

**13th REPORT ON NATIONAL CASE LAW  
RELATING TO THE LUGANO CONVENTIONS**

by

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**I. Introduction**

According to Article III of Protocol No 2 to the Lugano Convention of 1988, the Standing Committee of the Lugano Convention met every year to see if the courts in the State parties pay due account to the principles laid down by any relevant decision delivered by courts of the other Contracting States concerning provisions of the Convention. To improve the study of the case law of the State parties at the Lugano Convention, it was decided in the 5<sup>th</sup> meeting of the Standing Committee (1998) that every year three delegates were charged of presenting a detailed report on the decisions included in the previous package of decisions presented by the relevant service of the Court of Justice. The last meeting of the Standing Committee of the 1988 Lugano Convention took place in Spiez (Switzerland), on 13-14 September 2010.

. According to Article 4 of Protocol No 2 to the revised Lugano Convention of 2007, which replaces the Lugano Convention of 1988, the Standing Committee is only composed by representatives of the Contracting Parties. Consequently, representations of the Member States of the European Union are not present in the Standing Committee. However, according to Article 5 of the same Protocol, the Depositary of the Convention may convene a “meeting of experts to exchange views on the functioning of the Convention, in particular on the development of the case-law and new legislation that may

influence the application of the Convention”. By virtue of this provision, during the 17<sup>th</sup> and last meeting of the Standing Committee convened according to the 1988 Convention in September 2010, Switzerland proposed, and it was so agreed, that a meeting of experts would be held in the future. The Standing Committee will be informed of the result of the meeting.

Subsequently, it was agreed to continue the practice to present a detailed report on the case law. In this case, this is the 13<sup>th</sup> Report, presented by Alegría Borrás, Irene Neophytou and Fausto Pocar, on the national case law contained in the 19<sup>th</sup> and 20<sup>th</sup> packages of judgments submitted by the Court of Justice of the European Union in 2010 and 2011.

According to the mandate received by the Standing Committee in 2010, this 13<sup>th</sup> Report should only consist of an overview of decisions under the Lugano Convention, making reference to the Court of Justice of the European Union’s decisions on the respective provisions of the Brussels Convention and the Brussels I Regulation “in order to trace similarities and divergences within the interpretation of the various texts”.

The great majority of the decisions mentioned in this report, refers to the Lugano Convention of 1988, as part of them preceded the entry into force of the Lugano Convention of 2007. The report covers the following decisions:

- *Oberster Gerichtshof* Austria, Judgment 8 January 2009 (No 2010/22)
- *Oberster Gerischtshof* Austria, Judgment 16 February 2009 (No 2010/23)
- *Bundesgericht* Switzerland, Judgment 30 September 2008 (No 2010/28)<sup>1</sup>
- *Bundesgericht* Switzerland, Judgment 26 June 2009 (No 2010/29)
- *Bundesgericht* Switzerland, Judgment 5 October 2009 (No 2010/30)
- *Bundesgerichtshof* Germany, Judgment 5 March 2009 (No 2010/34)

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<sup>1</sup> The authors of the present Report have chosen not to comment on this decision, which was a subject of discussion in a case brought by Belgium against Switzerland before the International Court of Justice on the Interpretation of the Lugano Convention of 1988. Although the case has been subsequently withdrawn, diplomatic consultations may still be going on at the moment of the drafting of this Report between the interested governments.

- *Oberlandesgericht Dresden* (Germany), 7 May 2009 (No 2010/35)
- *Bundesgerichtshof* Germany, Judgment 30 November 2009 (No 2010/37)
- *Høyesterett* Norway, Judgment 7 May 2009 (No 2010/54)
- *Schweizerisches Bundesgericht*, Judgment 7 July 2010 (N° 2011/24)
- *Oberlandesgericht Düsseldorf*, Judgment 18 December 2009 (N° 2011/26)
- *Bundesgerichtshof*, Judgment 20 May 2010 (N° 2011/27)
- *Bundesgerichtshof*, Judgment 5 October 2010 (N° 2011/29)
- *Gerechtshof Amsterdam*, Judgment 12 November 2010 (N° 2011/45)
- *Høyesterett*, Judgment 2 July 2010 (N° 2011/46)
- *Sąd Najwyższy*, Judgment 6 June 2010 (N° 2011/47)
- *Högsta domstolen*, Judgment 23 March 2010 (N° 2011/49)<sup>2</sup>.

## II. Overview of the case law on jurisdiction

### 1. *Oberlandesgericht Düsseldorf*, Judgment 18 December 2009

The insolvency administrator of a German private limited liability company seized German courts in order to obtain the repayment of the important amount of money that the manager of the company, with domicile in Switzerland, had transferred to his wife and his father-in law, also domiciled in Switzerland, after the occurrence of its insolvency or after the finding of its over-indebtedness. For the defendant such actions are excluded from the scope of application of the Lugano Convention, as they are related to bankruptcy proceedings, that are excluded of the scope of the Convention by Article. 1(2), which excludes bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.

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<sup>2</sup> No comment of this judgment is included as it is a decision from *Högsta domstolen* (the Supreme Court) to grant a review permit of *Svea Hovrätt's* (a Court of Appeal) decision. The *Högsta domstolen* has not yet taken a final decision in the matter. The case relates to Article 5.3.

For the German Court, and according to the case law on the Brussels Convention (*Gourdain* case, judgment 22 February 1979, case 133/78) the *actio pauliana* is only excluded from the scope of Brussels Convention if it arise out of bankruptcy proceedings (nowadays, in the EU it will fall under art. 4.2. m) of Regulation 1346/2000 on insolvency). The result of that in this case is that the action fall under the scope of application of the Lugano Convention, as the action do not directly derive from the bankruptcy proceedings, an interpretation in accordance with the Schlosser Report (paragraph 53). Jurisdiction of the German Courts can be based, according to the judgment, on Article. 5(1), as the duties of the manager can be analyzed as a contractual obligation, where the place of performance of the contract was to be identified according to the *lex fori*, i.e. the German company law. The result is that the manager would have had to perform his obligations at the seat of the company, meaning that jurisdiction of German courts could be based on Article 5.1. of the Lugano Convention. And, according to the German court, jurisdiction of German Courts could also be based on article 5.3 of the Lugano Convention, as the harmful event occurred in Germany, at the seat of the company.

