TENTH REPORT ON NATIONAL CASE LAW RELATING TO THE LUGANO CONVENTION

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I. Introduction

In October 2007 the Standing Committee of the Lugano Convention appointed the delegates from the United Kingdom, Ireland and Romania to draft the tenth report on national case law relating to this convention. With the exception of the judgments from the courts of Switzerland, this report is based on the 16th package of judgments presented by the Court of Justice of the European Communities in October 2007 in accordance with Protocol No. 2 to the Convention.

Of the 39 judgments contained in the package, 7 related to the Convention. In the latter category 2 were given by the courts of Switzerland. At the request of the Swiss delegation these judgments have been omitted from this report; in their place 4 other Swiss judgments are discussed instead. On this basis 9 judgments will be referred to as follows:

* Judgment of the Federal Supreme Court of Switzerland (Bundesgericht) of 28th March 2007

* Judgment of the Federal Supreme Court of Switzerland (Bundesgericht) of 23rd April 2007

* Judgment of the Federal Supreme Court of Switzerland (Bundesgericht) of 13th March 2007

* Judgment of the Federal Supreme Court of Switzerland (Bundesgericht) of 6th March 2007

* Judgment of the French Cour de Cassation of 28th February 2006 (2007/22)

*Judgment of the High Court in Ireland of 7th March 2006 (2007/34)

* Judgment of the Hoyesterett in Norway of 7th September 2006 (2007/35)

* Judgment of the Supremo Tribunal de Justica in Portugual of 21st September 2006 (2007/37)

* Judgment of the Sad Najwyzszy in Poland of 28th March 2007 (2007/39)

The 9 judgments are briefly described and discussed below.

II. Overview of the case law

Title I - scope

Article 1(2) (non-application of the Convention to certain bankruptcy proceedings)

This case, decided on 23rd April 2007, concerned bankruptcy proceedings in respect of an airline. Although the main proceedings were brought in Belgium, the airline had become bankrupt in Switzerland. On this basis the parties to the Belgian proceedings, in particular the Belgian State, sought to have their claims entered in the list of creditors in the bankruptcy proceedings that were also brought in Switzerland. This list is a record of the liabilities of the bankrupt estate and accordingly a list of the claims which, depending on their status, amount, ranking and any preferential rights, may have a share in the proceeds of the bankruptcy. The Swiss bankruptcy liquidators refused to include the Belgian creditors' claims in the list of creditors. This decision was taken on the basis of territorial considerations, in particular that the Swiss rules governing these proceedings related only to claims brought in Switzerland and that it was for the liquidators alone to decide who should be admitted to the list. This list should not include the claims of creditors that were the subject of the pending Belgian proceedings. The Federal Court upheld this decision and dismissed the appeals against it.

One issue in this case was whether the proceedings before the Swiss liquidators fell within the scope of the Lugano Convention, Article 1(2) of which excludes from scope "bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". The Belgian claimants argued that, if these proceedings fell within the Convention's scope, there was an obligation on the Swiss liquidators to recognise the claimants in the Belgian proceedings and enter their names in their list.

The Federal Court held that, according to the case law of the European Court of Justice, this exclusion applies in general terms only to actions brought in connection with liquidation in bankruptcy, following directly from bankruptcy proceedings and closely related to a liquidation of assets or a judicial composition. Proceedings that do not have their origin in or are not a direct consequence of debt recovery or bankruptcy law and which would instead in all probability have been brought even without bankruptcy are not covered by the exclusion.

The Federal Court referred to the predominant view among academics that the Swiss composition proceedings fell outside the scope of the Convention. It also considered whether Article 16(5) operated in this case as an exception to Article 1(2). The Belgian creditors' argued for this proposition. The former provision confers a mandatory exclusive jurisdiction "in proceedings concerned with the enforcement of judgments [on] the courts of the Contracting State in which the judgment has been or is to be enforced".

