NINTH REPORT ON NATIONAL CASE LAW RELATING TO THE LUGANO CONVENTION

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I. Introduction

In October 2006, the Standing Committee of the Lugano Convention appointed the delegates from Finland, Latvia and the Netherlands to draft the ninth Report on National Case Law Relating to the Lugano Convention. This Report is based on the fifteenth fascicles of court judgements presented by the Court of Justice of the European Communities in October 2006 in accordance with Protocol No. 2 to the Lugano Convention.

Of the 44 judgments contained in the fascicle, 8 relate to the Lugano Convention. They will be referred to as follows:

- Judgement of the Federal Supreme Court of Switzerland (Bundesgericht) of 1 March 2006 (No. 2006/20)
- Judgement of the Federal Supreme Court of Switzerland (Bundesgericht) of 5 May 2006 (No. 2006/21)
- Judgement of the Court of Appeal (Corte di Appello di Milano) (Italy) of 14 May 2005 (No.2006/36)
- Judgement of the Court of Appeal (Cour d´appel) (Luxembourg) of 13 July 2006 (No. 2006/38)
- Judgement of Supreme Court of Norway (Høyersterett) of 9 March 2005 (No. 2006/39)
- Judgement of Supreme Court of Poland (Sąd Najwyzszy) of 19 May 2005 (No.2006/41)
- Judgement of Supreme Court of Poland (Sąd Najwyzszy) of 31 May 2005 (No.2006/42)
- Judgement of Supreme Court of Sweden (Högsta domstolen) of 3 January 2006 (No. 2006/43)

The 8 judgements are briefly described and discussed below.

II. Overview of the case law

Title II – Jurisdiction

Article 5(1)

The Norwegian case No. 2006/39 concerned the determination of the "obligation in question" in respect of Article 5 para. 1 of the Lugano Convention in a matter relating to breach of contract.

In a decision dated 9 March 2005 the Appeal Committee of the Supreme Court of Norway (*Høyesteretts kjæremålsutvalg*) came to the conclusion that when a vendor lodges a claim for damages because the amount ordered was smaller than what was anticipated in the sales contract, the place of performance of the principal obligation to pay the sales price was relevant when applying the rule on jurisdiction in matters relating to contract as set out in Article 5 para.1 clause 1 of the Lugano Convention. The purchaser could therefore be sued in the courts of the place where according to the law applicable to the contract the obligation to pay the sales price was to be performed.

In this case a Norwegian company *Mergi Marketing AS* (Mergi, domiciled in Bergen) had brought proceedings against a Polish company *Polska Zegluga Morska PP* (PZM, domiciled in Poland) seeking compensation for breach of contract. According to the contract in question PZM`s affiliated company was during a period of 18 months to purchase 750 barrels of combustion catalyser from a Norwegian company. Only 66 barrels were purchased. Mergi sued for damages due to breach of contract.

After the Oslo court of first instance rejected the claim due to lack of jurisdiction, the claim for compensation was filed with the Bergen court of first instance. The Bergen court of first instance accepted jurisdiction in accordance with article 5 para.1 of the Lugano Convention. In its reasoning the court found that the claim for compensation for non-fulfilment of the contract was to be considered equal to a claim for the purchase price and that the claim in question therefore in reality concerned this principal obligation of the purchaser. The place of payment –which according to the court was Bergen, Norway - could therefore be used as place of jurisdiction in accordance with article 5 para.1 of the Lugano Convention.

PZM appealed the decision on jurisdiction to the Gulating Court of Appeal. The appeal was rejected. In its reasoning the Court of Appeal stated that jurisdiction of the court in accordance with Article 5 para. 1 was to be determined by the place of performance of the disputed obligation. The Court of Appeal accepted the reasoning of the court of first instance. The court did also notice that the place of performance of the principal obligation on which the claim was based – the payment of the purchase price – was to be decided according to the relevant applicable law (§ 48 of the Norwegian commercial law, *kjøpsloven*).

PZM appealed the decision on jurisdiction to the Supreme Court on both procedure and interpretation of the law. The Supreme Court did not overturn the ruling of the Court of Appeal. It had no remarks concerning the interpretation of Article 5 para. 1 of the Lugano Convention or the national legislation in question. However, the Supreme Court did not agree with the interpretation that a claim for compensation was equal to a claim on payment of the purchase price and therefore to be considered as a claim on fulfilment of the principal obligation. Instead the claim for compensation due to breach of contract was to be considered equal to other cases of breach of contract. Such claims were when applying Article 5 para. 1 of the Lugano Convention considered being secondary claims. Even though the Supreme Court did not agree with the interpretation of the appellate court in respect of this issue, it found that the error had been of no significance when considering the question on jurisdiction. Since jurisdiction in respect of a secondary claim follows the principal obligation, jurisdiction concerning the claim in question was to be decided in accordance with the place of performance of the principal obligation, in this case the payment of the purchase price. The appeal was rejected.

Although the Supreme Court has not in its decision explicitly made reference to the case law of ECJ, its reasoning is in line with the case law on determination of the "obligation in question", mainly *de Bloos v. Boyer*[1]. The principle on splitting the obligations of the parties when determining jurisdiction was accepted as well as the conception that if an action for damages is based on the non-performance of a contractual duty, it is the place of performance of this duty which is relevant.

Article 5 para. 1 has been changed significantly in the new Lugano Convention. The new Article 5 para. 1 contains for instance an autonomous definition of the "place of performance". The place of

[1] C- 14/76 of 6 October 1976, ECR 1976, 1497.

payment of the purchase price as given in the law applicable to the contract will no longer constitute a ground for jurisdiction when applying Article 5 para. 1. According to the new Lugano Convention the place of performance of the obligation in question shall - unless otherwise agreed - be in the case of sale of goods the place in a State bound by the Convention where, under the contract, the goods were delivered or should have been delivered. In the case discussed above, this might have been somewhere in Poland.

