8th Report on National Case Law
Relating to the Lugano Convention

I. Introduction

At its 12th meeting, which took place in September 2005 in Zurich, the Standing Committee of the Lugano Convention appointed the delegates from Norway, the Czech Republic, and Germany to draft the 8th Report on National Case Law Relating to the Lugano Convention. This Report is based on the fourteenth fascicle of court judgments presented by the Court of Justice of the European Communities in September 2005 in accordance with Protocol No. 2 to the Lugano Convention.

Of the 50 judgments contained in the fascicle, 15 relate to the Lugano Convention. They will be referred to as follows:

- Judgment of the Supreme Court of Austria (*Oberster Gerichtshof*) of 28 April 2004 (No. 2005/19)
- Judgment of the Federal Supreme Court of Switzerland (*Tribunal fédéral*) of 23 December 2003 (No. 2005/21)
- Judgment of the Federal Supreme Court of Switzerland (*Tribunal fédéral*) of 9 June 2004 (No. 2005/22)
- Judgment of the Federal Supreme Court of Switzerland (*Tribunal fédéral*) of 15 December 2004 (No. 2005/23)
- Judgment of the Federal Labour Court of Germany (*Bundesarbeitsgericht*) of 20 August 2003 (No. 2005/25)
- Judgment of the Düsseldorf Higher Regional Court (*Oberlandesgericht*) (Germany) of 2 March 2004 (No. 2005/26)
- Judgment of the Supreme Court of France (*Cour de Cassation*) of 30 March 2004 (No. 2005/32)
- Judgment of the Court of Appeal (United Kingdom) of 3 February 2003 (No. 2005/37)
- Judgment of the Court of Appeal (United Kingdom) of 12 November 2004 (No. 2005/38)
- Judgment of the Supreme Court of Norway (*Høyesterett*) of 14 June 2004 (No. 2005/42)
- Judgment of the Supreme Court of Norway (*Høyesterett*) of 13 October 2004 (No. 2005/43)

- Judgment of the Supreme Court of the Netherlands (*Hoge Raad*) of 19 March 2004 (No. 2005/45)

- Judgment of the Poznań Court of Appeal (*Sąd Apelacyjny w Poznaniu*) (Poland) of 16 February 2004 (No. 2005/47)

- Judgment of the Supreme Court of Poland (*Sąd Najwyzszy*) of 14 July 2004 (No. 2005/48)

- Judgment of the Court of Appeal (*Svea hovrätt*) (Sweden) of 27 May 2004 (No. 2005/49).

The 15 judgments are briefly described and discussed below.

II. Notes on National Case Law

1. Area of Applicability of the Lugano Convention

In its judgment of 15 December 2004 (No. 2005/23) the Federal Supreme Court of Switzerland (*Tribunal fédéral*) addresses the question of the application of the Lugano Convention to revocatory actions under bankruptcy law. The judgment also discusses the question of the extent to which Swiss courts must take account of the case law of the Court of Justice of the European Communities (hereinafter: ECJ) on the parallel Brussels Convention.

The judgment is based upon the following set of facts:

Company A, headquartered in Geneva, entered into bankruptcy in 2000. It was a creditor of Company X, headquartered in Warsaw (Poland), to which it had granted a remission of debt two times prior to the opening of the bankruptcy proceedings. The bankruptcy trustee filed a revocatory action ("Paulian action") against Company X in Geneva as the place of the bankruptcy proceedings pursuant to Articles 285 et seq. of the Federal Law on Debt Recovery and Bankruptcy (Loi fédérale sur la poursuite pour dettes et la faillite, hereinafter: LP) with the goal of rescinding the remission of debt. The defendant Company X unsuccessfully argued at each instance of the proceedings against the international jurisdiction of the Swiss courts. In the defendant's opinion the proceedings were required to be conducted at its headquarters in Warsaw in accordance with the Lugano Convention.

The Federal Supreme Court decided that the Lugano Convention was not applicable to revocatory actions under bankruptcy law pursuant to Articles 285 et seq. LP because the latter fulfill the exclusion provision of Article 1(2)(2) of the Lugano Convention. If a revocatory action is filed after the insolvency proceeding is opened, its legal basis is the opening of the insolvency proceeding and results directly from this proceeding. Thus, there is a direct connection between the two proceedings.

In the bases for its judgment the Federal Supreme Court referred to the principles on the interpretation of the Lugano Convention developed by it in previous judgments. In this context it expressly emphasized the requirement to take into account the case law of both the ECJ and the courts of the EU Member States on the provisions of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter: Brussels Convention) and Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: Brussels I Regulation) in reaching judgment.

The Swiss Federal Supreme Court supported its opinion with the principles of the judgment of the ECJ in the matter of *Gourdain v. Nadler* of 22 February 1979 (C-133/78). In that judgment, “en comblement de passif social” (for the payment of company debts), a lawsuit specially regulated in French bankruptcy law, is part of bankruptcy and bankruptcy-like proceedings within the meaning of Article 1(2)(2) of the Brussels Convention.

However, the Federal Supreme Court expressly made clear that there are limits to the interpretation of the Lugano Convention oriented toward the case law of the ECJ on the Brussels Convention and the Brussels I Regulation. If the interpretation of the above-named “parallel provisions” are determinatively influenced by the Treaty on the European Communities or by secondary legal acts, the contracting states to the Lugano Convention are not required to take these into account.

The Federal Supreme Court held that the particularly narrow interpretation of the exception provision in bankruptcy matters, which is currently under discussion within the context of Article 1(2)(b) of the Brussels I Regulation

(Geimer/Schütze, *Europäisches Zivilverfahrensrecht*, 2nd Ed., Munich 2004, margin notes 130 et seq. on Article 1) was not applicable to the situation of a Non-EU Member State. In accordance therewith, complementary interpretation of this legal act and Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (Regulation on Insolvency) must take place. Under this view both regulations must be seen as a unit because they attempt comprehensive rules on international jurisdiction for individual and collective proceedings. If an individual proceeding such as a revocatory action could not be subsumed under the Regulation on Insolvency, in any event it would have to be encompassed within the area of applicability of the Brussels I Regulation. Contrary to the view of the Federal Supreme Court, the exclusion provision as to insolvency matters would not apply under this view.

2. International Jurisdiction

a) General Jurisdiction

Article 2(1) of the Lugano Convention

In its judgment of 23 December 2003 (2005/21) the Federal Supreme Court of Switzerland (*Tribunal fédéral*) addresses the special problem of the action for release from the debt within the context of Swiss debt collection proceedings, which are governed by the Federal Law on Debt Recovery and Bankruptcy (Loi fédérale sur la poursuite pour dettes et la faillite, hereinafter: LP). This was the first opinion by the Federal Supreme Court regarding jurisdiction over an action for release from the debt within the area of applicability of the Lugano Convention, which is an extremely disputed question in Switzerland.

