M and to which M did not oppose.

The court decided that paragraph 2 of article I of Protocol n.1 of the Lugano Convention was applicable and interpreted it as “requiring a provision dealing exclusively with conferral of jurisdiction and specifically signed by the party residing in Luxembourg”. The court concluded that those requirements were not fulfilled in the case *sub judice* and considered that the court had jurisdiction under paragraph 1 of article 5 of the Lugano Convention because the parties had agreed that the merchandise was to be delivered in Luxembourg.

In this case, the Lugano Convention had to be applied instead of the Brussels Convention because proceedings were initiated in June 1998, when the Convention on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Brussels Convention was not yet in force.

The decision makes no reference to previous case law; however, the Court of Justice in the case *Porta-LeasingGmbH/Prestige International, SA* (Case 784/79, ECR 1980, 1517) had already interpreted the similar provision of the Protocol annexed to the Brussels Convention. In paragraph 9 of that case the ECJ decided that “a clause conferring

jurisdiction within the meaning of that provision may not be considered to have been expressly and specifically agreed to by a person domiciled in Luxembourg unless that clause, besides being in writing as required by article 17 of the Convention, is mentioned in a provision specially and exclusively meant for this purpose and specifically signed by the party domiciled in Luxembourg; in this respect the signing of the contract as a whole does not in itself suffice”.

The two interpretations are in line and coincide with the comments in Jenard’s report<sup>3</sup>. Apparently, this provision was inspired by the Benelux Treaty and derives from the fact that a large number of contracts entered into by residents in Luxembourg are, in fact, international.

Although the Appeal Court’s (la Cour d’Appel) decision mentions “commercial relations between the parties during a reasonably long period of time and relating to repetitive purchase orders”<sup>4</sup>, the possibility of the existence of a usage between the parties or an international trade usage, under b) or c) of paragraph 1, Article 17.º (1) of the Lugano Convention, was not analysed. It would have been interesting to analyse the relation between paragraph 2 of article I of the Protocol n.1 to the Lugano Convention and the existence of a usage in compliance with article 17. When the Protocol annexed to the Brussels Convention was negotiated the Convention only made reference to agreements in writing or evidenced in writing. The international trade usage was introduced with the Convention on the Accession of the Kingdom of Denmark, of Ireland and the United Kingdom of Great Britain and Northern Ireland, and the usage between the parties in the Lugano negotiations. However, paragraph 2 of article I of the Protocol annexed to the Brussels Convention remained the same in the Protocol n.1 to the Lugano Convention and the report<sup>5</sup> to that Convention makes no reference to any discussion on the subject.

This issue, however, is no longer relevant within the scope of application of Regulation (EC) 44/2001, as that provision was not maintained. It is certainly an issue that will be taken into account in the negotiations for the revision of the Lugano Convention.

## **Article 24 of the Convention**

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<sup>3</sup> OJ [1990] C 189, p. 177.

<sup>4</sup> Case n. 2003/40, p. 7.

<sup>5</sup> OJ [1990] C 189, p. 86.



Jurisdiction to adjudicate on the application of provisional and protective measures was referred to by the Supreme Court of the Netherlands, in its judgment of 21 June 2002 (*Hoge Raad, judgment of 21.06.2002, no 2002/45*). In the judgment, the Court has definitely supported the necessity to preserve the uniform character of decisions passed under the Lugano Convention and the Brussels Convention and emphasised that, according to the undertakings given by the signatories to the Lugano Convention the courts of those States, whether they fall within the EC or the EFTA, must take account when applying the provisions of the Lugano Convention which also feature in the Brussels Convention, of the case-law of the European Court of Justice and of the courts of the Member States concerning those provisions. Consequently, the Supreme Court of the Netherlands, while examining the submitted case, has taken into account the decisions of the European Court of Justice.

By reference to the hitherto existing decisions of the European Court of Justice, the Supreme Court of the Netherlands stated that as regards an application for provisional measures, brought before the Netherlands court seeking payment of a sum in that court while the main proceedings are pending before a court in Norway, the Netherlands court is entitled to grant such a measure solely under Article 24 of the Lugano Convention only where there is a real connection between the subject-matter of that measure and its territorial jurisdiction.