Article 5 (3)

In a judgement of the Swiss Federal Supreme Court (*Schweizerisches Bundesgericht*) of 5 May 2006, this court had to give its judgement on the application of Article 5, para. 3, the Lugano Convention in relation to the registration of a trade mark in Switzerland, which according to the applicants constituted a harmful event in the sense of Article 5, para. 3 of the Lugano Convention (see also below under Article 16, para. 4). As did the cantonal court of first instance of St. Gallen and the Cantonal Cassation Court of St. Gallen, the Swiss Federal Supreme Court declined jurisdiction of the cantonal court of St. Gallen based on Article 5, para. 3 of the Lugano Convention. It held that Article 5, para. 3 should be interpreted autonomously and the 'delicts' in that paragraph includes claims bases on unfair competion. In case of several acts in different states constituting delicts, several courts might have jurisdiction under Article 5, para. 3. However, the jurisdiction of a court cannot be based on Article 5, para. 3 of the Lugano Convention, where the acts are only of a preparatory nature and therefore, cannot constitute a delict in the sense of that provision. In such case only a place where an act which could be defined as a delict in the sense of Article 5, para. 3, is relevant for determining the competent jurisdiction. The mere registration of a trade mark in the Swiss registers does not constitute a harmful event. It is at best a preparatory act to use the trade mark in the competition with the applicants. Therefore, jurisdiction of the first instance court of St. Gallen could not be based on Article 5, para. 3 of the Lugano Convention.

In this case the Swiss companies Ecofin Holding AG c.s., holders of the domain name "ecofin.ch" and "ecofin.com" had started proceedings at the first instance court in St. Gallen against Mr. Markus Scholand, a researcher at Darmstadt University, Germany. In relation to his research Mr Scholand holds the domain name "ecofin.de". In May 2003 he has registered "ECOFIN" in the Swiss trade mark register. His representative was a patent office situated in Bad Ragaz. The applicants asked, among other things, for the Swiss trade mark "ECOFIN" to be deleted in relation

to certain products and services on the ground that it constituted unfair competition, and for an order not to use the word ECOFIN in relation to some products and services. The applicants claimed jurisdiction of the court of St. Gallen based on the fact that the defendant's representative responsible for the registration of the trade mark was domiciled in that jurisdiction and therefore, that jurisdiction was competent as the place of the harmful event.

The judgement of the Swiss Federal Supreme Court follows the line of the ECJ case law on Article 5, para. 3 of the Brussels Convention, in that this provision should be interpreted in an autonomous way (*Kalfelis*-case, *Reichert II*-case and more recently *Tacconi v. Wagner*)[2] and that the facts stated in the applicants' document instituting the proceeding constitute a delict in the sense of that provision (*Kalfelis*-case).

Under the new Lugano Convention a small amendment to Article 5, para. 3, has been made, by adding the words "or may occur". This additional wording is in accordance with the application of Article 5, para. 3, under the current wording (cf. *VKI v. Henkel*).[3]

Article 16 (4)

In the same case of the Swiss Federal Supreme Court of 5 May 2006 (for a description of the case see above under Article 5 para. 3), that Court had to decide whether the jurisdistion of the first instance court of St. Gallen could be based on Article 16, para. 4 of the Lugano Convention. The Swiss Federal Supreme Court, making reference to case law of the ECJ on this provision, held that Article 16, para. 4 should be interpreted in an autonomous manner and that the exclusive jurisdiction rules are based on the idea that the courts in the territory where the registration has taken place or has been asked for, is best equipped to decide in cases where the dispute relates to the validity or the existence of the registration. Cases relating to e.g. unfair competition do not fall within the scope of Article 16, para. 4. However, cases which directly affect the registration, do fall within the scope of that provision. In the case at hand it is the deletion of the registered trade mark which is at stake. In that respect the underlying case should be distinguished from a dispute regarding the question who is entitled to the intellectual property right as was the case decided by

[2] C-189/87 of 27 September 1988, C-261/90 of 26 March 1992 and C-334/00 of 17 September 2002, Jur. 2002, p. I-7357 respectively.
[3] C-167/00 of 1 October 2002, Jur. 2002, p. I-8111.

the ECJ. Therefore, this falls within the scope of the exclusive jurisdiction of Article 16, para. 4 of the Lugano Convention. Whether the dispute between ECOFIN Holding AG c.s and Mr. Scholand primarily relates to the legal relationship between them or directly to the deletion registration is in that situation irrelevant, according to the Swiss Federal Supreme Court.

The Swiss Federal Supreme Court further held that on the basis of Article 109 para. 3 of the Swiss Private International Law Code (IPRG) the competent court in cases regarding disputes on the validity or registration of intellectual property rights in Switzerland, is the court of the representative's place of business, if the defendant has no domicile in Switzerland. Since Scholand's representative has his place of business within the jurisdiction of the first instance court of St. Gallen, the Swiss Federal Supreme Court found that the first instance court of St. Gallen had jurisdiction in this case on the basis of Article 16, para. 4 of the Lugano Convention.

The reference made by the Swiss Federal Supreme Court in its judgement concerned the case *Duijnstee v. Godenbauer*.[4] In this case the ECJ held that Article 16, para. 4 of the Brussels Convention should be interpreted in a restrictive way. A claim as to the entitlement to an intellectual property right does not fall within the scope of that provision.