The legal situation is briefly described as follows:

Enforcement conducted as part of collection proceedings based upon a monetary claim begins with a debt collection request (Art. 67 LP). The competent debt collection office issues a summons for payment to the debtor without substantive assessment of the creditor's request (Art. 69 et seq. LP). The debtor can file a formal complaint against this debt collection request. This results in a suspension of the debt collection proceedings (Art. 78 LP).

If the claim relates to an enforceable judgment or to a title placed on equal footing pursuant to Art. 80 subsec. 2 LP, the creditor can then request a final dismissal of objection (cf. Art. 80 LP). The debtor is limited to the objections set forth in Art. 81 of repayment, deferral of payment, or the tolling of the statute of limitations since the judgment was issued. This proceeding is generally viewed as an enforcement proceeding and allocated within the area of applicability of Art. 16(5) of the Lugano Convention.

The situation is different in regard to provisional dismissal of objection proceedings pursuant to Art. 82 et seq., set forth below.

If the claim relates to a debt established by a public document or an acknowledgment of debt confirmed by signature, the creditor can (only) request a provisional dismissal of objection (Art. 82 LP). A provisional asset seizure of the objects against which enforcement is intended to take place, thus, becomes possible. The debtor can lodge an action for release from the debt within 20 days of the dismissal of objection (Art. 83 subsec. 2 LP). If he misses the deadline, the provisional dismissal of objection becomes final (Art. 83 subsec. (3) LP).

The provisional dismissal of objection proceedings also begins without substantive assessment of the claim, however, in the proceedings on the action for release from the debt the debtor can raise substantive law objections against the claim. The court decides on the existence of the claim in a “regular proceeding” (cf. Art. 83 subsec. (2) LP). The action for release from the debt thus contains an action for a negative declaratory judgment to deny the substantive law claim. As a result, the choice of provisional dismissal of objection proceedings offers the creditor the advantage of a quick and low-cost proceeding placing on the debtor the burden of initiating a court decision regarding the existence of the claim while avoiding the filing of an action for specific performance.

The judgment of the Federal Supreme Court was based upon the following set of facts:

A bank headquartered in France had loaned money to a French company. A, headquartered in Switzerland, provided a guarantee for the repayment of the

loan claim. The French company did not meet its repayment obligation. Therefore the bank claimed against A as to its guarantee for repayment of the remaining amount of the loan. It instituted debt collection proceedings against it before the Swiss courts and obtained a summons for payment. After A lodged a formal objection against this, the bank applied for a provisional dismissal of objection, which also was granted. Subsequent thereto debtor A filed an action for release from the debt in Switzerland (*action en libération de dette*) pursuant to Article 83 subsec. (2) LP. The bank objected to the international jurisdiction of the Swiss courts involved. Pursuant to Article 2 (1) of the Lugano Convention, it contended, it must be sued at its headquarters in France. There is no special jurisdiction pursuant to the Lugano Convention.

The Federal Supreme Court confirmed the judgments of the lower courts. It also affirmed the international jurisdiction of the Swiss courts at the location of debt collection proceedings pursuant to Article 2 (1) of the Lugano Convention for the provisional dismissal of objection as well.

The Federal Supreme Court presented the bases of its judgment as follows:

In the determination of the court with international jurisdiction within the context of Article 83 LP, pursuant to Article 30a LP the provisions of the Lugano Convention must also be taken into consideration. Article 2 (1) of the Lugano Convention, which is applicable on its own, enables the debtor to file an action for release from the debt at the place of the debt collection proceedings and, thus, usually at his domicile. The wording of the provision is not contrary to this, because the reference here is not formally to a plaintiff or defendant, but rather, only that “persons domiciled in a Contracting State shall (…) be sued in the courts of that State.” The purpose of the provision relates to persons that are materially in the position of a defendant and not to those who formally assume the role of a defendant in the proceedings. The particular design of Swiss law on debt collection proceedings – other than enforcement law in other legal systems – accords the material role of defendant to the debtor. The proceedings for release from the debt replace the normal proceedings for the creditor in other states. If the creditor itself had taken legal action it would have been required to claim against defendant A before the Swiss courts. The creditor should not benefit from the fact that it made use of a different option for realizing its claim made available by Swiss law. Jurisdiction pursuant to Ar-

ticle 2 (1) of the Lugano Convention also is not displaced by the exclusive jurisdiction pursuant to Article 16(5) of the Lugano Convention. The proceedings on release from the debt are not merely enforcement proceedings within the meaning of the provision, but rather, are an *actio negatoria* under substantive law. They are aimed at establishing that the claim does not exist or is not enforceable.

In reaching its judgment, the Federal Supreme Court found a parallel to the case decided by the ECJ *SAS-Autoteileservice Gmbh v. Pierre Malhé* (ECJ of 4 July 1985, C-220/1984). It sees it as the underlying idea of the judgment that persons that must defend themselves at a substantive law level, in principle can defend themselves at their place of domicile

b) Special Jurisdiction

Article 5(1) of the Lugano Convention

aa) In its judgment of 20 August 2003 (*No. 2005/25*) the Federal Labour Court (*Bundesarbeitsgericht*, Germany) addressed the question of when an employment relationship exists within the meaning of Article 5(1) 2nd half sentence of the Lugano Convention. The result was a rejection of the international jurisdiction of the German labour courts.

The judgment was based on the following set of facts:

The plaintiff, domiciled in Germany, is a pilot and also an attorney. The defendant operates an alliance of European airlines headquartered in Switzerland. The plaintiff and defendant concluded a framework agreement whereby the plaintiff was to work for one company of the defendant's as pilot and for another company of the defendant's as managing director. Details regarding the scope and conduct of duties were to be contractually agreed with each company. The plaintiff initially worked as managing director and pilot, but then was not employed further.

He filed a lawsuit against the defendant with the German labour courts for a determination that the contractual employment relationship continued to exist, for payment of the agreed compensation, and for contractual damage com-

pensation by the defendant for breaches of obligation. The German labour courts, finding that they lacked international jurisdiction, rejected the lawsuit as inadmissible.