This second part of the judgment is not so clearly in accord with the case law of the ECJ. In fact, the nature of *actio pauliana* differs from one country to the other (see, paragraph 19 of judgment 29 March 1992, case C-261/90, *Reichert II*) and the only clear ground of jurisdiction would be the domicile of the defendant (art. 2), in this case, in Switzerland. The possibility of other grounds of jurisdiction is doubtful, as there is not a contract between the plaintiff and the third party nor it is a case of indemnity in reason of non-contractual responsibility. In the European Union, an argument to support this position is that neither Regulation Rome I nor Regulation Rome II contain a conflict of laws rule on this matter.

## **2. *Høyesterett* Norway, Interlocutory Order of 7 May 2009**

The dispute at the base of this case concerns the relationship between the general forum of Article 2 (domicile of the defendant) and the special fora of Article 5(1) and 5(3). The plaintiff, a company domiciled in Norway, sued before a Norwegian court its former chair and sole shareholder, domiciled in Sweden, according to Articles 3 to 7 of Act 13 June 1997 No 44 (the Norwegian Company Act) concerning unlawful distribution, which provide that “if a distribution is made by the company in contravention of statutory provisions, the recipient must return any money received”. The plaintiff relied on Article 5(3) of the Lugano Convention of 1988, while the defendant objected to the applicability of this provision and maintained that Sweden had jurisdiction under the general provision of Article 2.

The issue before the Appeals Selection Committee of the Supreme Court was therefore to consider whether the action brought by the plaintiff could be properly characterized as an action in tort for the purposes of the application of Article 5(3). Reference has been made to one of the leading cases of the European Court of Justice on this issue, in particular to the judgment of 27 September 1988 (Case C-189/87, *Kalfelis*), where the Court states that Article 5(3) does not apply to claims arising out of a contractual relationship, but only to tort. And suggests that the special grounds of jurisdiction enshrined in Articles 5 and 6 should, as exceptions to the general rule of jurisdiction, be subjected to a narrow interpretation. The Supreme Court is also recalling the judgment rendered by the European Court of Justice on 26 March 1992 (Case C-261/90, *Reichert*), concerning a claim aimed at the reversal of a donation, which would qualify under French law as an “*action paulienne*”. The claim was found by the European Court not to fall within the scope of Article 5(3), as its primary object was to render ineffective, as against the creditor, the disposition made by the debtor.

Relying on the above mentioned European case law, the Supreme Court of Norway came to the conclusion that a claim according to Articles 3 to 7 of Act No 44 can compare with a so-called “*action paulienne*”, because it is essentially a claim for reversal. As such, it does not fall within the scope of application of Article 5(3) of the Lugano Convention.

The subsequent question dealt with in the interlocutory order turns on the relationship between the company and its shareholders, in order to assess whether the claim could be characterized as an action in contract. Having considered that such a relationship is indeed a contractual one, the Supreme Court concluded that jurisdiction had to be determined under Article 5(1) of the Lugano Convention of 1988, which provides for the competence of the court of the place of performance of the contract. The Court found that the place of performance was to be identified in the place where the company had its seat under Norwegian law, in the case in Norway.

### **3. *Bundesgericht* Switzerland, Judgment of 26 June 2009**

In the present case a claim for damages was brought by a Swiss purchaser of a graffiti protection product against a German seller due to defects in the purchased goods. The plaintiff submitted its claim before the Swiss court of the place of delivery, which had been agreed in the contract and where that the delivery had actually taken place, as evidenced by the note of delivery. The actual dispute concerned the international and domestic competence of the court seized as to the claim for damages, which in the view of the seller should have been regarded as a separate obligation, outside the parties' agreement as to the place of delivery. The seller's alternative claim that two separate contracts had been concluded, one concerning the sale and the other concerning the transport of the goods for which an additional price was paid and in the course of which the damage had occurred, was rejected by the Federal Court as clearly ill founded.

The Federal Court rejected the seller's claim as misinterpreting Article 5(1) of the Lugano Convention of 1988, which permits the plaintiff to sue the defendant in the court at the place where the obligation was or should have been performed, by observing that the obligations arising from a contract include not only the direct contractual obligations, such as obligations to perform or to make payment, but also the obligations that take the place of a contractual obligation that has not been fulfilled in terms of the contract, such as for

instance claims for damages. Additionally, in a legal dispute over the consequences of a breach of contract in which damages are claimed, the case rests on the primary obligation, i.e. that obligation whose non-fulfilment in accordance with the contract is asserted in justification of the claim. In the present case this was the primary obligation of the seller to deliver the graffiti protection product free of defects. By so affirming the law under Article 5(1) of the applicable Lugano Convention, the Federal Court clearly conforms with the interpretation the identical provision in the Brussels Convention of 1968 was given by the European Court of Justice as of its judgment of 6 October 1976 (Case 14/76, *De Bloos*), where the Court decided, in a claim for damages, that the obligation to be taken into account, for the purposes of establishing the place of performance, is not the obligation to pay damages, but the primary obligation whose non-fulfillment was brought in justification of the claim.

Additionally, the Federal Court discussed whether the place of performance should be determined autonomously under the Lugano Convention of 1988 or according to the law applicable to the contractual obligation. Again, the Court took the second alternative option, in conformity with the case law on the Brussels Convention of 1968 of the European Court of Justice as of the celebrated judgment of 6 October 1976 (Case 12/76, *Tessili*). It observed that only after the entry into force of Article 5(1)(b) of the revised Lugano Convention of 2007 the notion of place of performance will have to be determined autonomously (see Pocar Report, paragraphs 49 to 51). The question of the place of performance in this case was decided in accordance with Article 31 of the UN Convention on Contracts on the international sale of goods (CISG) of 11 April 1980, whose applicability as *lex causae* was unchallenged between the parties. Here too the Federal Court is following the jurisprudence of the European Court of Justice on the Brussels Convention of 1968, where it has clarified that, for the purposes of Article 5(1), the applicable law may comprise the uniform legal provisions contained in an international convention (see in particular the judgment of 29 June 1994, Case C-288/92, *Custom Made Commercial*).