Under Article 22 of the new Lugano Convention a new wording has been added to the text, integrating the wording of Article V *quinquies* of Protocol I of the Lugano Convention. This provision relates to patents only and bears no relevance for trade marks. Also, since it already formed part of the Protocol, the inclusion in the text of Article 16, para. 4 does not bring any substantive changes.

Title III – Recognition and enforcement

Article 26

The Polish case No. 2006/41 concerned the question about the principle of so called "automatic recognition" and the effects of validity of a judgment to recognition according to Article 26 of the Lugano Convention.

[4] C-288/82 of 15 November 1983.

In this case a German company (plaintiff) had loaned money to Lucjan M. and Dariusz M. (defendants – Polish debtors). In 12 October 1995 the same German company concluded a contract with Winfried H. with which the debt of Lucjan M. and Dariusz M. was assigned to Winfried H. In 1995 the plaintiff, the German company, instituted proceedings against the Polish debtors at the District Court in Wroclaw for the payment of 119 369 000 zlotys. In a judgment dated 12 July 2003 the District Court dismissed the claim of the German company. The District Court stated that the German company is not the person, who is entitled to bring the claim before the court on the matter for the payment of debt.

However, in a judgment of 19 December 2003 the State Court in Germany established the fact that the plaintiff, the German company, was entitled to claim the payment of the disputed debt also in proceedings before the Polish court. In the proceedings before the German court the plaintiff was the German company, but the defendant was Winfried H.

In a judgment dated 20 January 2004 the Court of Appeal in Wroclaw dismissed the appeal against the judgment given by the District Court. In the course of the appeal proceedings, the plaintiff referred to the German judgment dated 19 December 2003. The Court of Appeal admitted that the facts established in the mentioned German judgement dated 19 December 2003 could not be considered in the proceedings, because it was neither proved that the German judgment is legally valid (has legal effects/force of law) nor that the formal requirements for its enforcement were fulfilled.

The German company brought appeal in cassation before the Supreme Court of Poland against the judgment. The plaintiff referred to the breach of substantive rules, for example, the provisions of the German Civil Law related to interpretation of the contracts as far as the contract on the assignment of a debt dated on 12 October 1995 between the German company and Winfried H. was concerned, as well as to the breach of procedural norms in addition referred to Article 26 para. 1 of the Convention.

In the judgment dated 19 May 2005 the Supreme Court examined the appeal in cassation and referred to the application of the Lugano Convention.

- The Supreme Court indicated that the Lugano Convention is not explicit about the meaning of the concept “recognition” while it is broadly accepted that recognition is defined as the extension of effects of judicial decisions in other Contracting States. Thus it brings into practice the

principle of so called “automatical recognition” (*ex lege*). The recognition extends the effects of the judgement in the State of origin to the State of recognition, namely, that these effects take place at the same time in both States.

- The Supreme Court mentioned that the preconditions for the recognition of foreign judgments provided by the Lugano Convention consists of positive conditions (that the judgement is covered within the scope of the Lugano Convention and it is enforceable in the State of origin) and negative conditions (the grounds for refusing recognition). The Supreme Court pointed out that the validity of the judgment is not a precondition for the recognition. Therefore, it seems that the German judgment dated 19 December 2003 could be recognized.
- The Supreme Court considered Article 27 para. 3 of the Lugano Convention and held that none of the grounds for refusing recognition of the judgment could be invoked and it is not feasible to refuse recognition on the ground of its irreconcilability with the Polish judgment dated 12 July 2003. Each judgment was given in proceedings involving different parties (only the plaintiff, the German company, was the same in both cases), while Article 27 para. 3 requires that the judgments of both States, irreconcilability of which is invoked, are given in a dispute between the same parties.
- The Supreme Court determined that the judgment, once recognised, has the same legal consequences in the State of origin as in the State of recognition. The consequences of the recognised judgment should be determined according to the law of the State of origin and not of the law of the State of recognition. In the instant case, the recognition of the German judgment dated 19 December 2003 involves the application of German law. In the light of the German law the judgment when it comes into legal effect has binding force for the parties to the proceedings. Also an essential factor of the legal effects of the judgment is that it has binding force in relation to the facts established in the judgment for other proceedings. The court of the second proceedings is not entitled to independently examine the matter once decided with legal effects, but it is obliged to take into account the facts established by the first court. The judgment of the German court is of prejudicial consequences to the other cases and equally, in the event of its recognition, to the proceedings pending in other States.
- The Supreme Court determined that the German judgment dated 19 December 2003 is binding for the parties involved in that litigation, namely, that it binds the German company and Winfried H. Still, the German judgment is not binding for Lucjan M. and Dariusz M. As the case pending before the Polish courts and case already decided in

> Germany involve participation of different parties, the facts established with the German judgment are not relevant for the proceedings pending before the Polish courts. Therefore, the mistaken assumption by the Court of Appeal that the German judgment is not legally valid, is not such a breach of procedural rules that would affect the outcome of the case.

As a result of the case the Supreme Court allowed the cassation based on the breach of substantive rules, namely, the breach of the provisions of the German Civil Law governing the interpretation of the contracts in relation to the contract dated on 12 October 1995, concluded between the German company and Winfried H. on the assignment of a debt.

In the Jenard report it is stated that pursuant to Article 26 para. 1, of the Lugano Convention, judgments given in a Contracting State must be recognized in the other Contracting States without any special procedure being required. In other words, judgments are entitled to automatic recognition: the Conventions establish the presumption in favor of recognition and the only grounds for refusal are those listed in Articles 27 and 28. The judgment of the Supreme Court in Wroclaw is in line with the Jenard report in this matter. Although, the Supreme Court in its judgment has not referred to the case law of ECJ, its reasoning is in line with ECJ judgment in case *Hoffmann v. Krieg*[5] on Article 26.