The judgment has been delivered pursuant to the following circumstances: The plaintiff seated in Amsterdam has lodged an action against 7 defendants domiciled or seated in the territory of Norway. The plaintiff has applied to the President of the Circuit Court in Amsterdam (*President van de Rechtbank te Amsterdam*) to issue an interim order consisting in the payment of a demanded amount for the plaintiff, or, in event the application was rejected, consisting in the provision of a security for the payment of the amount of 300 mln Norwegian crowns.

The President of the Circuit Court in Amsterdam decided that the court had no jurisdiction to examine the application for provisional measures.

The applicant appealed against that judgment and the appellate court reversed the judgment of the President of the Circuit Court in Amsterdam. It decided that the President of the Circuit Court in Amsterdam had jurisdiction to examine the application.

One of the defendants applied for the appeal of the judgment of the second instance court.

Having examined the appeal, the Supreme Court in the Netherlands stated that as regards that case, it is necessary to decide whether under the Lugano Convention, which is applicable to that case, the President of the Circuit Court in Amsterdam is competent to deliver an interim order consisting in the payment of the disputed amount in the situation where in the main case there is a pending judicial proceeding before a competent Norwegian court.

The issue of jurisdiction to decide on the provisional or protective measures pursuant to Article 24 of the Brussels Convention, which is worded identically as Article 24 of the Lugano Convention, has been considered in the ECJ's rulings.

The Supreme Court of the Netherlands reversed the decision of the appellate court . It has referred to the ECJ's judgment of 17 November 1998, delivered in the case *Van Uden Maritime BV/Deco-Line (case C-391/95, ECR 1998, I-7091)*. In that judgment, the European Court of Justice stated that in the situation where the subject-matter of the case in connection with which the issuing of provisional measures is requested falls within the objective scope of the Convention, the court having jurisdiction to decide on the merits of the case pursuant to Article 2 and Articles 5 to 18 of the Convention also has jurisdiction to decide on provisional or protective measures and that jurisdiction is not dependent on any further conditions. However, if a court requested to decide on provisional or protective measures has no jurisdiction to decide on the merits of the case, then jurisdiction to decide on provisional and protective measures may be conferred on it pursuant to Article 24 of the Brussels Convention, even though it is possible that the proceedings concerning the merits of the dispute have been already, or may be, instituted before another court or are already pending before an arbitration court. In that judgment, the European Court of Justice also emphasised that the application of provisional or protective measures pursuant to Article 24 of the Brussels Convention of 27 August 1968 is conditional on, *inter alia*, the existence of 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. In that judgment, the ECJ examined, with regard to the above factor, the measure consisting in an immediate payment of a contractual consideration.

The European Court of Justice decided that provisional or protective measures relating to matters excluded from the scope of the Convention are also excluded from the scope of Article 24 of the Convention, because there is no legal basis for arguing for a different scope

between provisional measures and definitive measures (also in the case *De Cavel/De Cavel judgment of 27.03.1979, ECR 1979, 1055*).

In its earlier judgment, dated 21.05.1980, issued in the case *Denilauler/Snc Couchet Frères* (case 125/79, ECR 1980, 1553), the European Court of Justice stated that the courts of the place – or, in any event, of the Contracting State – where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures authorised. It follows that the granting of provisional or protective measures on the basis of Article 24 is conditional on, inter alia, the existence of 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. That court should take up the measures in order to ensure the provisional or protective character of the adjudicated measures. In that judgment, the ECJ stated that the application of such measures requires particular care and knowledge and that the court must have a possibility of imposing a time limit with regard to the judgment or of limiting it to certain assets and objects, or else, of demanding bank guarantees or the designation of a depository in order to ensure the provisional or protective character of the adjudicated measure. It also stated that the most competent court to assess these circumstances is the court of the place where the assets subject to the measures sought are located. Article 24 of the Convention does not prohibit recognising and declaring the enforceability of provisional measures ordered in another state in litigious proceedings, pursuant to the conditions set out in Articles 25 to 29 of the Convention. On the other hand, the conditions set out in Title III are not complied with in the case of provisional and protective measures, which have been adjudicated or approved by the court in the absence of a party they concern, as well as in the case of the measures to be enforced without prior notification on that party. Measures, which do not comply with these conditions, are not subject to simplified enforcement procedure specified in Title III of the Convention.