The Federal Labour Court, with reference to the definitions and principles of interpretation developed by the ECJ regarding the Brussels Convention, argued as follows:

International jurisdiction of German labour courts does not arise from Article 5 (1) 2nd half sentence of the Lugano Convention, because an employment agreement was not concluded between the parties. Pursuant to the case law of the ECJ, a fundamental characteristic of an employment relationship is that a person provides services for another in accordance with their instructions during a particular time and for which they receive compensation in return. It is a requirement that the claims made by the employee are directly aimed at the employer. These prerequisites were not fulfilled because the plaintiff did not owe the main services agreed upon to the defendant, but rather, to each subsidiary and, thus, third parties.

With these arguments the Federal Labour Court adhered to the case law of the ECJ on Article 5(1) 2nd half sentence of the Brussels Convention in the matter of *Rutten v. Cross* (ECJ of 9 January 1997, C-383/95).

The Federal Labour Court consistently subsequently examines the jurisdiction of German courts in accordance with general jurisdiction of the place of performance arising from Article 5(1) 1st half-sentence of the Lugano Convention. It was rejected for the reason that the determinative place of performance was not located in Germany. The place of performance is not autonomous, but rather, to be determined in accordance with the law that is determinative for the disputed obligation (*lex causae*). In this regard it also depends on the place of performance of the principle contractual obligation if secondary claims, which could be caused by a breach of a collateral duty, are concurrently a subject matter of the legal dispute. From the principle that in the context of the determination of jurisdiction in relation to numerous concurrently asserted obligations arising from one contract collateral matters follow the main matter, the court derives priority of the claims for payment asserted by the plaintiff over the claim for determination. Because the plaintiff at the time

of the conclusion of the contract had his usual place of residence in Germany, German law is applicable in the case at issue. Pursuant to section 269 subsec. (1) of the German Civil Code (*Bürgerliches Gesetzbuch*), the place of performance of the determinative claims for payment is the place where the debtor has his domicile at the time the debt arose, which in this case is the defendant's headquarters in Switzerland.

In this respect the Federal Labour Court also expressly adhered to the case law of the European Court of Justice, in this case to Article 5(1) 1st half-sentence of the Brussels Convention.

bb) In its judgment of 14 June 2004 (No. 2005/42) the Supreme Court of Norway (*Høyesterett*) addressed the question of which jurisdiction is available under the Lugano Convention when claims for damage compensation are brought based on a breach of an exclusive marketing agreement that relates to the entire territory of a contracting state.

The judgment is based on the following set of facts:

A Finnish company concluded an exclusive marketing agreement with a Norwegian company. In accordance therewith the Norwegian company had the exclusive right to market agricultural machinery of the Finnish company in Norway. In the agreement the Finnish company obligated itself not to make any sales to other Norwegian traders. In breach of this obligation, the Finnish company apparently also sold agricultural machinery where the Norwegian company was located.

Thereafter the Norwegian company filed a lawsuit for damage compensation based upon breach of the exclusive marketing agreement at the court where its headquarters are located.

The Norwegian Supreme Court rejected the applicability of Article 5(1) 1st half sentence of the Lugano Convention. In its judgment the court took account not only of the case law of the ECJ, in particular here the judgment of 19 February 2002 in the matter of *Besicks v. WABAG*, but also referred to – at the suggestion of the plaintiff – the case law of EU Member States, in this case

one from the Netherlands (*Nederlandse Jurisprudentie* 1991, No. 676) and a Danish judgment (*UfR* 1991, p. 244).

The Norwegian Supreme Court presented the bases of its judgment as follows:

The obligation that is determinative regarding the place of performance is the obligation to refrain from action arising from the exclusive marketing agreement. This obligation to refrain from action relates to the entire Norwegian market and, thus, does not exist in just one location. However, the wording of Article 5(1) 1st half sentence of the Lugano Convention requires the determination of a specific place (of performance). The provision does not generally reference the courts of a state, but rather the court in one location. The provision, thus, also requires connection to a specific court location because it not only governs international jurisdiction, but also venue.

Article 5(1) 1st half sentence of the Lugano Convention also cannot be extensively interpreted as an exception provision to Article 2. Otherwise the principle in the Convention that the defendant is to be sued before the courts of his domicile could be undermined.

In the bases for its judgment the Norwegian Supreme Court expressly relied upon the case law of the ECJ on Article 5(1) of the Brussels Convention. The ECJ found the provision inapplicable when the place of performance of the obligation that is the object of the proceedings cannot be determined because the disputed contractual obligation is a geographically unlimited prohibition of competition to be performed or that would be performed at numerous locations. In such a case jurisdiction can only be determined pursuant to Article 2 (1) of the Lugano Convention (cf. ECJ of 19 February 2002, *Besicks v. WA-BAG*).

It must be noted that the facts at the basis of the ECJ judgment last mentioned differ from those at issue here in that there the obligation to refrain from action extended to a number of Member States, while the obligation to refrain from action here only related to one Member State, although to numerous possible locations within this Member State. Currently, a more comparable case is before the ECJ for interpretation. The object of the proceedings, however, is not

an obligation to refrain from action but supply obligations. The Supreme Court of Austria (*Oberster Gerichtshof*) presented the following question for interpretation to the Court of Justice in matter C-386/05:

"Is Article 5(1) (b) of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Official Journal 2001, L 12, p. 1) to be interpreted that a seller of movable goods who has his headquarters in the territory of a Member State and agrees to supply goods to a variety of locations in this other Member State to the purchaser who has his headquarters in the territory of a different Member State can be sued by the purchaser in regard to a contract claim relating to all partial deliveries at the sole discretion of the plaintiff before the court of this place (of performance)?"

Article 5(1) and (3) of the Lugano Convention

In its judgment of 30 March 2004 (No. 2005/32), the French Supreme Court (*Cour de Cassation*) addressed the scope of Article 5(1) and (3) of the Lugano Convention in regard to claims arising from the dissolution of a commercial partnership between the parties.

The Plaintiff, a company headquartered in France, and the defendant, a company headquartered in Austria, worked together in international transportation on a contractual basis. The contract regarding the commercial partnership contained an agreement for a three month termination notice period, which was guaranteed by a contractual penalty. The Austrian company terminated the cooperation without adherence to this notice period. The French company thereafter sued in the French courts for payment of the contractual penalty and for payment of damage compensation based on unfair competition. The Tribunal de Commerce accepted international jurisdiction based on Article 5(3) of the Lugano Convention. The Supreme Court upheld this only in regard to the lawsuit for damages based on unfair competition. Regarding this, it presented the following arguments:

When claims based on contract are brought in addition to claims based on tort (claim for payment of the agreed contractual penalty), the petitioned court can only decide the matter in international jurisdiction if the prerequisites of Article

5(1) of the Lugano Convention are fulfilled. However, there is a lack of conclusive argumentation by the plaintiff for this.