#### **4. *Gerechtshof Amsterdam*, Judgment 12 November 2010**

The shareholders of a company suffered losses as a consequence of the infringement of the rules contained in United States of America securities legislation. Proceedings were started in the US, resulting in a “consolidated class action”, but the US District Court for the Southern District of New York held that it had no jurisdiction to admit claims by individuals and companies who at the time of the purchase were domiciled or established outside the United States. The proceedings resulted in two settlements under which the company has to pay compensation to the natural persons and companies in respect of which the District Court did consider that it had jurisdiction. The counterparts of the company were a Foundation and another company, both legal entities under Dutch law established at The Hague. The Foundation was created with a view to concluding the agreements in the interest of persons concerned who suffered losses and was to distribute the funds which, after the declaration of binding force of the agreements, were to be made available by the company.

The purpose of the application seeking recognition of the binding nature of the settlement is to award compensation also to other persons who had bought shares of the company and were domiciled or established outside the US. 200 of them were domiciled or established in the Netherlands, other were domiciled in other EU Member States, in States parties to the revised Lugano Convention and in States which are neither members of the EU nor parties to the aforementioned Convention. The number of persons domiciled or established in Switzerland was estimated at about 8.500.

The *Gerechtshof Amsterdam* , in the first place, held that the proceedings fell within the scope of Article 1 (1) of Brussels and Lugano instruments, as it was aimed at creating a legal relationship under civil law between the applicants and the persons in favor of which the agreements were concluded. Afterwards, the Court is of the opinion that it had jurisdiction according to Articles 2 and 5(1) of the abovementioned instruments , referring to the judgment of the ECJ of 1<sup>st</sup> October 2002 (case C-167/00, *Henkel*) and of 4<sup>th</sup> March

1982 (case 38/81, *Effer*). In the opinion of the Court, the obligations arising from the agreements have to be performed in the Netherlands and, in consequence, Dutch courts have jurisdiction.

The second purpose of the application was to make it impossible for persons and companies entitled to compensation to lodge any further claims against the company with any court or on any ground, with the aim that none of the persons who had suffered losses were entitled to a higher compensation than the one established in the agreement. In this situation, the *Gerechtshof Amsterdam* was of the opinion that the claims were so closely interrelated that a proper administration of justice required that they should be assessed simultaneously in order to avoid irreconcilable judgments in the event of separate proceedings. In consequence, it declared to have jurisdiction, under Article 6(1) not only in respect of persons domiciled or established in the Netherlands, but also in respect of persons domiciled or established in another EU Member State, a State party of the Lugano Conventions not EU member State or a non-EU/Lugano State (in this last case, according to the Dutch Code of Civil Procedure).

Finally, the Court referred to Articles 25 and 26 of the Brussels I/Lugano instruments, concerning the *ex officio* verification of jurisdiction. As the purpose of the application was to limit the access to justice of persons in respect of whom the agreements were to be declared binding, the Court decided to stay the proceedings in order to give them the opportunity to express their views before the Court could finally establish whether it had jurisdiction, referring to Article 26, second paragraph, and Article 6 of the European Convention of Human Rights.

##### **5. *Bundesgerichtshof* Germany, Judgment of 30 November 2009**

An action is brought in Germany against defendants domiciled in Germany for breaches of trust in Germany in relation with fiduciary obligations, including also accessories resident in Switzerland. The action raised against more than two defendants is

based on different causes of action, such as contractual liability and liability in tort, although in this case the defendants were liable in tort and under contract law. The court considers the action against the perpetrator at the same time as that against the accessories, although the action was first raised against a sole perpetrator and thereafter expanded to include the accessories.

The *Bundesgerichtshof* correctly uses the case law of the European Court of Justice in the Judgment of 27 September 1988 (Case 189/87, *A. Kalfelis v. Banque Schroeder, Muenchmeyer, Hengst & Cia (Hema), Banque Schroeder, Muenchmeyer, Hengst International SA and E. Markgraf*) and in the Judgment of 11 October 2007 (Case C-98/06, *Freeport plc v. Olle Arnoldsson*) to maintain that beyond the wording of the provision of Article 6(1) jurisdiction is dependent on there being a connection between the actions against two or more persons that are raised in one court that makes a joint hearing and decision appear necessary in order to prevent contradictory decisions from being reached in separate proceedings, whereby only such a contradiction is relevant that refers to the same factual and legal situation.

It is important to underline that Article 6(1) has been modified in the revised Lugano Convention of 2007, in the same sense than the Regulation 44/2001. As it is said in the Pocar Report (paragraphs 69-70), for the case where they are more than one defendant, the Court of Justice, although it was not in the text of the Lugano Convention of 1988, 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 (in the mentioned cases *Kalfelis* and *Freeport*). In Brussels I Regulation and in Lugano Convention 2007 this case law has been codified, defining what the relationship between the actions should be if it was to confer jurisdiction with respect to all defendants on the courts of the domicile of one of them.

It has not been codified the other principle, put forward by the Commission following the Jenard Report, according to which jurisdiction is justified only if the claim does not have the exclusive purpose of removing one of the defendants from their proper

Court. The reason is that the close relation that must exist 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 (Judgment of 26 May 2005, Case C-77/04, *GIE Réunion européenne et al. v. Zurich España et al.*), was sufficient to avoid the misuse of the rule.

#### **6. Oberster Gerichtshof Austria, Judgment of 8 January 2009**

The plaintiff, a woman domiciled in Vienna, entered into an asset management agreement with the respondent, assuring a long term private pension, as the result of the sale of a building. It is clear that she is a final consumer not acting in a professional or commercial capacity. The respondent, to whom wide-ranging powers had been conferred by the woman, could not accomplish his obligations and all the capital was lost. The plaintiff sought to claim damages.