### **Article 27(1) of the Convention**

The case dated 5 July 2001 (*Tribunal Fédéral, case no 2003/23*), refers to an opposition to the execution of a judgment of the High Court of Justice of London in

Switzerland, on the basis of violation of public policy. Party X pleaded that in the proceedings in London the court had not considered the legal opinion submitted by that party as an affidavit, while considering as such the legal opinion submitted by the other party.

However, after analysing the case, the Federal Court decided that there was no violation of public policy as the legal opinion in question did not satisfy the requirements of English law on taking of evidence, while the other did. Moreover, the court concluded from the analysis of the facts, that the procedural rights were granted to both parties and that for procedural public policy purposes, it is not relevant if the party did, in fact, make use or not of those rights, as long as they were available.

### **Article 27(2) of the Convention**

In the decision dated 10 May 2002, the Finnish Supreme Court (Korkein oikeus, no 2003/47) expressed its opinion on the question of interpretation of Article 27(2) of the Lugano Convention. The case concerned a default judgment, the enforcement of which was applied for in Finland and the question whether a summons had been served on the defendant in the manner provided for in Article 27 (2) of the Lugano Convention.

The French Société Chantiers et Ateliers de la Perrière (hereinafter referred to as CAP) applied for the enforcement of a judgment rendered by the Court of Appeals in Rennes (France) against Hollming Ltd (hereinafter referred to as Hollming). On 6 February 1998 the Rauma District Court (Finland) decided that the judgment of the French court was to be enforced in accordance with Articles 31, 34 and 36 of the Lugano Convention.

Hollming lodged an appeal to the District Court's decision on the grounds that Hollming had not received a summons and had not been properly represented during the proceedings in France; consequently the judgment of the Court of Appeals in Rennes could not be enforced in Finland.

The Finnish Court of Appeals found the case chiefly to involve the question whether Hollming had been properly represented, which concerned the fair trial requirement during the proceedings in the first instance in France, i.e. the Commercial Court in Lorient, and the related question whether Hollming had been served with a summons to appear before the

commercial court or whether it had any other reliable information other than that contained in the summons concerning its status as a defendant.

The Finnish Court of Appeals referred to the judgment of the Lorient Commercial Court, according to which the barrister Possoz represented Hollming. The Court held that the entry of this point into the record was not necessarily true to fact, as the barrister was only obliged to produce a power of attorney if a request was made to that effect.

According to the wording of the judgment of the Lorient Commercial Court, Hollming had been summoned to appear. Nevertheless, the case file does not make it clear whether a summons concerning Hollming existed. At any rate, Hollming's assertion that the company itself had not been summoned, and that instead Hollming's commercial agent in France, Sofaret had received a summons at that company's address, was considered reliable. The Court of Appeals concluded that no summons could be found that had been served on Hollming. A summons served at the premises of Sofaret could not replace a summons served on Hollming directly, and was not binding upon Hollming. Thus, Hollming had not been summoned to appear before the commercial court. The relationship on the grounds of which Sofaret was acting as a commercial agent to Hollming did not render Sofaret competent to defend Hollming in court, whether in the Commercial Court or in the Court of Appeals. There was no indication that Hollming had granted a power of representation in the case to Sofaret, the defendant, or to Sofaret's barrister, Possoz.

According to Article 27 of the Lugano Convention, a judgment will not be recognised if its recognition is contrary to public policy in the State in which recognition is sought. According to Article 29 of the Convention, no facts relating to the resolution of a case in a foreign judgment shall be reviewed under any circumstances. Matters concerning the representation and the service of summons have no relation to the subject matter of a judgment. Hollming itself did not receive a summons. Actually, Hollming did not possess information to the effect that the case had been filed in the Commercial Court or on its status as a defendant there. Nor had CAP asserted that Sofaret or the barrister Possoz possessed a mandate of legal representation from Hollming. It was found that Hollming, not having been summoned, was absent from the proceedings of the commercial court. Consequently the proceedings could not be said to constitute a fair trial of the absent party. The fact that the proceedings may have been fair in other respects was not relevant. Recognition of the judgments of the Lorient Commercial Court of 17 December 1993 and the Rennes Court of Appeals of 13 March 1996 was contrary to the basic principles of Finnish procedural law.

The Court of Appeals therefore denied CAP's application.

CAP was entitled to lodge an appeal.