The Federal Court concluded that it would not decide whether the exclusion from scope in Article 1(2) or the exclusive jurisdiction in Article 16(5) applied in this case. It held that in view of the *procedural* nature of the Swiss proceedings before the liquidators the territoriality principle applied and that accordingly Switzerland had international jurisdiction for those proceedings. The Lugano Convention provided no basis in international law for curtailing

the competence of the Swiss bankruptcy administration or challenging its composition decision.

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

Title II – Jurisdiction

Article 5(1) (application of the contract jurisdiction)

In Case 2007/34, there were two key issues that came before the Irish High Court for consideration. One related to Article 17 and is discussed later in this report where the facts pertinent to the consideration of that Article are also outlined. The other related to Article 5(1) and is discussed here. The plaintiff in the case was a company incorporated in Ireland while the defendant was a company incorporated in Switzerland. The latter had contracted to manufacture and supply a particular kind of machine and, when that machine caught fire and exploded, the plaintiffs, in reliance upon Article 5(1), attempted to sue the defendant company in Ireland. For this attempt to be successful, it was necessary for the court to determine whether or not the plaintiff company had discharged the onus of demonstrating that the place of the performance of the contractual obligation was Ireland. In arriving at its determination, the court had to identify the obligation in respect of which the claim was made and had also to consider by reference to what law that identity was to be tested. In regard to this latter issue, absent any requirement to consider a choice of law clause, the court was satisfied that Community jurisprudence should be determinative. Accordingly, it was held that the obligation in Article 5(1) was the contractual obligation which formed the basis of the legal proceedings (as opposed to any obligation whatsoever arising under the contract in question) – see De Bloos SPLR v. Société en commandite par actions Bouyer[1].

[1] Case C-14/76 [1976] ECR

In this case, some parts of the contractual obligations could only be performed in Switzerland, e.g., design and manufacture of the product while others could only be performed in Ireland, e.g., reassembly, commissioning of the machine, staff training. In order to reach a satisfactory outcome, it was necessary to identify the overall obligation and to focus on where that obligation had to be performed. The conclusion was that here the overall obligation was to supply a machine free from those defects which would render it unfit for its intended purpose. In the context of that obligation, the supply of the machine was to be in Ireland and the overriding obligation under the contract was to supply the machine assembled and commissioned in Ireland. As the place for the performance of the obligation for the purposes of Article 5(1) was the plaintiff's plant in Ireland, the plaintiffs were entitled to rely on that Article so as to sue the defendants in Ireland.

Notwithstanding the significant changes introduced into Article 5(1) under the terms of the new Lugano Convention, it is by no means clear that, on the facts of this case, the application of those changes would necessarily have led to a different outcome.

Article 5(3) (application of the tort jurisdiction)

(i) application in relation to the Internet

This case, decided on 6th March 2007, concerned a claim by a Swiss insurance company, which had brought proceedings in Switzerland to protect its domain names against the unlawful use of those names by a person who was domiciled in London. The claim was allowed by the Zurich Cantonal Court in proceedings in which the judge held he had jurisdiction under Article 5(3) of the Lugano Convention. It was allowed on the basis that the defendant had infringed the plaintiff's trademarks. On appeal from this decision the Federal Court upheld the decision of the Cantonal Court, in particular that court's claim to jurisdiction under Article 5(3).

The Federal Court held that in principle Article 5(3) covers all claims based on a defendant's alleged liability for harm where the claim is not based on a contract within the meaning of Article 5(1). In particular it covers claims for the infringement of intellectual property rights, including trademarks. Although there is uncertainty whether in relation to tortious claims concerning the Internet the place of the effect of the tortious behaviour is presumed to be anywhere where the web site can be accessed, the court stated that the place of effect as regards the infringement of a trade mark by domain names clearly includes the place where those names can be accessed as intended. The court held that it is sufficient for a web site's publication that it can be accessed on the Internet under the domain name. It left open the question whether the place of effect must be restricted to the place of intended use. Even if there was such a restriction, that was satisfied in this case in view of the fact that the domain names contained the component "Suisse" and were therefore intended to be accessed anywhere in Switzerland.