According to Article 13(3)(a) and (b) of the Lugano Convention of 1988, the courts of the State of the consumer's domicile have jurisdiction if the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and if the consumer took in that State the steps necessary for the conclusion of the contract. In this case, the transaction was concluded in Vienna and preceded by an offer or related advertising in Austria by the representatives of the defendant.

Article 14 determines only that the “courts of the Contracting State” have jurisdiction, without precisising which of the Austrian courts has jurisdiction. In this situation, the *Oberster Gerichtshof* has to decide the local court with jurisdiction, what will be decided by *ordination*, according to the Austrian internal law.

As it is stated in the Pocar Report (Paragraphs 81 to 84), Article 15 of the revised Convention considerably widens the range of consumer contracts to which it refers. While Article 13(1)(3) of the 1988 Convention speaks of "any other contract for the supply of goods or a contract for the supply of services", Article 15(1)(c) of the new Convention uses

the words "in all other cases", referring to any contract, other than a contract for the sale of goods on installment credit terms or for a loan repayable by installments, which is concluded with a person who pursues commercial or professional activities, provided the contract falls within the scope of such activities. This broad concept of consumer contracts extends the scope of the protection offered, and simplifies the determination of the contracts covered, in line with the protection provided by the Community directives on consumer protection

According to Article 15 (1)(c) it is needed that “the contract has been concluded with a person who pursues commercial or professional activities in the State bound by this Convention of the consumer’s domicile or, by any means, directs such activities to that State or to several States including that State, and the contract falls within the scope of such activities”. It does not innovate with regard to the sale of goods on installment credit terms or loans repayable by installments, where there is no need for proximity between the contract and the State in which the consumer is domiciled. For other contracts, however, the extension of protection to all consumer contracts, and the extension of the *forum actoris* that that brings with it, would not be justified without a factor connecting the other contracting party and the State of domicile of the consumer. The 1988 Convention required certain links in the case of contracts for the supply of goods or services – the requirement that in the State of the consumer’s domicile the conclusion of the contract was preceded by a specific invitation addressed to the consumer or by advertising, and the requirement that the consumer took in that State the steps necessary for the conclusion of the contract – but the ad hoc working party considered that these were insufficient, and unsuited to the present requirements of consumer protection. The new Convention therefore requires that the commercial or professional activities of the person with whom the consumer concludes a contract be pursued in the State of the consumer’s domicile, or that they be directed to that State or to several States including that State. The new connection with the State of domicile of the consumer can be applied to a contract of any kind, and is intended in particular to meet the need for protection arising out of electronic commerce. It does not depend on the place where the consumer acts, or on the place where the contract is concluded, which may be in a country other than that of the consumer’s domicile: it

attaches importance only to the activities of the other party, which must be pursued in the State of the consumer's domicile, or directed to that State, perhaps by electronic means. In the case of an Internet transaction, for example, the fact that the consumer has ordered the goods from a State other than the State of his own domicile does not deprive him of the protection offered by the Convention if the seller's activities are directed to the State of his domicile, or to that State among others; in that case to the consumer may bring proceedings in the courts of his own domicile, under Article 16 of the Convention, regardless of the place where the contract was concluded and regardless of the place where a service supplied electronically was enjoyed.

The European Court of Justice has had opportunity to decide on questions related to publicity and contracts concluded by consumers, in opposite terms, in Judgments 11 July 2002 (case C-96/00, *Rudolf Gabriel*) and of 20 January 2005 (case C-27/02, *Engler*). More recently, on Article 15 of the Regulation, Judgment of 14 May 2009 (Case C-180/06, *Ilseger*, in particular paragraph 41). In relation with the concept of activity 'directed to' the Member State of the consumer's domicile and the accessibility of the website, Judgment of 7 December 2010 (Joined cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG* and *Hotel Alpenhof GesmbH v. Oliver Heller*).

As to the internal jurisprudence, in other cases territorial jurisdiction has to be determined. This is the case in the judgment of the *Oberster Gerichtshof* of Austria of 15 October 1996, once determined the jurisdiction of the courts of the State where the consumer is domiciled, had to determine the court that has territorial jurisdiction according to the law of that State (Articles 13 and 14 of the Lugano Convention of 1988).

### **7. Høyesterett Norway, Judgment 2 July 2010**

In this case decided by the Appeals Selection Committee of the Supreme Court of Norway, the dispute between the parties arose out of a sales contract whereby the plaintiff, a woman domiciled in Norway, had bought a horse from a woman domiciled in Germany.

The buyer sued the seller before the Norwegian court of her domicile, submitting that such court had jurisdiction under Article 13 of the Lugano Convention of 1988, according to which a consumer can bring an action before the court of his or her domicile. The defendant opposed that the protective rule of jurisdiction only applied in a relationship between a consumer and a professional, whereas the contract under dispute was a contract under which the seller could not qualify as a professional. The question was therefore whether a contract between two consumers was to be regarded as a consumer contract according to the Lugano Convention.

The Supreme Court recognized that the wording of Article 13 of the Lugano Convention of 1988 does not explicitly set as a condition for its application that the seller is acting for purposes relating to his trade, business or profession. However, it explained that legal doctrine as well as case law indicate that such a requirement must be regarded as necessary by way of interpretation. As legal doctrine has clarified, indeed, the purpose of the special rule of jurisdiction concerning consumers is to protect the weaker party to the contract. This is the case when the consumer enters a contract with a professional, not when the other party to the contract is also, in legal terms, a consumer. It is also worth noticing that the Supreme Court relied, as an additional means of interpretation of the 1988 Convention, on the clearer wording of Article 15 of the revised Lugano Convention of 2007, as well as on the pertinent paragraphs of the Pocar Explanatory Report to the new Convention. For the foregoing reasons, the Supreme Court correctly concludes that the provisions on jurisdiction for consumer contracts in the Lugano Convention of 1988 did not apply to the dispute.