The new Lugano Convention will bring no changes regarding the question on the principle of the so called "automatic recognition" (ex lege). The new Lugano Convention maintains the principle that the validity of a judgment is not a necessary condition for recognition.

Article 27 (1)

Article 27, para. 1 was at stake in the case of the Appellate Court of Luxemburg (*Cour d'appel*) of 13 July 2006. In that case the party against whom recognition was sought had lodged a complaint with the European Court of Human Rights because of a said violation of Article 6 of the European Convention of Human Rights (ECHR) by the court in the State of origin. The Luxemburg Appellate Court had to decide whether recognition of the judgement was contrary to Luxemburg public policy on the grounds which also formed the basis of the complaint based on Article 6 ECHR lodged with the European Court of Human Rights. In its decision the Luxemburg Appellate Court discusses at

[5] C-145/86 of 4 February 1988, ECR 1988, 645.

length the *Pellegrini*-case of the ECHR. In this case the ECHR held that the State in which an exequatur is sought should check on conformity with Article 6 ECHR when the State of origin does not apply the Human Rights Convention and that a same check is even more necessary where the issue at stake for the exequatur is of essential importance for the parties.[6] The respect of the fundamental rights laid down in Article 6 ECHR in the proceedings in the State of origin is, therefore, relevant to determine whether recognition of the judgement is contrary to Luxemburg public policy.

With a reference to the *Jenard*-report and to the case law of the ECJ on article 27, para. 1 of the Brussels Convention, the Luxemburg Appellate Court underlined that the *recognition* should be contrary to public policy, not the judgement itself and that Article 27, para. 1 should be applied in a restrictive way and should only be applied in exceptional cases.

Where the grounds invoked for refusal of exequatur on the basis of Article 27, para. 1, are the same as the grounds for the complaint with the European Court of Human Right, the Luxemburg Appellate Court in the exequatur proceedings should not prejudice a judgement on a violation of Article 6 ECRH, since that belongs to the sole competence of the Strasbourg Court. However, the Luxemburg Appellate Court should determine whether the said lack of an impartial tribunal and the said inequality of arms in the proceedings in the state of origin constitute a manifest violation of a fundamental right.[7]

In this case Procedo Capital Corporation SA ("PCC"), a corporation under the laws of Panama, appealed a decision from the Luxemburg lower Court to grant exequatur to the Norwegian company Sundal Collier & Co ASA ("SCC"), for a judgement of the Court of first instance in Oslo of 4 January 2002, which was confirmed by the Appellate Court of Bogarting (Norway) of 22 January 2004, according to which a large sum of money, including interest and cost, had to be paid by PCC to SCC. An appeal against this decision lodged with the Norwegian Supreme Court had been denounced by the Norwegian Request Chamber on 16 July 2004, with an order for PCC to pay the costs of the appeal. The application for exequatur by SCC concerned all three of these decisions.

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[6] *Pelligrini v. Italy* (no 30882/96).

[7] At this point the judgement of the Luxemburg Appellate Court seems to deviate from an earlier English Court of Appeal's decision on Article 27, par. 1, of the Brussels Convention (*Maronier v. Larmer* of 29 May 2002), in which it held that recognition of a Dutch judgement should be refused because it was contrary to procedural public policy since the Dutch judgement was given in breach of Article 6 ECHR. The English Court of Appeal held that a non-refusal might constitute a breach of Article 6 ECHR by the UK.

After exequatur had been granted for the Luxemburg territory on 8 September 2004, PCC has lodged a complaint against Norway with the European Court of Human Rights on 13 January 2005 on the ground that Article 6 ECHR had been violated in the Norwegian proceedings between SCC and PCC. PCC based its complaint on the fact that the court of first instance in Oslo had not been impartial because one expert who formed part of the tribunal and who had been present at the first hearings (6 days of the 19 hearing days) had turned out to do advisory work for SCC in the same period and had therefore been challenged and removed from the case, but without replacing the tribunal as a whole. PCC also claimed that there had been no equality of arms, since the tribunal had allowed SCC to hear its lawyers as a witness, whereas PCC could not cross-examine them because of the client-lawyer privilege which SCC refused to lift for that purpose. In its appeal against the granting of exequatur PCC claimed the fact it lodged a complaint with the European Human Rights Court was a ground for staying the proceedings under Article 38 of the Lugano Convention. It also claimed that on the grounds raised in its complaint with the said Commission, the exequatur should be refused on the basis of Article 27, para. 1 of the Lugano Convention, since the recognition of the judgements which had been given in violation of Article 6 ECHR would be contrary to public policy.

As to the two points raised, the partiality of the court and the violation of the equality of arms principle, the Luxemburg Appellate Court first established that SCC and PCC confirmed that the expert had been replaced before the decisive stage of the proceedings regarding the hearing of witnesses and the final pleadings. It held that PCC failed to establish how the expert could have influenced the Court of Oslo as a whole in respect of its required impartiality for rendering its judgement. According to the Luxemburg Appellate Court the fact that the Court in Oslo was formed mainly by professional judges offered the necessary guarantees that the case would be heard with complete objectivity. The restriction of the application of the public policy clause to exceptional cases, where the guarantees provided for in the national legislation of the State of origin and in the Convention itself are insufficient to protect the defendant against a manifest violation of its right to a due process, leads the Luxemburg Appellate Court to the conclusion that in this case there is no reason to refuse the exequatur for the Norwegian judgements on the ground that the court in Oslo lacks impartiality.