(ii) application in relation to negative declarations

This case, decided on 13th March 2007, concerned a company, A, with its registered office in Switzerland, which negotiated a reinsurance contract between a company, C, and another company, K. Company C. subsequently went bankrupt and as a result of this and a clause in the contract, many of its clients were unable to be reimbursed on the basis of possible liability. This gave rise to a potential liability in tort in respect of company A. This was on the basis that that company had made false representations that there was adequate insurance cover for those clients. In view of this potential liability company A brought an action in Switzerland for a negative declaration to establish that it had not incurred any non-contractual liability towards any aggrieved clients who might subsequently claim that it had falsely represented to them the existence of insurance cover. The Basel Civil Court, the Basel Appeal Court and the Federal Court all rejected jurisdiction in relation to company A's claim for a negative declaration.

In this case the Swiss courts were considering the circumstances in which a plaintiff seeking a negative declaration could invoke jurisdiction under Article 5(3). In accordance with the jurisprudence of the ECJ claims brought by parties claiming to have suffered tortious damage can properly be brought both in the place of where the originating harmful act occurred and the place where the effect of that act was suffered. Although in principle a party causing harm could also invoke this option, it could only properly do so to the extent that the option chosen by this potential tortfeasor did not result in the selection of a jurisdiction which would contravene the principle of expediency which underlies this basis of jurisdiction. This principle reflects considerations relating to the proper administration of justice and the proper conduct of the trial, in particular as regards the identification of a court best placed to take the necessary evidence and resolve the dispute. In negative declaration cases there should therefore be a requirement of particular proximity between the Article 5(3) jurisdiction and the evidence and the facts of the case. The Federal Court's judgment also refers to this requirement as compensation for the potential victim for the loss of his choice of forum, but it is not clear to what extent the court relied on this consideration in reaching its conclusion.

The Federal Court clearly relied on another consideration in devising this requirement of particular proximity. The fact that it is the potential tortfeasor who normally determines the place of his acts represents a crucial difference from the potential victim's jurisdictional option, which depends on the circumstances created by the potential tortfeasor. The requirement of particular proximity is necessary in order to prevent the latter, by skilful planning of his actions which can be committed anywhere, improperly securing for himself a jurisdiction in which to obtain a negative declaration and which is as disadvantageous as possible to the potential victim.

The plaintiff argued that Basel in Switzerland was properly a place with Article 5(3) jurisdiction. This was on the basis that it was a place where important elements of the potentially tortious act had taken place. However the Federal Court held that this place lacked the necessary proximity to the facts of the dispute, since the actions which had occurred there amounted to only a small

part of the totality of the events in this case. It was necessary in a case such as this to take into account the joint actions of all the parties concerned, and not merely those of the potential tortfeasor. It was important to identify the court that would be most convenient for the taking of evidence that would be crucial for the resolution of the dispute. In making this assessment it was essential to identify the particular disputed issues for the resolution of which evidence would be needed at trial.

In the light of these considerations the Federal Court held that the place of the plaintiff's actions in Switzerland was of much less significance in the context of the case as a whole than was the place of their effect in the Netherlands. Accordingly on the facts of this case Article 5(3) jurisdiction was properly situated in the latter country and not in the former.

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

Article 13(1) (application of the consumer jurisdiction)

This case, decided on 28th March 2007, concerned A, an individual resident in Greece with a numbered bank account in a bank, Bank X, which was domiciled in Switzerland. Bank X brought proceedings in the Zurich District Court against A for 9 million US dollars. A argued that the Swiss courts lacked jurisdiction. This was on the basis that the contract was a consumer contract for the purpose of Article 13 of the Convention and that in accordance with Article 14(2) jurisdiction therefore lay with the court of the State where the consumer was domiciled.

The District Court rejected A's plea of lack of jurisdiction, as did the Zurich Higher Court. The latter found that none of the preconditions laid down in Article 13(1) were satisfied. It also found that the court had jurisdiction on the basis of A having entered an appearance for the purposes of Article 18 (jurisdiction based on appearance). A appealed to the Federal Court.