The application of the legal conclusion of the Supreme Court was more difficult in terms of the facts of the case. While the woman who owned the horse was no doubt a non professional, the practical arrangements prior to the sale were conducted by her brothers who acted in a more professional way. The Supreme Court relied on the evidence heard by the court of first instance, according to which the brothers acted merely as representatives, to exclude that the brothers could be regarded they too as sellers together with their sister. It also rejected the argument of the buyer that the brothers acted as agents. If these are the

facts of the case, in particular if the brothers did not act as agents, the Supreme Court's conclusion denying the application of the Lugano Convention provisions on consumer jurisdiction appears to be correct. However, the judgment raises an issue which is not only factual, but legal: does the involvement of professionals in a sale between consumers alter the nature of the contract, from the point of view of the identification of a weaker party? And which is the degree of involvement necessary to this effect? The Norwegian Supreme Court decision seems to shed only some light on these questions and contribute only to some extent to their solution.

### **8. *Bundesgerichtshof*, Judgment 5 October 2010**

In the present case the plaintiff, a private person domiciled in Germany, entered into a framework contract and a first subscription agreement with an asset-management company having its seat in Switzerland in order to invest his private savings. The contract was signed by the plaintiff in his private apartment in Germany, the signing having been preceded by promotional activities in the same apartment in Germany. Later on, the contract was signed by the company in Switzerland. A few months later, the framework contract was put into concrete terms by a second subscription agreement, signed by both parties in Switzerland. As the bank deposits showed a level which was very different from the one promised by the company, the plaintiff sued the Swiss company before a German court for damages, and argued that the Swiss company did not have an official asset-management authorisation in Germany. As matter of fact, it has to be mentioned that most of the money lost had been paid only after the conclusion of the second subscription agreement, which took place in Switzerland. Before the German court, the Swiss company claimed lack of jurisdiction, and submitted that the initial contract contained a choice of court agreement in favour of Swiss courts.

The legal issue brought by the plaintiff before the German court was that jurisdiction should be based on the Lugano Convention provision concerning consumer contracts,

which would not allow for derogatory choice of court agreements. As the reproach made by the plaintiff against the Swiss company was that it lacked an official authorisation for asset-management in Germany, the company invoked the applicability of Article 5 (3) of the Convention, which would allow for a choice of court agreement. The *Oberlandesgericht Stuttgart* accepted the company's argument and declined jurisdiction, maintaining that the case was based on tort and fell within the provision of the Lugano Convention on torts. Additionally, the *Oberlandesgericht* analyzed the second subscription agreement concluded in Switzerland and regarded it as being the main contract to be taken into account for deciding the case.

The *Bundesgerichtshof* quashed the lower court's decision and send the case back to it, affirming German jurisdiction on the case. The first consideration of the Court is that the contract involved is a consumer contract, which restricts the possibility of choice of court agreements under the relevant Lugano Convention's provision. The Federal Court recognizes that the final conclusion of the framework contract took place in Switzerland – unlike its signing by the consumer, which occurred in Germany – and that both the signing and the conclusion of the second subscription contract also took place in Switzerland. However, it maintains that the signing of the framework contract by the consumer in Germany is sufficient to establish German jurisdiction, because the framework contract has to be regarded as representing the contractual basis for the asset-management activities, in particular as it contained a detailed description of the rights and duties of the parties. The invocation of a tort committed by the company as the ground for the action against the company does not change this conclusion. On the contrary, the jurisdiction based on the consumer's domicile would include torts related to the contract, in particular as the tort committed by the Swiss company consisted of the conclusion of a contract that it did not have the authorisation to conclude.

The judgment appears to rely on previous case law of the ECJ, and expressly on the judgment rendered on 11 July 2002 (case 96/00, *Gabriel*), where the European Court has decided that, where a consumer has been contacted at his home by a professional vendor for the purpose of bringing about the placement of an order for goods offered under the

conditions determined by that vendor, and where the consumer has in fact placed such an order in the State in which he is domiciled, the action by which the consumer seeks through judicial proceedings brought against the vendor to obtain a prize which he has won is an action relating to a contract concluded by the consumer within the meaning of Article 13 (1) (3) of the Brussels Convention. Irrespective of the factual differences in the two cases, the Federal Court's reasoning is that events which are related to a contractual relationship between a professional and a consumer have to be regarded as comprised in such a relationship for the purposes of jurisdiction under the Convention, in particular as to the possibility of derogatory choice of court agreements, even if they may be characterised as non-contractual events. The clear intent is not to allow for derogations from the protective jurisdiction provided by the Convention.

#### **9. *Oberlandesgericht Dresden* Germany, Judgment of 7 May 2009**

In the present case the seller, a Swiss firm, brought a claim before a German District Court against the purchaser, a German firm, at the place of the latter's domicile, under Article 2 of the Lugano Convention of 1988. At the request of the purchaser, the District Court declared to be incompetent, as the parties had agreed in the contract that Swiss courts would have exclusive jurisdiction. Indeed, at the request of the defendant, the plaintiff had sent her an offer by e-mail, and the defendant accepted some of the goods offered both by telephone and by e-mail. In the offer reference had been made to the general terms and conditions of business and to the internet page where these terms and conditions, which provided for exclusive jurisdiction in Switzerland, could be viewed. Furthermore, an identical jurisdiction clause was included in the confirmation of the order sent by the seller. In light of this exchange of written documents and the reference contained therein, the District Court concluded that the agreement on jurisdiction was valid under Article 17 of the Lugano Convention of 1988 and should be implemented.

On appeal, however, the *Oberlandesgericht Dresden* reversed the decision and pronounced in favor of the jurisdiction of the German court. It agreed with the lower court that the agreement on jurisdiction was valid under Article 17(1)(a). In the view of the Court, the factual situation could sustain the existence of a written agreement, as both declarations of intent to enter into an agreement on jurisdiction could be printed out, or of a verbal agreement confirmed later by the plaintiff in writing. Nevertheless, the Court held that even in the event of a valid and effective agreement on the exclusive jurisdiction of Swiss courts, the plaintiff was entitled in the case at hand, to bring an action in Germany, under Article 17(4) of the Convention. According to this provision, a party retains the right to bring an action in any other court that has jurisdiction under the Convention if an agreement conferring jurisdiction has been concluded solely for the benefit of that party. The Court observed in this regard that the parties had not only chosen as exclusive jurisdiction a court in the neighborhood of the plaintiff, they had also chosen, through their reference to the general contractual terms and conditions, the national law of the plaintiff as applicable to fill in gaps in the contractual provisions. In these conditions, according to the Court, it is possible to speak of an agreement on jurisdiction entered in favor of one of the parties, which would allow the favored party to sue in any other court that has jurisdiction under the Lugano Convention of 1988.