The Supreme Court (France) applies ECJ case law on the relationship of Article 5(1) and (3) of the Brussels Convention to the Lugano Convention (*Kalfehlis v. Schröder*), however, without express reference thereto.

Article 5(5) of the Lugano Convention

aa) In decision dated 3 February 2003, the Court of Appeal, London, delivered a judgment on the question of interpretation of Article 5(5) of the Lugano Convention.

As to the facts: A Norwegian bank has a branch situated in London. That branch, hereafter referred to as the defendants, is morgagee of a vessel. Due to default to pay the underlying loan, the vessel was arrested in Panama upon instructions of the branch in London. This arrest caused damage to goods transported by the vessel, and the buyers, hereafter referred to as claimants, wants to sue the defendants.

The claimants argued that the arrest arose out of a London branch loan. Further it was pointed to the fact that it was the London branch that had taken the decision to arrest the vessel and also ordered the arrest, which nevertheless was performed by Panamanian lawyers.

The defendants alleged that according to article 5(5), it was not enough to establish a link with the branch in question; it was also necessary to establish a link between the dispute and the English court. In defending this position it was referred to two decisions by the ECJ, first Somafer v Saar Fern Gas AG [1978] ECR 2183 and secondly Lloyd's Register of Shipping v Society Campenon Bernard [1995] ECR I-961.

The court stated that the legal question was whether article 5(5) conferred jurisdiction to the English court.

As to the interpretation of article 5(5), the court first turned to the commentary to the Brussels Convention by Jenard specifying, "adoption of the special rule

on jurisdiction is justified by the fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it". Furthermore the court referred to observations by the ECJ, which echoed that proposition.

The court also briefly mentioned the rejection by the lower court of the argument by the claimants that jurisdiction could be established under article 5(3) on the ground that England was the place where the harmful event occurred. The lower court admitted that there is a connection between the decision to order arrest and the interference with the contracts of carriage that ultimately led to the damage. However, it is not a "particular close connecting factor", which is the relevant applicable criterion in order to uphold the restrictive approach to the application of article 5. This part of the judgment by the lower court is not appealed.

Regarding the two judgments by ECJ that the defendants referred to, the court stated that they were to be given their natural effect. When it comes to the Lloyd's Register case, it demonstrates that there must be a link between the branch and the dispute so as to render it natural to describe the dispute as one arising out of the activities of the branch. When the claim is in tort, the events that give rise to liability can vary widely. However, instead of going into a specific analysis of this issue, the court turned to some general observations of article 5. This article addresses specific causes of action except for paragraph 5, which is of general application.

The court then expressed its support for the conclusions of the Advocate General in the Lloyd's Register case. There the purpose of article 5(5) is seen as approximating the place where a branch carries on with business with third parties to the point of departure of the first paragraph of article 2 – regardless of where the underlying activity takes place. Subsequently, the court pointed out that the correct comparison was the connection between the dispute and London, with the connection between the dispute and Norway. That analysis led to the conclusion that the dispute arose out of the activities of the defendants' London branch. The agreement was negotiated in London, the decision to enforce the security over the vessel was taken in London and finally it was also the London branch that gave instructions to enforce the security and the power of the attorney to enable it to be done.

bb) In decision dated 2. March 2004, the Court of Appeal (Oberlandesgericht Düsseldorf) in Germany, delivered a judgment on the question of interpretation of Article 5(5) of the Lugano Convention.

As to the facts: A German company gave a loan to a Polish company. The purpose was to establish a branch in Germany. Later the loan was defaulted. Consequently the German company sued the Polish company in Germany on the ground that the Polish company had a branch in Germany.

The claimant – the German company – argued that the court had jurisdiction with respect of the Polish company. The Polish company had a branch in Germany and the loan should finance the establishment of that branch.

The defendant – the Polish company – opposed this, arguing that the German court did not have jurisdiction.

The court stated that the legal question was whether article 5(5) conferred jurisdiction to the German court.

With reference to the ECJ decision in Somafer v Saar Fern Gas AG [1978] ECR 2183, the court found that the branch of the Polish company met the criteria decided on by that judgment. The court pointed out that the Polish company had decided upon the establishment of a German branch which was subordinated the Polish board of directors. The branch had also entered into contracts with German companies. That the application for registration of the branch had been withdrawn did not change that conclusion, as the business did not seize to exist in Germany. The branch was only being moved to a neighbouring city.

<u>Article 6(1) of the Lugano Convention</u>

In decision dated 9 June 2004, the Swiss Supreme Court (Bundesgericht), delivered a judgment on the question of the interpretation of Article 6(1) of the Lugano Convention.

As to the facts: The customers to a Swiss tailor paid by transferring money to an invoice company owned by the tailor's wife. The couple divorced and the tailor moved to Austria. The invoice company thereafter sued the tailor as well as one customer. The lower Swiss court (Bezirksgericht Bischofszell) dismissed the claim against the customer. As regards the claim against the ex-husband, the court found that it did not have jurisdiction. The appeal court (Obergericht des Kanton Thurgau) upheld that judgment. The case was then brought before the Swiss Supreme Court (Bundesgericht).

The claimant – the invoice company – argued that the court had jurisdiction with respect of both defendants, cf. article 6(1) "more than one defendant".

The defendants – the ex-husband and one customer – argued that the Swiss court did not have jurisdiction.

The court upheld the decision to dismiss the claim against the customer. In situations where there is a dispute regarding a cession agreement between a cessionary and a cedent, it cannot under any circumstances involve the debtor.

As regards the ex-husband, the legal question is whether article 6(1) confer jurisdiction to the Swiss court. As a point of departure the court states that, as this is an exception to the basic principle of domicile in article 2, it is necessary to apply a restrictive interpretation of article 6(1). According to the court, one condition when applying article 6(1) is that there is such a connection between the claims that a joint decision is necessary in order to avoid conflicting judgments. The court further stated that it is up to the national courts to examine whether this requirement is fulfilled.

The court cannot find that such connection exists between the defendants. The claim against the customer cannot be upheld for reasons described above. Consequently, conflicting judgments against the customer and the ex-husband, cannot occur either.

It is true that this result is based on an assessment of the underlying claim against the customer. Is must nevertheless be acceptable in this case as it is

obvious that that claim cannot succeed. Due to the costs of legal procedure, it is justifiable to dismiss the claims.

c) Jurisdiction over Consumer Contracts

Article 13(3) of the Lugano Convention

In decision dated 13 October 2004, the Appeal Committee of the Supreme Court (Høyesteretts kjæremålsutvalg) in Norway, delivered a judgment on the question of interpretation of Article 13(3) – consumer contracts – of the Lugano Convention.