The Federal Court dealt briefly, and in orthodox terms, with the Article 18 point. It held that under that provision any defence to a claim on its merits constitutes an entry of appearance. However applications preliminary to the defence on the merits, such as an application for the adjournment of proceedings, are not covered by this provision. A challenge to jurisdiction may not be raised after the making of submissions that under national procedural law are considered to be a defence on the merits. That national law determines the point in time at which a procedural act must be considered to constitute an entry of appearance.

In relation to Article 13(1) the Federal Court found that in accordance with Gruber v. Bay[2] the term "consumer" should be interpreted strictly. The question must be answered on the basis of an individual's position within the contract in question, in conjunction with the contract's nature and purpose and not on the basis of the individual's subjective status. Accordingly the same person may be regarded as a consumer for some transactions and not for others (Benincasa v. Dentalkit)[3]. The court must decide in the light of the evidence whether the contract was intended, to any significant extent, to meet the needs of the trade or profession of the individual concerned.

In this case the decisive factor was whether the purpose for which A concluded the banking contract was private in nature. A claimed that the account had only served private purposes. He argued that the contract of pledge relating to this account had been concluded at the insistence of Bank X. Its purpose had not been to pledge the balance in the account in favour of A's companies, but to cover the negative balances on his own and his wife's private accounts. Bank X disputed these assertions, but the Higher Court took no evidence on the matter. Instead, solely on the basis of the undisputed fact that the account was interrelated with A's various business accounts, it concluded that this particular account had considerable importance for his business activities and was not therefore for private purposes. On the basis of the Higher Court's failure to take evidence on this issue the Federal Court

[2] Case C-464/01 (judgment given on 20 January 2005

found that court to be in breach of Article 13(1). The issue was remitted to the lower court with the direction that evidence should be heard on it and that it should be resolved on the basis of that evidence.

The Federal Court also found that the contract for the establishment of a banking account was a “contract for the supply of services” within the terms of Article 13(1). In the light of the broad interpretation to be accorded to this category of contract this particular classification should not be negated by the parties’ subsequent agreement of a credit limit. The latter agreement should not be viewed in isolation, but merely as one of various services routinely provided by a bank in relation to its banking services.

Finally the Federal Court held that the Higher Court had failed adequately to take evidence based on A’s assertions that his account, which he had opened in 1982, had merely become dormant and had subsequently reopened under the same account number. If this assertion were to be substantiated on the evidence, the date of reopening should not deprive A of the jurisdictional protection afforded to him by Section 4 of the Convention. On this basis the earlier date was the crucial date because that was the moment when the contract was concluded. The position would be different if it were to be established that a new current account contract had been entered into subsequently. In that case the later date would be the crucial one. This matter was also remitted to the lower court for evidence to be taken.

Notwithstanding the significant changes introduced into Article 13 under the terms of the new Lugano Convention, it is not apparent that this case would be decided differently under that instrument.

Article 16(1) (application of the exclusive jurisdiction over immovable property)

(i) non-application in the context of divorce proceedings

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[3] Case C-269/95 [1997] ECR

In Case No. 2007/37 the Portuguese Courts had to consider whether or not a particular aspect of a divorce decision which concerned a property matter fell within the category of "proceedings which have as their object rights *in rem* in immovable property" such that the relevant ruling in the original case by the Swiss courts should not be enforced.

As part of the settlement in divorce proceedings that had taken place in Switzerland, the Swiss courts had specified certain requirements with regard to a house that was located in Portugal. In essence, if the husband wished to keep full ownership of the property a certain sum, corresponding to half the estimated value of the house (the building of which had been financed by the couple from their savings) was to be deposited in the name of his wife. In the event of the house being sold, the wife had the right to half the sum obtained as a result of that sale.

The husband contested the decision before the Portuguese courts primarily on the grounds that the Portuguese courts were exclusively competent to deal with actions relating to property located in Portuguese territory. In making the argument, reliance was placed upon a particular Article of the Portuguese Civil Law Code which had aligned Portuguese law with the wording of Article 16 of the Brussels and Lugano Conventions. The husband was unsuccessful at first instance and appealed the decision of the lower court to the Supreme Court.