As a conclusion based on an appreciation of facts, the Court's decision is difficult to criticize. However, it has to be noted that the provision of Article 17(4) in a situation like the one described confirms the doubts raised by the Working Party entrusted with the revision of the Lugano Convention of 1988 (as well as of the Brussels Convention of 1968), when it observed that such a provision ultimately gave an advantage to the stronger party in negotiating a contract, without any tangible benefit for international trade (see Pocar Report, par. 106). It is not surprising therefore that the provision has been deleted in the revised Lugano Convention of 2007, while at the same time recognizing the validity of an agreement on jurisdiction which provides for a non exclusive attribution of jurisdiction.

### **10. *Schweizerisches Bundesgericht*, Judgment 7 October 2010**

This is a case where a creditor domiciled in Germany filed a debt collection request (*Betreibungsbegehren*) in Switzerland against a debtor domiciled in Switzerland. It has to be mentioned that under Swiss law this debt collection request is an enforcement procedure, which is possible without any prior judgment. In such a procedure, the debtor may raise an objection and request the creditor to prove his entitlement in writing, e.g. by the submission of a written contract. When the creditor cannot prove his entitlement, he will have to initiate regular proceedings before the competent court and obtain a judgment in order to enforce his claim. In the case at hand, after formal objection by the debtor, the Swiss judge acceded to the creditor's request of provisional dismissal of the objection (*provisorische Rechtsöffnung*), thereby allowing the enforcement procedure to continue. The debtor appealed against the decision of the Swiss judge and claimed his incompetence to issue the order setting aside the request to dismiss the objection, relying on the existence of a choice of forum clause in favor of the German courts.

The legal question before the *Bundesgericht* was therefore the following: can parties derogate by agreement from jurisdiction regarding the provisional dismissal of debt collection request objections, or does this procedure fall under the provision of Article 16 (5) of the Lugano Convention, which provides for exclusive jurisdiction in matters of enforcement of decision, thereby prohibiting any choice of court agreement? The Court answered the question in the sense that the procedure for the provisional dismissal of objections against debt collection requests falls under the exclusive jurisdiction provision of Article 16 (5), and that no choice of court is possible. The Court states that Article 16 (5) encompasses all the procedures which have as their direct object the enforcement, and that the provisional dismissal of debt collection request objections is so strictly related to the enforcement that it has to be subsumed under the said provision of the Lugano Convention. Consequently, the jurisdiction of the court competent for the provisional dismissal cannot be derogated from by means of a choice of court agreement by the parties. The reason put forward by the Federal Court is that in pronouncing on the dismissal, the judge is dealing only with the enforceability, and not on the existence of the pretended debt; his decision is

limited to the issue whether the objection can be raised or whether the creditor has to initiate regular proceedings. The Federal Court rejects in particular the argument that the procedure on the provisional dismissal may be construed as aiming at assessing the existence of the debt, and insists in characterizing it as a mere enforcement procedure.

In general terms, the reasoning of the Federal Court is to approve, as the Swiss procedure discussed is clearly only an enforcement procedure, where the creditor may be requested to show his entitlement only for purposes of the enforcement. More generally, it has been maintained by ECJ that an application to oppose enforcement falls within the jurisdiction provision of Article 16(5) of the Brussels Convention (Judgment 4 July 1985, case 220/84, *Autoteile Service/Malhé*). The existence of the debt may still be challenged in a competent forum and a judgment in favor of the creditor may be obtained before a competent court. It would be interesting to assess how far the question raised in this judgment is peculiar to the Swiss legal system or may find application with respect to similar injunction proceedings existing in other countries bound by the Lugano Convention.

### **III. Overview of the case law on recognition and enforcement**

#### **1. *Oberster Gerichtshof* Austria, Judgment of 16 February 2009**

In a case of enforcement of a Polish decision on maintenance of 18 March 2002 in Austria, two different problems arise. Maintenance is included in the scope of Lugano Convention.

The first one is the problem of applicability of the Lugano Convention or of Regulation 44/2001. In this case, the Regulation is not applicable, as it enters into force for Poland in 1<sup>st</sup> May 2004, according to the transitional rule of art. 66(2) (a) of the Regulation.

Poland adhered to the Lugano Convention on 1<sup>st</sup> November 1999 and the Convention is applicable to this country from 1<sup>st</sup> February 2000.

The second problem is which Austrian Court has jurisdiction to issue the declaration of enforceability according to the Lugano Convention, that only establishes in Article 31 that a decision given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there. The problem is that the father has not the residence in Austria, but in Poland and he has not assets in Austria. In this case, the determination of the internal Court with jurisdiction to declare the enforceability of the Polish judgment is determined by the internal law of Austria, by a process known as *Ordination* to which also reference has been made in the comments of the judgment of the *Oberster Gerichtshof* Austria of 8 January 2009. In this case, the Supreme Court states that the Court with jurisdiction to declare the enforceability is the Court of the place of residence of the mother of the child and that is the place where the mother made the requirement to obtain maintenance for her child. The reason to ask for the enforceability in Austria comes from the need that the Polish judgment is enforceable in Austria to obtain an advance payment from the Austrian authorities.

The current rule in the Lugano Convention of 2007 in Article 38 is exactly the same than in Article 31 of the 1988 Lugano Convention. Not any relevant decision on the point discussed in this judgment merits to be highlighted.