With regard to the issue of equality of arms the Luxemburg Appellate Court confirms the fundamental right of each party to present its case to the court under conditions which does not give

a nett disadvantage to the other party.[8] Since the report of the hearing of the witnesses has not been submitted to the Luxemburg Appellate Court and the judgement of the Court in Oslo does not mention the said incident, the Luxemburg Appellate Court held that it could not establish a manifest violation of its public policy since it is strictly forbidden for the court in the State where recognition is sought, to redress an error in the facts or as to the law made by the court in the State of origin.

In a judgement of the Appellate Court of Milan of 14 May 2005 (Corte d'Appello di Milano) – for a description of the case see below under Article 27, para. 3 - it held that the mere fact that the default judgement was given after a single hearing is not a ground for refusal of recognition in the meaning of Article 27, para. 1 of the Lugano Convention, if this fact is not supported by other grounds which could prove that recognition of the judgement is contrary to Italian public policy. It is the responsibility of the court in the State of origin to decide on the timeframe of the proceedings once it has established that the proceedings were properly started and that it is the competent court.

Both judgements are in line with what is said about Article 27, para. 1 of the Brussels Convention in the *Jenard*-report and with the case law of the ECJ on Article 27, para. 1 of the Brussels Convention.

In the *Jenard*-report it is made clear that Article 27, para. 1 is not about the judgement being contrary to public policy, but the recognition of it. The ECJ takes a restrictive approach towards the application of the notion of public policy of Article 27, para. 1 of the Brussels Convention and holds the view that it should only be applied in exceptional cases. Although the notion of 'public policy' is based on national concepts, the limits are set by the Convention itself. It should only be applied when the recognition would violate in an unacceptable manner the public order of the State in which enforcement is sought on the ground that it is a manifest violation of a fundamental principle or of a rule of law which is regarded as essential in the legal order of the State (cf. *Krombach* v. *Bamberski*, *Renault v. Maxicar*, *Hoffmann v. Krieg*).[9] The right of the defendant to defend his case properly in the proceeding in the State of origin is one of the fundamental ideas behind the Convention and a violation thereof could lead to a refusal of the recognition in the State where recognition is sought (*Krombach v. Bamberski*).

[8] With a reference to case law of the European Court of Human Rights in its decision in *Dombo Beheer BV v. the Netherlands* of 27 October 1994, A 274)
[9] C-7/98 of 28 March 2000, Jur. 2000, p. I-1935; C-38/98 of 11 May 2000, Jur. 2000, p. I-2973; C-146/86 of 4 February 1988, Jur. 1988, p. 645.

Article 34, para. 1 of the new Lugano Convention will underline this restrictive application of public policy by requiring that recognition may be refused on grounds of public policy, only if the recognition is *manifestly* contrary to public policy.

Article 27 (2)

In the same judgement of the Appellate Court of Milan the court stated that Article 27, para. 2 of the Lugano Convention cannot be invoked to prevent the enforcement of a Swiss default judgement when the documents instituting the proceedings have been served upon the defendant in accordance with Article 5 of the Hague Convention on Service of Documents of 1965, according to which no translation in is required.

In the appeal before the Appellate Court of Milan Marshall claimed that it had not had the opportunity to properly defend itself in the proceedings before the Court in Geneva since the documents instituting the proceedings had been served without a translation in Italian. In its judgement the Appellate Court of Milan reasoned that given that fact that no special agreement exists between Italy and Switzerland according to which a translation is required, there was no obligation under the Hague Convention to translate the documents instituting the proceedings. Also, it had become clear that Marshall understood the content of those documents perfectly well and it certainly understood a note in Italian concerning the first hearing in the proceedings in Geneva. Therefore, the Appellate Court saw no ground to refuse recognition of the Swiss judgement on ground of Article 27, para. 2.

There is a lot of case law of the ECJ concerning Article 27, para. 2 of the Brussels Convention. It all goes down to the idea that the defendant must have had a proper opportunity to defend his case before the court in the State of origin. A court in the State in which recognition is sought should indeed, as the appellate court of Milan has done, decide for itself whether Article 27, para. 2 of the Brussels Convention applies. In its decision in *Pendy Plastics Products BV* the ECJ stated that the court of the State in which recognition is sought may refuse recognition on the basis of that provision even when the court in the State of origin has come to the conclusion that the service of the documents instituting the proceedings had been done properly.[10] In the more recent *Scania*-case

[10] C-228/81 of 15 July 1982, Jur. 1982, p. 2723.

the ECJ ruled that in case of an international agreement between the State of origin and the State in which recognition is sought, the due and timely service of the documents instituting the proceedings against the defendant against whom a default judgement was given, should be judged on the basis of this international agreement.

Article 27, para. 2 was also at stake in a Swiss case No. 2006/20 concerning the enforcement of a English worldwide freezing order. In a ruling dated 1 march 2006 the Federal Supreme Court of Switzerland (*Bundesgericht)* found that a worldwide freezing order (former *Mareva*-injunction) issued by the High Court of Justice, Chancery Division in London, England did not qualify for recognition and enforcement in accordance with the Lugano Convention, since the order had been issued without a hearing provided to the defendant and without her being given reasonable opportunity to defend herself in a contradictory proceeding in advance of the exequatur proceedings.

The High Court of Justice in London had on 15 December 2004 issued an order against the defendant and a co-defendant forbidding them – amongst other obligations - by means of a freezing injunction from removing from England and Wales any assets located there, up to a value of USD $3 million, or from selling, pursuing commerce with, or in any way reducing the value of any assets found outside England and Wales, up to the same value.