While not specifically adverted to in the judgment, it is clear that the Court had regard to a long line of ECJ jurisprudence whereby Article 16(1), being an exception to the general jurisdiction rules, must not be given an interpretation that is wider than that required by its objective (Klein v. Rhodos Management Ltd)[4] The Court also noted ECJ dicta to the effect that Article 16 (1) must be interpreted as meaning that the exclusive jurisdiction of the courts of a Contracting State in which a property is situated does not encompass all

[4] Case C-73/04 [2005] ECR

actions concerning rights *in rem* in immovable property, but only those which are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein and to provide the holders of those rights with protection for the powers which attach to their interest (Reicher and Kockler v. Dresdner Bank AG)[5]. In this case the view seems to have been taken that the original decision did not interfere with existing property rights – it merely specified the financial obligations which would ensue in the event that certain hypothetical courses of action were followed. As such, exclusive jurisdiction did not lie with the Portuguese courts.

(ii) application in relation to the joint ownership of property

In Case 2007/35 the pertinent facts for the purposes of this report related to a property located in Spain which was in the joint ownership of a co-habiting couple. When one of the joint owners died, the other sought the dissolution of the joint ownership and, as the estate of the deceased was domiciled in Norway, the claim was brought in that country. The claim was resisted by the estate on the basis that Article 16(1)(a) of the Lugano Convention applied so as to give exclusive jurisdiction to the courts of Spain. It would appear that the claim, if upheld, would have resulted in the sale of the property.

The matter eventually came before the Supreme Court on appeal in circumstances where two lower courts had upheld the jurisdiction of the Norwegian courts in relation to this matter. That Court noted that, following the case law of the ECJ (Land Oberösterreich v ČEZ as), the term "rights in rem" was to be accorded an autonomous interpretation.[6] The passage from the Reicher and Kockler case (referred to earlier in the discussion of Case 2007/37) was also quoted. In addition, mention was made of the Gaillard v Chekili case[7] wherein the ECJ had referred to the explanation given in the Schlosser Report as to the difference between a right *in rem* and a right *in*

[5] Case C-115/88 [1990] ECR
[6] Case C-343/04 [2006] ECR
[7] Case C-518/99 (judgment given on 5 April 2001)

personam - the former having effect *erga omnes*, whereas the latter can only be claimed against a particular person. From the perspective of the Supreme Court, the legal question to be answered was whether or not the conditions for the dissolution of the agreement on joint ownership had been fulfilled. Those conditions could be regulated by a contract or by law. Accordingly, the claim for dissolution should be directed against those taking over that part of the joint ownership that had been previously held by the deceased. It could not be regarded as a claim against the whole world and Article 16(1)(a) of the Lugano Convention, given the fact that it should not be given an interpretation wider than the limits of its aim and purpose, did not apply. The Norwegian courts were, therefore, competent to deal with the case.

It should be noted that the language of Article 16(1) is replicated precisely in Article 22(1) of the new Lugano Convention. In consequence, the well established jurisprudence in relation to this Article is likely to remain largely undisturbed.

Article 17 (application of the rules on prorogation of jurisdiction)

In Case 2007/34 (referred to earlier) the Irish courts also had to consider the relevance of Article 17 to the proceedings. Essentially, the Swiss defendants were seeking to have service set aside on grounds that the contract on which the plaintiff was relying contained a clause conferring sole and exclusive jurisdiction on the courts of Aargau in Switzerland.

The facts relevant to this aspect of the case may be summarised briefly as follows. The defendants had submitted a number of quotations for the manufacture and supply of a particular machine – all of which stated that they were to be subject to the defendant's general conditions of contract which were enclosed. Those conditions contained an exclusive jurisdiction clause to the effect that:

- the place of jurisdiction for both the customer and supplier should be the registered office of the supplier (however, the

supplier was to be entitled to sue the customer at the latter's registered address);

- the contract was to be governed by Swiss substantive law.