As to the facts: A consumer domiciled in Oslo, Norway, participated in a reality show on TV about cosmetic surgery. The advertisement for participation in this TV programme was done in Norway. Except for the invitation to undergo cosmetic surgery, the ad mentioned neither the doctor nor the clinic. Prior to participation she signed two contracts, one in Oslo with the television company, and one in Malmö, Sweden with the doctor and the clinic. After the operation she filed a suit against both the doctor who performed the operation and the clinic he is working at, both seated in Malmö.

The claimant – the consumer – argue that the Norwegian court has jurisdiction with respect of the Swedish doctor and clinic.

The defendants – the doctor and the clinic – opposed this, arguing that the Norwegian court did not have jurisdiction.

The court stated that the legal question was whether article 13(3) conferred jurisdiction to the Norwegian court. Both the conditions in article 13 (3) letter a and b must be met in order to deviate from the general provision in article 2.

According to article 13(3) letter a, conclusion of the contract with the consumer must have been “preceded by a specific invitation addressed to him or by advertising” in the state of the consumer’s domicile.

The court found that the connection between the advertisement in Norway and the agreement with the Swedish clinic concerning performance of the surgery,

was so closely interrelated that the conditions in article 13(3) letter a was met. Even though the advertisement did not refer to the Swedish clinic, it was obvious that surgery was to be performed. Further, the clinic had a clear interest in this advertisement as it generated new assignments for them. The applicability of this provision is not conditional upon the defendant's own advertising.

Furthermore, it is a requirement according to article 13 (3) letter b that the consumer, in his state of domicile, has taken the steps necessary for the conclusion of the contract.

The court also found that this requirement was met. It was in Oslo that the consumer was introduced to the television program where participation also included cosmetic surgery. The contract, signed in Oslo with the television company included cosmetic surgery performed by the Swedish clinic, and the consumer committed herself to undergo this treatment. The owner of the clinic was also present in Oslo at the time of conclusion of the contract between the consumer and the broadcasting company. He examined her and informed her about the clinic. Due to his arrangement with the broadcasting company, he could offer her a discount.

The clinic argued that the owner was in Oslo only due to the contract with the broadcasting company. The owner solely performed a general assessment of the possible candidates. However, the court found that even if he weren't representing the clinic, the consumer had good reason to assume that. That a more thorough examination was needed prior to the surgery (took place in Malmö) and that the definite contract between the consumer and the clinic also was signed there did not alter the stand of the court. Neither did the fact that the examination in Oslo was only preliminary and that the consumer at that point could have withdrawn from the project if she had wanted to.

The court commented on the wording "steps necessary". Even though it primarily refers to mail orders, the wording nevertheless also covers situations like these. This interpretation was also found to be in line with the general principle of a restrictive approach to the application of provisions on special jurisdiction.

As far as the doctor is concerned, the court's assessment of the suit against the clinic, applies accordingly to the suit against him. Even if the clinic is party to the contract entered into in Sweden, the contract mentions the name of the doctor in question in the title. So, he is regarded as a party to the contract as well. Consequently, his participation in this programme, including the publicity, is such as he may be sued in Oslo on the same grounds as the clinic.

d) Exclusive Jurisdiction and Lis pendens - Related Actions

Article 16(2) and article 21 of the Lugano Convention

In decision dated 12 November 2004, the England and Wales Court of Appeal, London, delivered a judgment on the question of interpretation of Article 16(2) – exclusive jurisdiction in proceedings regarding companies – of the Lugano Convention. Further, the court also decided upon the relationship between article 16 and article 21 on lis pendens.

As to the facts:
"FOH" is seated in the UK. It is owned by SLEC which is a holding company seated in Jersey. SLEC is owned by two holding companies "Speed" and "Bambino", which are both seated in Jersey. Speed, Bambino FOH and others are all parties to an agreement called the SLEC Shareholders agreement. By clause 30, the parties submit to "the exclusive jurisdiction of the courts of Geneva Switzerland". However, it is common ground that this may be displaced, if they apply, by the exclusive jurisdiction provisions of the Judgments Regulation or the Lugano Convention.

The parties to the dispute is on one side Speed and SLEC, and on the other hand Bambino and two individuals domiciled in Switzerland (the Argands), who by Bambino were appointed to the board of directors of FOH. The dispute concerns the legality of that appointment.

The claimants – Speed and SLEC – argue that the court of England and Wales has jurisdiction according to article 16(2) of the Lugano Convention.
The defendants – Bambino and the Argands – oppose this, arguing that the court of Geneva, Switzerland has jurisdiction. Further, The Argands also ar-

gue that the Swiss court were first seized and that the English court shall stay its proceedings according to article 21 (lis pendens) of the Lugano-convention.

The appeal court agreed with the court of first instance.

The court of first instance found that the case concerned the composition of the board of directors and consequently fell clearly within article 16(2). That solution also accorded with “practical convenience, and with the reasonable expectations of those involved”. That interpretation involved some expansions of the language of the Article, since it did not strictly concern the “validity” of the constitution or, of any actual board decisions. However, the court found that determining the composition of the Board is “clearly essential for the validity of future decisions”. Further, that interpretation was found to be in line with the objective of assimilation the jurisdiction under the Convention rules to choice-of-law principles of private international law. Finally, support for that interpretation was found in Professor Jenard’s authoritative report concerning article 16(2) where he says: “It is important, in the interests of legal certainty, to avoid conflicting judgments being given as regards the existence of a company or association or as regards the validity of the decisions of its organs.” The defendants however argued in vain that the article should be given a “restrictive” interpretation.

The appeal court supported the view that the real subject matter of the dispute is the composition of the Board of directors. It is not changed by the fact the answer may require one to look beyond the strict limits of the company’s constitution, technically speaking.

As to the *stay* issue, the Argands showed that Bambino commenced proceedings in Geneva confirming the validity of their appointment, a few days before the proceedings in the UK were served on the Argands. They alleged that since the Swiss court was first seized, the UK court “shall of its own motion stay its proceedings”, according to article 21 in the Lugano convention.