The order was served on the defendant on 19 January 2005. On 27 January 2005 the plaintiffs applied to the Court Presidium (*Gerichtspräsidium*) of Zurzach, Switzerland for recognition, declaration of enforceability and execution of the order through the placing of distress on various assets of the defendant. The President of the District Court (*Bezirksgericht*) of Zurzach on 18 February 2005 recognized the English freezing order and declared it enforceable with effect for the parties in Switzerland. He did, however, turn down the application for execution of the freezing injunction through placing of distress.

The defendant as well as the plaintiffs appealed the ruling to the *Obergericht* of Aargau Canton. On 26 September 2005 the *Obergericht* overturned the judgment of the District Court in respect of the recognition and declaration of enforceability of the order. The *Obergericht* refused the exequatur application for the following three reasons.

- It found that given the short time between service of the order issued in an *ex parte* proceedings and the application for enforcement (five working days) and the spatial distance (London), it had

not for purely practical reasons been possible for the defendant to defend herself against the freezing order in a contradictory proceedings in advance of the exequatur proceedings and that this constituted an impediment to recognition under Article 27 para. 2 of the Lugano Convention.
- The freezing order was not compatible with the judgment on measures between the parties in Switzerland and this constituted a recognition impediment under Article 27 para. 3 of the Lugano Convention.
- Recognition and/or enforcement of the order was to be considered tantamount to an exploratory injunction, i.e. a fishing expedition for assets not definitely known to exist, and therefore recognition and enforcement had to be refused as contrary to *ordre public* (Article 27 para. 1 of the Lugano Convention).

The plaintiffs filed a constitutional complaint with the Federal Supreme Court arguing that the judgment of the *Obergericht* should be overruled and that the case should be returned to the *Obergericht* for a new judgment. The complaint was rejected.

The Federal Supreme Court based its reasoning on relevant ECJ case law. According to the ECJ ruling *Denilauler v. Couchet*[11] protective orders issued only on the motion of one party, without a legal hearing granted to the opposite party (so-called *ex parte* injunctions in contrast to *inter partes* injunctions) do not qualify for recognition under the Brussels Convention and therefore need not be approved for enforcement in other countries. The Federal Supreme Court noted that in the opinion of the European Court this limitation is founded in the objective, principles and systematic of the Lugano Convention, which require that the right to a legal hearing is to be guaranteed in all proceedings that may lead to recognizable and executable judicial decisions. Under this legal understanding, the surprise effect typical and characteristic of provisional and protective measures can be realized only when the decree is applied for in the country of enforcement.

Following the reasoning above, provisional and protective orders can however be recognized and declared enforceable if the injuncted party has had an opportunity to a contradictory proceedings in the State of origin, specifically before recognition and enforcement of the measure is sought in another Contracting State. In this case, this was not the situation. Due to the fact that an application for exequatur had been filed only five working days after the freezing order had been served with the defendant, she had not been able to make use of the opportunity of defence. In its reasoning the

[11] C-125/79 of 21 May 1980, ECR 1980, 1553.

Supreme Court made reference to a previous judgment (BGE 129 III 628), where a similar freezing order had been granted exequatur. In that case the defendant had had a possibility to contest the injunction order in the State of origin, and had also done so. Therefore the requirement of the Convention had, contrary to the case at hand, been fulfilled.

Since the Federal Supreme Court found the decision of the *Obergericht* correct in respect of its refusal to grant exequatur already on the basis of Article. 27 para. 2 of the Lugano Convention, it had become superfluous to also analyze whether the judgment of the *Obergericht* had been correct in respect of Article 27 paras. 1 and 3.

Under Article 34, para. 2 of the new Lugano Convention the most important change in this respect will be that in case the defendant was not duly and timely served with the documents instituting the proceedings, this is no longer a ground for refusal of recognition if the defendant has failed to commence proceedings to challenge the judgement when it was possible for him to do so (cf. Article 34, para. 2 Brussels I Regulation). The ECJ has held in its decision in the *ASML*-case that it was 'possible' only if the defendant was in fact acquainted with the contents of the judgement, because it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given.[12] However, the adopted changes would not affect a situation similar to the Swiss case discussed above. If only five working days have elapsed from the date of service, it is quite difficult to argue that the defendant has had the possibility to commence proceedings to challenge the judgement and failed to do so.

Article 27 (3)

In the decision of the Appellate Court of Milan dated 14 May 2005 it found that the requirements of Article 27 para. 3 are not met when there is not yet any judgement of a court in the State in which recognition of a foreign judgement is sought, and therefore, there is only a *potential* irreconcilability with that foreign judgement. In such case the court of the State in which recognition enforcement is sought and before which a case is pending which could lead to a irreconcilable judgement, should take into account the earlier foreign decision which is *res judicata* so as to prevent an irreconcilable judgement. To this reasoning the Appellate Court of Milan added that the case pending before the

[12] C-283/05 of 14 December 2006, Jur.

court in the State in which recognition and enforcement were sought, concerned proceedings between different legal entities submitted to different legal systems.

In this case the Italian company Marshall s.r.l. (Marshall) lodged an appeal with the appellate court of Milan against a decision of the lower court of Milan (Tribunale di Milano), in which the lower court in Milan had declared enforceable a judgement of the Swiss court of Geneva of 16 January 2003. The judgement of the court in Geneva against Marshall was given in default. Applicant was the Turkish company Okyanus Spor Malzemeleri Sanayi Ve Ticaret AS (Okyanus, domiciled in Turkey). The court in Geneva rewarded Okyanus claim against Marshall. In its appeal Marshall argued that the lower court of Milan violated art. 27 para. 3 of the Lugano Convention and that the Swiss judgement should not be recognized since it was potentially irreconcilable with the decision yet to be given by the court of Piacenza (Italy). However, the case before the court in Piacenza concerned proceedings not between Marshall and the Turkish company Okyanus, governed by Turkish law, but between Marshall and the Italian company Marshall Boats s.r.l., governed by Italian law, which partly controlled Okyanus.