## **2. *Sad Najwyższy* (Supreme Court), Judgment 6 June 2010**

As in the previous mentioned decision, the first problem in this case is the applicability of the Lugano Convention or of Regulation 44/2001, to the enforcement of a German decision rendered by the *Arbeitsgericht Wiesbaden* on 27 April 2004. As in the other case, the Regulation is not applicable, as it enters into force for Poland in 1<sup>st</sup> May 2004, according to the transitional rule of art. 66(2) (a) of the Regulation. Lugano Convention is applicable as Poland adhered to the Lugano Convention on 1<sup>st</sup> November 1999 and the Convention is applicable to this country from 1<sup>st</sup> February 2000.

The same solution has been adopted by the European Court of Justice in the recent Judgment of 21 June 2012 (case C-514/10, *Wolf Naturprodukte GmbH c. EWAR spol. s.r.o.*) for the enforcement in the Czech Republic of an Austrian judgment rendered the 15 April 2003, to which internal Czech law has to be applied. The problem of interpretation arises from the drafting of art. 66(2) of Brussels I Regulation, that really refers to the transitional rule for the Member States in the moment of the entry into force of the Regulation. But a “dynamic interpretation” allows applying the same rule to the new Member States. It is the reason why the European Court states that Article 66(2) “must be interpreted as meaning that, for that regulation to be applicable for the purpose of the recognition and enforcement of a judgment, it is necessary that at the time of delivery of that judgment the regulation was in force both in the Member State of origin and in the Member State addressed”.

Once decided that Lugano Convention applies, the second question is if the case in the main proceedings is included in the material scope (“civil and commercial matters”) of the Convention or it is excluded by art. 1, paragraph 2, number 3, as it comes within the sphere of social security. The case relates to the non-payment of contributions to a social fund (*Sozialkasse*) established by a collective agreement for employees (*Bundeseramentarifvertrag*) in the construction sector, which pays them compensations related to holiday leave. In this case, the Supreme Court is of the opinion that a case arising from a suit filed by the fund against the employer for the payment of premiums falls within the scope of application of the Lugano Convention. This interpretation is in accordance with the interpretation given by the Jenard Report in the sense that the exclusion has to be limited to disputes between the administrative authorities and employers or employees (p. 13), also applicable for Lugano Convention (Schlosser Report, n° 60). In the same sense and according to the Judgment of the European Court of 14 November 2002 (Case C.271/00, *Gemeente Steenberg c. Luc Baten*), public authorities’ actions against third parties or in subrogation to the rights of and injured party fall within the Regulation.

The third and last question refers to the problem of the extent of the obligation to serve the decision declaring the enforceability of a judgment on the debtor. It establishes that the decision in question should have been communicated to the debtor in accordance with the procedures laid down by the law of the Member State addressed, and should therefore have been accompanied by a statement of the grounds. It is only when the decision thus reasoned is served when the time for bringing an appeal starts to run. In this case, it has to be underlined that the Polish Supreme Court expressly mentions the Judgment of the European Court of Justice of 16 February 2006 (Case C-3/05, *Gaetano Verdoliva v. J. M. Van der Hoeven BV, Banco di Sardegna and San Paolo IMI SpA*), where the Court states that art. 36 of the Brussels Convention (and the same serves for art. 36 of the Lugano Convention) “is to be interpreted as requiring due service of the decision authorizing enforcement in accordance with the procedural rules of the Contracting State in which enforcement is sought, and therefore, in cases of failure of, or defective, service of the decision authorizing enforcement, the mere fact that the party against whom enforcement is sought has notice of that decision is not sufficient to cause time to run for the purposes of the time-limit fixed in that article”.

### **3. *Bundesgericht* Switzerland, Judgment of 5 October 2009**

The case relates to the enforcement of a judgment given in Germany awarding damages against a Swiss company. For the Swiss company, it has been an arbitrary application of Article 5 (3) of the Lugano Convention by the judge of origin as it has been based on an interpretation according to internal law and not on an autonomous interpretation. For the Swiss Federal Supreme Court there is not any doubt that the jurisdiction of the court of the State of origin may not be reviewed by the judge of exequatur, according to the rule contained in Article 28 (4) of the Lugano Convention, which also states that the test of public policy referred to in Article 27 (1) may not be applied to the rules relating to jurisdiction.

In this situation, the Swiss company complained that it has been a violation of formal public policy in terms of Article 27 (1), of the Lugano Convention, as the judge who delivered the judgment in Germany had not been impartial. The reason is that the judge and the assignor of the debt were members of the same choir and are singing in the same section of the choir, performing the choir every week. The violation of basic principles of Swiss procedural law, as the impartiality of the judge, may prevent the recognition and enforcement of a decision according to the terms of Article 27 (1). But in this case, the judge of origin, before giving the judgment, had informed the parties of these facts and no objection had been raised at that moment. By this reason, the judge regarded herself as unbiased. In the case in question, the *Schweizerisches Bundesgericht* held that there was no violation of the duty of recusal or of impartiality. In particular, the court held that the appellant's right lapsed due to her failure to react to the letter from the judge. In addition, the court was of the view that bias cannot be assumed as singing in the same choir or in the same section of the choir, even if this choir performs regularly, is no indication that there will be bias.

The rules applied in this case are maintained in Article 35 (3) (no revision of the jurisdiction of the court of the State of origin) and in Article 34 (1) (public policy) of the revised Lugano Convention of 2007, in the same sense that also are included in Regulation 44/2001.

As to the case law on Article 28 (3) (now, Article 35 (3)) the rule is being applied in general correctly by the courts in the different States. Problems had appeared in the early judgments applying Brussels and Lugano Conventions. But in a lot of cases of enforcement the party against whom the decision is rendered puts forward reasons of public policy to obtain that exequatur is refused, as public policy is an undetermined concept.

But, the interpretation of the existence of a violation of public policy has to be interpreted in a restrictive way. As it was said in the *Krombach* case, "Recourse to the public-policy clause in Article 27, point 1, of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would

be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order” (Paragraph 37 of the Judgment 28 March 2000, case 7/98, *Krombach*, and in the same sense, paragraph 27 of the Judgment of 2 April 2009, Case C-394/07, *Gambazzi*).