The court found that article 21 on lis pendens did not apply when the second seized court had exclusive jurisdiction. The court first referred to two judgments by the European Court of Justice: Overseas Union Insurance v New Hampshire [1992] and Eric Gasser v MISAT [2004]. However, the first judgment left the question open and the second one only decided upon the rela-

tionship between article 21 and article 17 on choice of forum agreements. Nevertheless, in judicial theory this issue had been discussed, and support had been given for the view that article 21 was inapplicable in the second seized court and the latter need not therefore decline to adjudicate. Reference was given to the spirit and policy of the Convention as well as to the fact that the first seized court's judgment would not be entitled to recognition in other Contracting states. Consequently, recognition would not be required to be given to two possibly conflicting judgments. Finally, the court thought that any other solution in fact would not serve any purpose but to increase delay and expenses.

e) Prorogation of Jurisdiction

Article 17(1) of the Lugano Convention

In decision dated 16 February 2004, the Court of Appeal, Poznan, delivered a judgement on the question of interpretation of Article 17(1) of the Lugano Convention.

As to the facts: The company Exact Software Poland Sp. z o.o. in Poznan made (as a licensor) a written offer to the company Prestige S.S. in Poznan (a licensee) for the conclusion of a set of agreements in the area of using computer software. The offer contained, in addition to other terms, the following provision: "The Licensee hereby confirms that it has been acquainted with the General Terms and Conditions and undertakes to act in compliance with the aforementioned rules, unless agreed otherwise." This offer was signed by a person authorised to represent the company Exact Software Poland Sp. z o.o. and the signature was attached below the text quoted above. One of the provisions of the General Terms and Conditions to which the offer refers stipulates that "Any and all disputes arising from or in connection with the agreements shall be heard and resolved by the competent court in the Netherlands. However, if the software was acquired outside the territory of the Netherlands and the above provision is invalid pursuant to the domestic laws, any and all disputes arising from or in connection with the agreements shall be heard and resolved by the competent court of the capital city of the state where the software was acquired."

The claimant (licensee) requested in its petition that the court declare the legal relationship invalid. The defendant (licensor) objected that the case does not fall within the jurisdiction of courts in Poland. The defendant based its objection on Article 17 of the Lugano Convention and Article 1105 (5) of the Polish Civil Procedure Code and requested that the District Court in Poznan dismiss the petition. However, the District Court in Poznan did not satisfy the defendant's request and did not dismiss the petition. It stated in its judgement that the case did not contain a foreign element and, therefore, the defendant's arguments were not relevant.

The defendant filed a complaint to the Court of Appeal, Poznan, against the judgement of the District Court in Poznan on 4 September 2003 under file no. IX GC 290/03. The Court of Appeal rejected the defendant's complaint by its judgement of 16 February 2004, file no. I Acz 2601/03.

In its judgement, the Court of Appeal stated that the contents of Article 17 of the Lugano Convention did not indicate that the conclusion of an agreement on exclusion of Polish courts jurisdiction would be conditional upon the existence of the so-called foreign (international) element in the dispute. Article 17 of the Lugano Convention stipulates that if the parties of which at least one resides in the territory of a contracting state agree that a dispute arising from a certain legal relationship be resolved by a court or courts of a contracting state, then the courts of such Contracting State shall have exclusive jurisdiction. The court jurisdiction clause must be concluded in writing or in verbal form (which must be confirmed) or in another form corresponding to the customs established between both parties. Pursuant to the provisions of Article 1105 (1) of the Polish Civil Procedure Code, the parties may, within the scope of their contractual obligations, agree on writing on excluding the jurisdiction of Polish courts in favour of another country's courts, if permissible pursuant to the laws of such a country. The above provisions of the Lugano Convention and the Polish laws really do not indicate their applicability only to disputes with an international element. For this reason, the statement of the District Court in Poznan that the parties cannot refer to these provisions is incorrect.
The Court of Appeal in its judgement further stated that the agreement between the claimant and the defendant was undoubtedly concluded on the basis of an offer, but only with respect to the offer subject (provision of software,

including licence). However, an agreement containing a court jurisdiction clause in a manner stipulated in Article 17 (1) of the Lugano Convention or Article 1105 (1) of the Polish Civil Procedure Code was not concluded. The defendant proved neither the conclusion of such an agreement, nor signing by the claimant of the offer acceptance, including the General Terms and Conditions to which the offer refers. Besides, the General Terms and Conditions were formulated in a way linking the court jurisdiction to the software origin. The defendant did not prove in which state the software was acquired and whether the change of jurisdiction was effective pursuant to the laws of such state.

Finally, it must therefore be stated that the Court of Appeal, Poznan, rejected the defendant's complaint primarily because the defendant could not bear the burden of proof that the application of the provisions of Article 17 (1) of the Lugano Convention or Article 1105 (1) of the Polish Civil Procedure Code was adequate in the given dispute.

f) Lis pendens - Related Actions

Article 21 of the Lugano Convention

The Supreme Court of Austria decided by its judgement dated 28 April 2004 with respect to the issue regulated in the provisions of Article 21 of the Lugano Convention.

As to the facts: Grazyna J. (the defendant) holds execution against Mag. Stefan C. (the claimant) on the basis of the Regional Court of the City of Warsaw, Poland, dated 21 October 1997, file no. Zl XRC 463/96, with the aim to recovering receivables arising from a failure to pay the alimonies to his wife. The above judgement of the Polish court was declared enforceable in Austria on 29 January 1999.

On 10 January 2000, the claimant filed a petition with the competent Polish court for determination that the obligation to pay alimonies to his ex-wife (the defendant) stipulated by judgement dated 21 October 1997 was already extinct. The claimant further filed an opposition petition on 5 December 2002 with the District Court in Baden, requesting that the claims of his ex-wife set

forth in the aforementioned judgement of the Polish court be declared fully extinct. In the opposition petition, the claimant stated that the financial situation of the defendant had significantly improved, while the claimant's income had significantly fallen.

The defendant filed an objection of the lack of jurisdiction pursuant to Article 21 of the Lugano Convention as to the opposition petition. The first instance court satisfied the defendant's objection, declared itself incompetent to decide the case and rejected the opposition petition. It stated that the parties in both proceedings were identical and both disputes related to the same issue (determination of the ex-wife's claims as extinct). The first instance court stated that the petition with it was filed later, which was why it declared itself incompetent in favour of the Polish court to which the petition was delivered already on 10 January 2000.

The Court of Appeal confirmed the judgement of the first instance court. It based its decision on the fact that both Poland and Austria are contracting states to the Lugano Convention and stated that the objective of the petition and the reasons of the claimant's claims were identical in both proceedings and both petitions had the same objective – cancellation of the execution title. The claimant filed a protest against the judgement of the Court of Appeal dated 22 May 2003, file no. 16 R 132/03f-9, requesting a review.
The Supreme Court decided to dismiss the protest requesting a review. In its judgement, the court stated that there were no doubts regarding the need to apply the Lugano Convention in this case, which prevails over the Austrian laws. The sense of Article 21 of the Lugano Convention is to eliminate the existence of several proceedings on the same claim before courts of various Contracting States to the Convention, thus eliminating the danger of incompatible judgements that could not be consequently recognised pursuant to Article 27 (3) of the Convention.