According to Article 27 para. 3, a judgement should not be recognized if it is irreconcilable with a judgement given in a dispute between the same parties in the State in which recognition is sought. The case is in line with the wording of Article 27 para. 3 of the Lugano Convention and the interpretation given of that paragraph in the *Jenard* report, which do not require *res judicata* but which do require that at least a decision is given in the State in which recognition and enforcement is sought.

The new Lugano Convention will not bring any changes in this respect.

Article 29 (1)

In the judgement of the Appellate Court of Milan of 14 May 2005 it held that the statement of the original defendant that the representative of the company to the assignment of the brand “marshall”, lacked power of attorney, is a statement on the merits of the case in the sense of Article 29, para. 1, which the court of the State in which recognition is sought may under no circumstances review.

The new Lugano Convention will bring no changes regarding this point.

Article 31 (1)

In a decision dated 3 January 2006 the Swedish Supreme Court (*Högsta domstolen*, case no. 2006/43, LM v. BL) came to the conclusion that a decision concerning costs (legal expenses) of a case, which does not specify the person with the right to payment, cannot be declared enforceable when there is no proof that the applicant for the certificate of enforceability has the right to performance in the State of origin.

In this case the respondent LM had appealed to the Supreme Court a decision of the Svea Court of Appeal declaring a decision delivered on the 30 April 1998 by the lower court in Torremolinos, Spain concerning costs (legal expenses) enforceable. The Svea Court of Appeal had given its decision on the application of BL. In his appeal LM did not dispute the obligation to pay, but argued that in accordance with Spanish law the payment in question should be received by the court and not the adverse party (BL). Furthermore LM claimed that BL would be entitled to payment only on the condition that he had paid his court costs to the court, which he had not done. BL argued that he according to Spanish law was entitled to the payment and did in the Supreme Court present wording of the Spanish proceedings act to support his claim.

According to Article 31 para. 1 of the Lugano Convention a judgement 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. In the reasoning of the case, the Supreme Court noticed that only a person who can ask for the decision to be enforced in the State of origin is entitled to apply for a certificate of enforceability in another Contracting State.[13]

Since the decision of the lower court of Torremolinos did not in respect of the costs specify the person with the right to payment, the Supreme Court did not find it possible to declare the decision enforceable without further explanation. In order to decide whether BL was entitled to apply for enforcement the Supreme Court did set aside the appealed decision and sent the case back to the Svea Court of Appeal in order to give BL the opportunity to prove his right to payment.

[13] The reasoning of the Supreme Court is in line with the *Jenard*-report (see p. 49).

Article 37 (2)

Case 2006/42 concerned interpretation of Article 37 para. 2 of the Convention on a question, whether possibility to contest a judgment given on an appeal according to Article 37 para. 2 includes also possibility to contest a decision of the appeal court refusing to prolong the time limit for submitting an appeal as regards the decision given by the first instance court or if this possibility to contest a judgment given on appeal is limited only to the questions related to enforcement (enforceability) of the judgment given in another Contracting State. The Supreme Court of Poland held that in situations where enforcement of a foreign decision is sought in Poland, right to contest a judgment given on appeal under Article 37 para. 2 of the Convention is limited to such decisions of the appeal court that are given examining an appeal against a decision of the court of first instance (*Sąd Okręgowy*) in questions related to enforceability.

In this case applicant N.S.W. requested order for enforcement in Poland for the notarial deed done on 24 April 2001 by the notary public Bernard F. with registered office in W-W (Germany) against debtors, the couple Ralf G. and Sabine G.

- in 9 February 2004 the court of first instance - Circuit Court (*Sąd Okręgowy*) in Jelenia Góra granted enforceability.
- in 15 July 2004 the same court dismissed the motion of the debtor Ralf G. to prolong time limit for lodging an appeal against the above mentioned decision.
- in 29 December 2004 the court of second instance - Appellate Court in Wrocław rejected the debtor's appeal against the decision refusing to prolong the time limit and for the rest of the complaint - the court dismissed the appeal.
- in 31 May 2005 the Supreme Court of Poland did not allowed the possibility to contest the decision of the Appellate Court in cassation.

In the instant situation, on the one hand, under the provisions of the Code of Civil Procedure the debtor has no possibility to contest in cassation the decision of the Appellate Court with which the court refuses to prolong the time limit for submission of an appeal against the decision of the court of first instance. On the other hand, admissibility of the appeal against the decision of the Appellate Court stems from Article 37 para. 2 of the Convention.

The Supreme Court held that the Convention in relation to the appeal proceedings (before the second and third instance courts) limits the application of the national procedural law of the Contracting States. In such situations application of the national law must take into account the objectives and principles resulting from the Convention's provisions and may not lead to the results which would be contrary to its provisions. The Supreme Court also held that the provisions of Section 2 of title III of the Convention are limited only to certain matters such as possible measures of appeal, persons entitled to submit an appeal, time limit for submitting the appeal, the competent courts to examine the appeal, the nature of the appeal proceedings, the power of the court of second instance to stay proceedings or to make enforcement conditional upon the provision of the security, a right of a party to be heard and appear in the appeal proceedings.