The plaintiffs duly forwarded a purchase order – in the first instance by fax and in the second by post. The postal version contained a copy of the plaintiffs' Standard Conditions which was received but does not appear to have been read – merely filed. Those standard conditions provided that acknowledgement of the order by the sellers (the defendants) was deemed to be an acceptance of the order but that the acceptance was limited to certain express terms and conditions and any terms and conditions additional or different to those specified were objected to and rejected by the buyer. Thus, the order went ahead with the defendants believing that the transaction was proceeding on the basis of their general conditions while the plaintiffs believed that their terms and conditions had been accepted.

The court was first called upon to consider the standard of proof which was appropriate in considering whether or not Article 17 should apply. It rejected the argument put forward by the defendants that the onus was merely to show a good arguable case. Instead, the court took the view that the normal standard of proof in civil matters applied such that the defendant must prove the relevant facts on the balance of probability. In reaching this view the court noted that acceptance of the defendants' line of argument would present difficulties when both sides had what might fairly be described as a good arguable case. Were the relief sought granted, it could amount to invidious discrimination against the plaintiffs such as to violate Article 40.1 of the Constitution of Ireland which guarantees equality before the law.

Looking at Article 17, the court noted that any agreement must be strictly construed and that it must be established that the clause conferring jurisdiction was the subject of consensus between the parties (*Salotti v. Rüwa Polstereimashinen GmbH*)[8] (*Galeries Segoura SPRL v. Société Rahim*

[8] Case C-24/76 [1976] ECR

Banakdarian)[9]. The purpose of the formal requirements imposed by Article 17 was to ensure that this consensus was in fact established. Consensus could be inferred where the clause conferring jurisdiction was included in the general conditions of sale but only if the contract signed by the parties contained an express reference to those conditions. It could be inferred even in the absence of actual proof of agreement where circumstances are such as to demonstrate that, in the commercial context in which the agreement has been made, the existence of that consensus is a probability rather than otherwise.

In this instance, it was clear that the jurisdiction clause was in writing in the defendant's general conditions. However, there were no practices in existence between the parties prior to the contract – it being the first such contract between the parties - and there was no evidence to suggest that the agreement accorded with a usage widely known in their trade or commerce and regularly observed by parties to the kind of contract involved in this case. Thus, the real issue was whether or not there was any agreement in the first place to the inclusion of that clause.

Looking at the facts of the case objectively, the court concluded that the parties were not ad idem on the inclusion of the exclusive jurisdiction clause because the sending by the plaintiffs of their standard conditions was consistent only with the rejection by them of the defendants' general conditions (which included the jurisdiction clause) and with a desire to have their own standard conditions included in the contract. The fact that the attempt to have those standard conditions included was "hopelessly ineffective" having regard to the absence of any reference to them in the faxed documentation was immaterial. In consequence the defendant had failed to discharge the onus of demonstrating that there was consensus between the parties and Article 17 did not apply so as to confer exclusive jurisdiction on the Swiss courts.

[9] Case C-25/76 [1976] ECR

Given that the key issue here was whether or not agreement existed between the parties, the modifications introduced by Article 23 of the new Lugano Convention do not require additional comment.

Title III – Recognition and Enforcement

Articles 27 and 28 (application of the rules on the non-recognition of judgments)

(i) application of the rules on public policy and irreconcilable judgments

In Case No. 2007/22 the French Cour de Cassation upheld a decision of the Court of Appeal in Chambery to enforce a judgment of a Swiss court. The latter had ordered a French municipal council to pay sums of money to three banks. These sums were held to be payable on the basis that the municipality had previously entered into legally enforceable guarantees in favour of these banks in order to finance the building of a hotel complex. The decision of the Chambery court had been appealed against on the basis that the Swiss judgment should not be enforced because it breached the principle of public policy in Article 27(1) and was "irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought" pursuant to Article 27(3).