The term "identical claim" must be interpreted independently within the context of the Lugano Convention, not pursuant to the application of domestic laws. The identity of the subject of dispute is specified if both petitions have the same basis and relate to the same issue. The claim basis includes the situation and legal regulations on which the petition is based. The Supreme Court stated in the reasoning of its judgement that the first instance court and the

Court of Appeal correctly concluded that the termination of execution against the claimant in Austria was only a consequence of the judgement proposed by the claimant in the opposition petition. However, the main objective of the opposition petition was, same as in the case of the petition filed by the claimant with the Polish court on 10 January 2000, the extinction of the claim for alimonies.

As for the reason on which the claimant based his protest, i.e. that the Supreme Court did not provide its opinion on the interpretation of the term "identical claim" in Article 21 of the Lugano Convention, the Supreme Court concluded that this was not a substantial legal issue that needs to be assessed in the given case pursuant to Austrian laws. The only decisive aspect is the independent interpretation of the subject of dispute within the context of the Convention (see above), which was why the claimant's protest against the judgement of the appeal court was dismissed.

3. Provisional, including protective, measures

Article 24 of the Lugano Convention

In decision dated 19 March 2004, the Supreme Court in the Netherlands delivered the judgement on the question of interpretation of Article 24 of the Lugano Convention.

As to the facts: The company Koninklijke Philips Electronics N.V. (hereinafter "Philips") is the holder of rights pertaining to specific European patents relating to information carriers in the form of a compact disc. These discs are also known as "recordable CDs" or CD-R. The companies Postech, Princo Tai-wan, and Princo Switzerland manufacture and trade CD-Rs. The companies Postech and Princo Tai-wan have their registered office in Tai-wan, the company Princo Switzerland has its registered office in Switzerland. Philips was of the opinion that the above foreign companies breach the European patents of which it is a holder. Based on an applicable EU Regulation on piracy, it applied with the Dutch customs authorities to inform it of the occurrence of CD-R shipments sent from Tai-wan by the companies Postech c.s. and Princo Tai-wan. The Dutch customs authorities identified in total six such shipments and informed of them the company Philips that restrained them upon a court order.

Subsequently, Philips invited Postech and 7 other companies to participate in summary proceedings before the Court in s'Gravenhage. It requested that Postech be prohibited from violating the patent rights of Philips and that the court order Postech to withdraw its CD-Rs and ensure their liquidation. In its judgement dated 11 January 2001, the Court in s'Gravenhage confirmed the requested measures against Postech.

Postech filed an appeal against the judgement in which it objected in particular the lack of the international jurisdiction of the Dutch court. The Court of Appeal in s'Gravenhage cancelled the disputed first instance judgement and resolved the case following complex evidence proceedings by prohibiting the company Postech and each of its members individually from violating the rights of Philips in the Netherlands subject to financial sanctions only.

Philips filed a protest (cassation) against this judgement, as the judgement did not grant it a sufficient protection of its intellectual property.

The Supreme Court in its judgement dated 19 March 2004, file no. C02/110 HR, cancelled the judgment of the Court of Appeal in s'Gravenhage of 1 October 2001 and returned the case to this court for new hearing and resolution. The Supreme Court concluded that the Court of Appeal in s'Gravenhage incorrectly assessed its jurisdiction with respect to foreign companies. If a Dutch judge is entitled, pursuant to any rules of the international law, to review a request relating to violation of intellectual property rights in another country, the judge may, if necessary, prohibit unlawful activities carried out abroad. There is no reason for adopting a restriction specified in the judgement of the EC Court of Justice dated 21 May 1980 in the case of Denilauer/ Couchet Fréres in the cases falling outside the formal area of applicability of the EEX or EVEX Treaty. The objective of the Regulation on piracy in EU with respect to Article 8 (1) and point 11 of the Preamble is to enable that the goods violating the intellectual property rights be liquidated without any damage compensation.

4. Recognition and Enforcement

Article 27 (3) of the Lugano Convention

In decision dated 27 May 2004, the Svea Court of Appeal (Svea hovrätt) delivered the judgement on the question of interpretation of Article 27 (3) of the Lugano Convention.

As to the facts: L.N. and C.N. entered into marriage in 1965. On 5 April 1993 a French court decided on their separation. This judgement approved a final agreement between the spouses that stated, among other things, that L.N. undertook to pay alimonies to C.N. amounting to FRF 10,000 to be indexed pursuant to a certain index. The judgement further states that the spouses were instructed of the fact that the judgement may only be transformed from separation to divorce on the basis of their joint proposal. The spouses undertook that this joint proposal would be submitted for decision pursuant to the French laws, unless they agree otherwise.

In 1997, L.N. filed a proposal for the marriage divorce with the District Court in Stockholm. This court passed a partial judgement on the marriage divorce on 9 January 1998. In the proceedings before this court C.N. requested that the District Court in Stockholm confirm the part of the above mentioned French judgement regarding the alimonies since 8 September 1998 and that L.N. be obliged to pay her alimonies amounting to FRF 10,000 as of this date. The District Court in Stockholm dismissed the requests of C.N. in its final judgement dated 13 November 2002. In the reasoning of its judgement it stated that pursuant to the Lugano Convention, the recognition of a French court judgement in Sweden was conditional upon its review by the Court of Appeal. If it is found possible to recognise the French judgement in Sweden in its part relating to the alimonies, there will be an obstacle of a decided case (res iudicata).
The Court of Appeal (as the first instance body) declared in its judgement dated 7 July 2003, on the proposal of C.N., that the above mentioned French judgement in its part relating to the alimonies was exercisable in Sweden. L.N. filed an appeal against this judgement. In the appeal, he stated that the proposal of C.N. should be dismissed pursuant to Article 34 (2) and Article 27 (3) of the Lugano Convention. He performed his alimental obligation towards C.N. until the effectiveness of the Swedish judgement on the divorce. The proposal for declaration of the French judgement on alimonies of 1993 was filed by C.N. only after the issuance of the Swedish court judgement on the divorce. In the opinion of L.N., both judgements were incompatible, because the French

judgement was based on a situation when the marriage is not divorced, i.e. its legal existence continues.

C.N. stated with respect to the appeal filed by L.N. that she insisted on the declaration of the French judgement on alimonies of 1993. She considers the judgement compatible with the judgement of the Swedish court on the divorce. Separation of husband and wife pursuant to French laws means that their common life is terminated once for all, which allows for the decision of alimonies. The Swedish laws also grant the wife the right to alimonies, which means that both judgements are not incompatible, but supplementary to each other.