In its appeal, the CAP requested a reversal of the judgment of the Court of Appeals, and granting its application for recognition of the decision of the Court of Appeals in Rennes, making the judgment enforceable.

In its decision issued on 10 May 2002, the Supreme Court, which examined the appeal, stated that according to Article 34 (2) of the Lugano Convention, a court handling an application for a decision on enforcement may only refuse such application for one of the reasons specified in Articles 27 and 28 of the Convention. According to Art. 27 (2), a judgment shall not be recognised if it was given in default of appearance, and 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. Thus, Article 27 (2) of the Convention relates only to judgments rendered in default of appearance. It can be noticed in the case *Hendrikman and Feyen/Magenta Druck&Veerlak GmbH (case C-78/95, judgment of 10 October 1996; OJ 1996 p. I-4943)* the Court of Justice stated that where proceedings are initiated against a person without his knowledge and a lawyer appears before the court first seised on his behalf but without his authority, such a person is quite powerless to defend himself and must be regarded as a defendant in default of appearance, within the meaning of Article 27(2) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, even if the proceedings before the court first seised became, in point of form, proceedings *inter partes*.

Article 27(2) of the Convention therefore applies to judgments given against a defendant who was not duly served with, or notified of, the document instituting proceedings in sufficient time and who was not validly represented during those proceedings, albeit the judgments given were not given in default of appearance because someone purporting to represent the defendant appeared before the court first seised.

According to the judgment of the Lorient Commercial Court of 17 December 1993, two barristers were registered as representatives of the defendant Hollming. Thus, the judgment was not rendered in the defendant's absence. The first question to be resolved was whether Hollming had been duly represented in the Lorient Commercial Court. Against Hollming's denial it was not established that Hollming provided the said barristers with a power of representation before that court. Nor has it been established that the company Sofaret, which acted as Hollming's commercial agent in France, was by virtue of that

function or for some other reason empowered to represent Hollming in the course of the litigation.

Thus, the Supreme Court holds that, within the meaning of Article 27 (2), the judgment was given in default of appearance on the part of Hollming.

A judgment given in default of appearance can only be enforced in the absence of the faults referred to in Article 27 (2). The provision requires that a document instituting the proceedings be served on the defendant in sufficient time to enable him to arrange for his defence. Its purpose is to ensure that a judgment is not enforced on the basis of the Lugano Convention if the defendant did not have an opportunity to defend himself during the proceedings.

According to a submitted exposition, a summons for appearance before the Lorient Commercial Court was served on the company Sofaret (“Ste Hollming SA co Sofaret”). It was not explained that Sofaret was, on the basis of an agreement between that company and Hollming, empowered to receive a summons or an equivalent document on Hollming’s behalf, or that Sofaret was otherwise in possession of such a mandate. As a summons was not served on Hollming at all, it follows that such a document was not served on Hollming in sufficient time to arrange for its defence.

On this basis, the Supreme Court denied CAP’s application for the enforcement of the judgment of the Rennes Court of Appeals.

### **III. Final considerations**

The review of the national decisions on the Lugano Convention contained in the twelfth fascicle issued by the Court of Justice confirms the tendency of national courts to follow the case law of the ECJ pertaining the Brussels Convention.

Numerous references to the case law of the European Court of Justice, made by national courts in their judgments, seem to prove that the ECJ’s decisions are in general well known. The fact that national courts, while deciding on the issues pertaining to the Lugano Convention, analyse the decisions of the European Court of Justice and make in their judgments direct references to the case law worked out by the ECJ, proves that they take a proper care to have homogenous decisions passed with regard to both Conventions, i.e. the Lugano Convention and the Brussels Convention.

On the other hand none of the decisions of the European Court of Justice contained in the twelfth fascicle can be cited as an example of the ECJ paying due account to the rulings contained in the case-law of the Lugano Convention according to the Declaration of the Representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Communities.

It is worthy of appreciation that national courts make references to the case laws of other Contracting States. Due to the fact that judgments passed by national courts are most frequently published in their original language versions, it is worth noting the effort of the courts of some countries in establishing a uniform interpretation of the Lugano Convention.

The fact that national decisions are published in national language versions may limit the general knowledge of the content of these decisions. Therefore, these Reports may be a valuable auxiliary to national courts, especially if translated into all national languages and widely disseminated.