The Cour de Cassation rejected both these objections to the recognition of the Swiss judgment. These had been raised in the light of a decision of the Conseil d'Etat. This decision, so it was argued, had operated retrospectively and in doing so had effectively rendered unlawful the action of the municipal council in entering into the guarantees. On this basis it was contended that the decision had rendered invalid the contracts entered into by the municipal council and the banks. However the Cour de Cassation held that the administrative decision of the Conseil d'Etat should not be understood as having any effect of this kind in private law. On this basis there had been no breach of public policy and neither were there two irreconcilable judgments

within the meaning of Article 27 to prevent recognition of the Swiss decision in France.

There is no reason to suppose that this decision would have been decided differently under the new Lugano Convention.

(ii) res judicata in the context of a declaration of enforceability

In Case 2007/39 the Polish Supreme Court had to consider certain enforceability issues in relation to a series of German judgments which had been granted in 2002. The principal judgment was a default judgment whereby the defendant company (R.S.P.K. in K.) was ordered to pay the named plaintiff a sum somewhat in excess of €2m. The factual background to the case is somewhat complicated but may be summarised in broad terms as follows. In September 2002 the named plaintiff was successful in obtaining a declaration of enforceability in Poland from the District Court in Lodz in relation to the default judgment. Subsequent to this, on two separate occasions during the course of January 2004, that default judgment was subject to rectification by the German court to allow for relatively minor corrections to the name of the plaintiff company. Furthermore, in February 2004, the German courts confirmed that title to the debt in question had transferred from the plaintiff company to the applicant in the present case (A.V. S.). It would also appear that in September 2004, the Court of Appeal in Lodz had declined to enforce the default judgment in the applicant's favour because of a problem with the documentation showing the proper legal transfer of title. In December 2005 the applicant was successful before the District Court in Kalisz in securing a new declaration of enforceability. That decision was appealed unsuccessfully by the debtor who pleaded *res judicata.* A cassation action was then brought before the Supreme Court where the debtor was represented by a receiver as, subsequent to the original appeal proceedings, bankruptcy had been declared.

In dealing with the case, the Supreme Court made it clear that it was considering only the relevant provisions of the Lugano Convention – previous

arguments seemed to have been heard and determined on the basis of Council Regulation No. 44/2001 which, according to the Court, was irrelevant given the date of the German judgments. The Supreme Court proceeded to examine the two main grounds upon which the Court of Appeal had declined to accept the debtor's argument that the matter was *res judicata* by virtue of the original enforceability decision of 2002. The first of these was that, as the default judgment had been rectified twice since the 2002 decision, a separate enforcement application was now appropriate. The second was that the 2002 decision had issued prior to the transfer which saw the present applicant stepping into the shoes of the old plaintiff. The Supreme Court declined to accept the validity of these grounds. In a situation where rectification involved a relatively minor matter it could not be considered that a separate judgment had come into being such that a separate enforcement action was necessary. Furthermore, the transfer of the debt to the applicant, at least in principle, did not give the applicant a right to seek a fresh declaration of enforceability. That applicant had taken on the legal situation of the original plaintiff and the plea of *res judicata* was therefore appropriate.

However, given the factual circumstances of this particular case where the application of the principle of *res judicata* would preclude the applicant from enforcing his entitlements in Poland, the need to uphold the free movement of decisions under the Lugano Convention took precedence over the application of that principle. The Court had regard to the terms of Articles 27 and 28 of the Convention which define in a very strict way the grounds on which enforcement may be refused (none of which was being relied upon by the debtor). The Court also noted in passing that the clear implication to be drawn from Article 28 was that jurisdiction provisions were not comprehended by public policy within the meaning of Article 27(1) of the Convention. Accordingly, the Court dismissed the cassation action.

IIII. Final considerations

As in other years it is once again to be noted that the rulings of the national courts on the Lugano Convention show an ever deepening awareness of the case law of the European Court of Justice and a sensitivity to the need to

respect the principle of parallelism which is reflected in the terms of the two Declarations regarding Protocol II of that Convention. It is perhaps less clear that there is any appreciable growth in relation to the application by national courts of relevant decisions delivered in the courts of other Contracting States. In any event, the trend towards parallelism is solidly established at this stage and augurs well for the effective application of the equivalent Protocol 2 when the new Lugano Convention enters into force.