The Supreme Court concluded that the Convention provides for the possibility of lodging the appeal only against such a judgment of the first instance court that relates to the matters of enforceability, i.e. authorizing (Articles 36 to 38) or refusing the enforcement (Articles 40 and 41) and such a judgment that is given examining the appeal lodged against a judgment given on the appeal. Pursuant to Article 36 of the Convention, if the enforcement has been authorized, the party may lodge an appeal within one month from the date of the service of such judgment. Since the Convention does not govern the procedure and form for submission of an appeal, the possibility to lodge an appeal against a judgment of the court of first instance is governed according to Article 1151 § 2 of the Code of Civil Procedure.

According to ECJ (*Dalfsen v. Loon*) the concept of "judgment given on the appeal" used in Article 37 para. 2 of the Convention includes only judgments examining the substance of the appeal lodged against the decision of the court of first instance authorizing the enforcement pursuant to Article 37 para. 1.[14] The case law of the ECJ refers to the objective of the Convention to provide for fast proceedings for ordering enforcement of decisions given in other Contracting States and to preserve uniformity of the appeal system it governs. These considerations impose a restrictive interpretation of Article 37 para. 2 of the Convention. Therefore, taking into account the general scheme of the Convention, and in the light of one of its main objectives which is to simplify procedures in the State in which enforcement is sought, the scope of application of Article 37 para. 2 of the Convention cannot be extended so as to enable an appeal in cassation to be lodged against a judgment other that that given on appeal pursuant to Article 37 para. 2.

[14] C-l83/90 of 4 October 1991, ECR 1993, no. 4 p. 119

Sharing the position with mentioned directions for interpretation the Supreme Court noted that in case the enforcement is sought in Poland pursuant to Article 37 para. 2 of the Convention, the cassation is possible only against a decision of the Appellate Court given examining the appeal against the decision of the Circuit Court (*Sąd Okręgowy*), which is given in relation to enforceability. Thus, cassation is admissible if it is submitted against the decision of the Appellate Court refusing or allowing the appeal and which changes the decision of the Circuit Court with regard to enforceability or reverses this decision and rejects the application for the enforcement or discontinues proceedings at the same time. Judgments of the second instance court with regard to incidental matters, prior to the decision in substance in relation to enforceability, are excluded from the scope of the concept "judgment given on the appeal" pursuant to Article 37 para. 2 of the Convention.

For the reasons described above the cassation was refused.

In conclusion it should be mentioned, that new Lugano Convention introduces significant changes to the whole title III of the Convention. Still, Article 37 para. 2 of the Convention is almost left unchanged if comparing to Article 44 of the new Lugano Convention. The concept "judgment given on the appeal" is retained in Article 44 of the new Lugano Convention. It means that the outcome of the instant case would not be different and the interpretation given to this concept by the ECJ equally could be applied to this case. The only changes that are introduced in Article 44 of the new Lugano Convention are that the competent courts are not listed in the respective Article of the Convention, but in the Annex IV to the Convention.

Article 38

In the case of the Luxemburg Appellate Court of 13 July 2006 (see above under Article 27, para. 1) that Court also had to decide whether the lodging of a complaint with the European Court on Human Rights because of a said violation of Article 6 ECHR in the proceedings which led to the judgement of which recognition was sought, was a ground to stay the decision on the granting of exequatur in accordance with Article 38 of the Lugano Convention. The Luxemburg Appellate Court held that the exequatur proceedings should not be stayed, since there was no ordinary appeal, which can result in the annulment or amendment of the decisions of which recognition is sought and

the lodging of which is bound, in the State in which judgment was given, to a period which is laid down by the law and starts to run by virtue of that same judgment, available to the original defendant in Norway.

By way of additional consideration and in response to the argument put forward by PCC (the applicant in the proceedings before the Luxemburg Appellate Court) that confirmation of the decision to grant exequatur could result in a breach of Article 6 ECHR by Luxemburg, the Luxemburg Appellate Court added that Article 6 ECHR also applies to procedures to grant exequatur on a foreign judgement (cf. European Court of Human Right in its decisions *Sylvestre v. Autriche*, *Hussin v. Belgium*, *K. v. Italy*).[15] Therefore, staying the exequatur proceedings until the European Human Rights Court have decided on the complaint (which will take some time because the caseload of that Court), might lead to a complaint by the other party on grounds of unreasonable delay in the sense of Article 6 ECHR in the exequatur proceedings. It concluded.

The judgement is in line with the ECJ's decision on Article 38 of the Brussels Convention in *Industrial Diamonds Supplies v. Riva*.[16] In that decision the ECJ held that an ordinary appeal refers to any appeal in the State of origin which may result in the annulment or the amendment of the judgment which is the subject-matter of the procedure for recognition or enforcement under the Convention and the lodging of which is bound, in the State in which judgment was given, to a period which is laid down by the law and starts to run by virtue of that same judgment.

The new Lugano Convention does not bring any changes in this respect.

[15] Decisions of 9 October 2003 (no. 54640/00), 6 May 2004 (no.70807/01) and 20 July 2004 (no. 38805/97) respectively.
[16] C-43/77 of 22 November 1977, Jur. 1977, p. 2175.

III. Final considerations

The Brussels Convention was signed 39 years and the Lugano Convention 19 years ago. The case law in respect of the parallel provisions is measurable and the knowledge thereof within the national courts has steadily increased. In light of the two Declarations made with regard to Protocol II of the Lugano Convention and concerning the interpretation of the Lugano Convention and its relation to the case law and especially ECJ-case law on the Brussels Convention it is no surprise that the Lugano Convention rulings of national courts during the reporting period are well in line with ECJ case law.

The new Lugano Convention will, when entering into force, make certain important case law obsolete. Since national courts have during the passed years gained a good ability to follow and make use of the ECJ case law, this will certainly not have a deteriorating effect on national Lugano judgments even in situations when questions on new issues arise.