#### **4. *Bundesgerichtshof*, Judgment 20 May 2010**

As in the previous case, a problem of public policy arises here in the enforcement of a Swiss judgment in Germany. The problem is the scope of the exception. In fact, the above mentioned cases *Krombach* and *Gambazzi* give the answer in general terms.

In the current case, a defendant, domiciled in Germany, is condemned by a Swiss Court to pay compensations. He appealed against this judgment, but the Swiss Court of appeal requested him to pay an advance of costs within two days and refused to consider the case as this condition was not met. In this situation, the claimant requested the recognition and enforcement of the judgment in Germany. The defendant opposed to the enforcement, arguing that the time limit of two days for an advance of costs combined with a refusal to decide on the merits in case of default of payment is incompatible with the German *ordre public*, which constitutes a ground for refusal according to Article 27 (1) of the Lugano Convention (in the same sense, Article 34 (1) of the Brussels Regulation and 2007 Lugano Convention).

The recognition and enforcement of the judgment was refused by the *Bundesgerichtshof* by reasons of public policy, taking into account that a deadline of two days for making the payment on account of the court fees is an excessively short period of time, having the consequence of preventing the applicant from asserting his right in court.

The answer seems correct as domestic law determines what principles belong to public policy. And it is a clear difference in relation to the instruments of the European Union, as, although being public policy a national concept, there is also a “European public policy”, progressively identified by the ECJ.

### **5. *Bundesgerichtshof* Germany, of 5 March 2009**

In this case, the *Bezirksgerichts Zürich* ordered the respondent to pay procedural and legal costs in proceedings relating to the division of an estate. It has to be underlined that it is not a question related to successions and, in consequence excluded of the scope of the Convention (Article 1(2)(a)), but a question related to the legal costs and, in consequence, included in the concept of “judgment” as it is in Article 25 of the Convention (Article 32 of the revised Lugano Convention), as relates to “the determination of costs or expenses by an officer of the court”. The term “judgment” has to be understood in large sense. What means that a decision on the enforceability of a decision on legal cost may be given independently of the decision of the enforceability of a judgment on the substance of the case and, in this sense, the judgment of the *Corte d’appello di Milano* of 12 September 1978.

In this case, the applicant asked for the enforcement of the Swiss order to pay procedural and legal costs in Germany. The *Landgericht* in Germany authorized the enforcement of the judgment and the appeal of the respondent was unsuccessful. For the respondent, the decision of the *Bezirksgerichts* in Zurich had been given “in default of appearance”, in the terms of Article 27 (2) of the Lugano Convention. The judgment of the *Bundesgerichtshof* maintains that in this case there was not violation of Article 27 (2) as the respondent authorized two representatives to accept service of court documents, with the

result that he had entered appearance in the proceedings. Appearance is constituted not only by an act by which the defendant defends the action against him, but also by any reaction by the defendant that goes beyond mere passivity and which reveals that he is aware of the legal action being taken against him. According to the judgment of the *Bundesgerichtshof* the fact of appointing persons to act on your behalf in the proceedings must therefore be regarded as entering appearance, because the respondent knew that the case related to the division of an estate of which he had already been given notice and which he had already commented on in a letter.

It is to be underlined that in this case the problem was if the Swiss judgment had been given “in default of appearance”. Once this first element failed, the issue of whether the statement of claim was served in the proper manner was therefore irrelevant.

This case relates to Article 27(2) of the Lugano Convention, in the same sense that Brussels Convention and in the reviewed text of Article 34 (2) of the 44/2001 Regulation and the revised Lugano Convention of 2007. This rule has been the object of many decisions on preliminary ruling by the Court of Justice and also of decisions of internal courts.

To protect the defendant is an independent condition of the respect of public policy and it is so recognized in different States, but in the context of the European instruments, it has to be the object of an autonomous interpretation (Judgment of 21 April 1993, case C-172/91, *Volker Sonntag v. Hans Waidmann et al.*). The Court has made a non formalistic interpretation of the concept, stressing the idea that the appearance in court of the defendant has to be the expression of his will (It is so in Judgment 10 October 1996, Case C-78/95, *Hendrikman et M. Freyen v. Magenta Druck und Verlag GmbH*, in the Judgment of 14 October 2004, case C-39/02, *Maersk Olie*, and in the Judgment of 21 February 1993, case C-172/91, *Volker Sonntag v. Hans Waidmann et al.*).

A great majority of the decisions of internal courts on Article 27 (2), of the Convention refers to the no due service of the document which instituted the proceedings to

the defendant in default of appearance, but not to the inexistence of appearance. In this sense, it is relevant a Finnish judgment, applying the Lugano Convention (Judgment of the *Korkein Oikeus* of Finland of 10 May 2002, *Société Chantiers et Ateliers de la Perrière v. Hollwing Oy*, Package n° 12, , n° 2003/47), in which the document initiating the proceedings was not served on the defendant, but only on his commercial agent, who was not authorized to accept such service and where the lawyers of that agent, who did not have authority to act on behalf of the defendant, nevertheless represented him before the court of origin.

#### **IV. Concluding remarks**

Notwithstanding the limited number of cases, the consideration of the case law developed on the Lugano Convention of 1988, and more recently on the Lugano Convention of 2007, confirms a trend aiming at streamlining the jurisprudence with the decisions rendered by the European Court of Justice with regard to the Brussels Convention of 1968 and the Brussels I Regulation. The courts of the Member States of the European Union appear to go expressly in that direction, and quote the European Court's decisions to affirm their conclusions. Although this is not necessarily the case of the courts of the Lugano countries, which frequently prefer not to cite to the preliminary rulings on the Brussels Convention and on Brussels I Regulation as precedents, their taking into account of the European jurisprudence is visible and significant.

Another remark has to be done in relation to the future of these reports on national case law. The reporters have been unable to prepare comments on some decisions, as no version in one of the language they know was available. This situation will be more and more frequent as important decisions are rendered in the States party to the Lugano Convention and in all the Member States of the European Union. In this situation, some measures have to be taken, in order to provide the reporters with a translation in one of the languages most spoken and understood used in international communications by persons having another language as their mother tongue.