The Svea Court of Appeal decided by the judgement of its appeal body of 27 May 2004, file no. Ö 6034-03, on dismissing the proposal of C.N. for the declaration of the French judgement as exercisable. It explained its judgement by stating that the Court of Appeal (its first instance body) cannot be reviewed pursuant to Article 34 of the Lugano Convention. The proposal for its recognition may only be dismissed for one of the reasons set forth in Article 27 and 28. For this reason, the Court of Appeal dismissed the proposal of L.N. for rejecting the declaration of the French judgement on alimonies as exercisable in Sweden.

At the same time, the Court of Appeal (its appeal body) decided in its judgement dated 27 May 2004 to change the judgement on its first instance body so that the proposal of C.N. for declaration of the French judgement on alimonies be dismissed. In the reasoning of its judgement, it pointed out the incompatibility of both decisions. The French judgement presumed continued existence of the marriage of C.N. and L.N., the husband and wife were released from the obligation to live together, but their obligation to take care of each other still existed (Bell m. fl. Principles of French Law, Oxford University Press, 1998, page 266). The Swedish judgement is incompatible with the French judgement, because it divorces the marriage of C.N. and L.N., which means the marriage termination. When evaluating both judgements with respect to their compatibility or incompatibility, the Court of Appeal (its appeal body) took into consideration a similar judgement of the EC Court dated 4 February 1988, file no. 145/86, in the case of Hofmann / Krieg. In this case, the EC Court decided that the German judgement on alimonies for the separated wife was in-

compatible with the Dutch judgement on divorce. It is obvious that the proceedings on the proposal of C.N: before the Court of Appeal met the criteria for the rejection of its non-recognition pursuant to Article 27 (3) of the Lugano Convention.

Article 40 of the Lugano Convention

In decision dated 14 July 2004, the Supreme Court in Poland delivered the judgement on the question of interpretation of Article 40 of the Lugano Convention.

As to the facts: The creditor ERMEWA S.A. in Geneva filed a proposal with the Regional Court in Białymstok for the eenforcement of a judgement *in contumatiam* issued on 1 February 2002 by the first instance Court of the republic and canton of Geneva, under which the debtor Mirosław S. was to pay financial amounts in EUR at the amounts set forth in articles 1 – 28 of the judgement.

The Regional Court in Białymstok found out that the Court in Geneva summoned the parties for the hearing to be held on 17 January 2002. The summons were to be delivered to the defendant, Mirosław S., through the chairperson of the District Court in Białymstok on 2 November 2000, pursuant to Article 5 a) of the Hague Convention. The defendant did not accept the summons letter within the prescribed period after its deposition on the post office. The judgement *in contiumatiam* issued by the Court in Geneva was delivered to the defendant, Mirosław S., in the same manner, the letter with the judgement not collected at the post office was filed as delivered.

The Regional Court in Białymstok concluded that the first notice delivery was incorrect, because the notice should have been delivered to the defendant in person. The substitute delivery, i.e. the notice deposition with the effect of delivery, is only permissible in the case of further notices and after the addressee has been informed of procedural consequences of such a delivery. Due to the first incorrect delivery of the notice to Mirosław S., the Regional Court in Białymstok dismissed the proposal of the creditor ERMEWA S.A. for the enforcement of the judgement *in contiumatiam.*

By its decision of 9 June 2003, Court of Appeal in Białymstok changed the judgement of the Regional Court in Białymstok and permitted the enforcement of the judgement against the debtor, Mirosław S. It disagreed with the legal opinion of the District Court and referred to the provisions of Article 139 of the Polish Civil Procedure Code that allows delivery of notices by means of their depositing at a post office or a municipal authority. A notice of such delivery must be inserted into the addressee's mailbox or posted on the door. The debtor filed a protest against the judgement of the Court of Appeal and objected against a breach of specific provisions of the Polish Civil Procedure Code, as well as a breach of Articles 40 (2), Article 34 (2) and 27 (2) of the Lugano Convention.

The Supreme Court cancelled the above mentioned judgement of the Regional Court by its judgement dated 14 June 2004, file no. IV CK 495/03. It stated that it undoubtedly possible to apply the provisions of the Lugano Convention to this case, as both Poland and Switzerland were parties to the Convention. It pointed out that Article 40 of the Lugano Convention did not stipulate a time period for filing an appeal against a judgement on dismissal of the creditor's proposal for the judgement execution. This time period must be determined in compliance with the domestic laws of the country in which the judgement execution is being requested. The appeal must be filed with a court set out in Article 40 of the Lugano Convention, i.e. with a court that will decide on the appeal.

In the given case, the appeal should have been filed within one week of delivery of the judgement of the Regional Court in Białymstok to the creditor and the debtor. The appeal should have been filed with the court that decides on it pursuant to Article 40 of the Lugano Convention, i.e. the Appeal Court. The creditor filed the appeal after the expiry of the one-week period set forth in Article 394 (2) of the Polish Civil Procedure Code with the Regional Court in Białymstok, not with the Appeal Court in Białymstok. For this reason, the Supreme Court cancelled the decision of the Appeal Court challenged by the protest (cassation). At the same time, it stated that the creditor's appeal against the judgement of the Regional Court in Białymstok dated 28 March 2003 was dismissed for the same reasons.

III. Final considerations

The rulings of national courts on the Lugano Convention during the reporting period confirm a tendency already observed in the past several years: The national courts are not only well aware of the case law of the European Court of Justice regarding the parallel provisions of the Brussels Convention and the Brussels I Regulation; indeed, they expressly take it into consideration with the goal of ensuring the uniform interpretation of the provisions of the two parallel conventions.

This is shown not only by the numerous references to ECJ decisions in solving already-familiar problems. The national courts also use the statements of the ECJ, and to some extent those of the parties as well, in the search for solutions to new problems (cf. Court of Appeal, United Kingdom, No. 2005/37). Continuing the ECJ's approach, they seek answers to legal questions that have thus far not been submitted for decision to the ECJ.

In contrast, only in isolated cases were the rulings of the courts of the EU Member States considered as well, consistent with Protocol no. 2 to the Lugano Convention (cf. HØyesterett, Norway, no. 2005/42). In that case as well, this occurred only on the initiative of one of the parties to the proceedings.

Finally, it should be emphasised that the limits of the binding nature of ECJ case law on the courts with regard to the Brussels parallel convention in the scope of the Lugano Convention are being increasingly addressed and placed in more precise terms (cf. Federal Court, Switzerland, no. 2005/23).