

## European Civil Procedure

### Handout 5

#### Scope of application of the Lugano Convention/Brussels I *bis* Regulation

- Two-step test
  - Step 1: Does the lawsuit have as its object a civil or commercial matter?
  - Step 2: Does the lawsuit have as its object a matter excluded from scope under Article 1(2) LC/ Brussels I *bis* Regulation?
- Civil and commercial matters: concept
  - explicitly excluded (non-enumerative list)
    - revenue, customs, or administrative matters
    - and, in the Brussels I *bis* Regulation, “liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)”
  - autonomous interpretation: “independent concept to be interpreted by referring, first, to the objectives and scheme of the Brussels Convention and, second, to the general principles which stem from the corpus of the national legal systems” (see, e.g., ECJ *Lechouritou*)
  - actions between a public authority and a private person are not civil or commercial where
    - the public authority is acting in the exercise of its public powers (i.e., “outside the scope of the ordinary legal rules applicable to relationships between private individuals” [see, e.g., ECJ *Eurelec Trading SCRL*])
  - or
    - the claim results from the exercise of public powers
  - sovereign immunity is a separate concept governed by public international law
- “whatever the nature of the court or tribunal”
  - Where a case that is civil/commercial in nature from the perspective of the LC/Brussels I *bis* Regulation is handled, e.g., by an administrative or criminal court, the LC/Brussels I *bis* Regulation is applicable.
  - An arbitral tribunal or other non-state dispute resolution body is not a “court or tribunal”.
  - An administrative authority can be a “court or tribunal” under the LC if it has jurisdiction over civil or commercial matters (see Article 62 LC). Under the Brussels I *bis* Regulation, this is limited to specific authorities (see Article 3 Brussels I *bis* Regulation).

- practical application of the concept of civil/commercial matters
  - determination of the relevant rules of national law
  - assessment against the (autonomous) criteria under Article 1(1) LC/Brussels I bis Regulation
  - test: does one of the parties exercise powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals? (See, e.g., ECJ *Movic*)
    - to determine this, it is necessary to look at
      - the legal relationship between the parties and at the subject matter of the dispute
      - or, alternatively, at the basis for the action and the detailed rules applicable to it
- Exclusions from scope: background and rationale
  - existing or envisaged special treaties or special EU legislative acts for the excluded areas
  - in some cases, deep divergences between national approaches (with respect to jurisdiction and/or substantive law)
- enumerative list of exclusions from scope in Article 1(2) LC/Brussels I bis Regulation
- an action or judgment is not outside the scope merely because a matter to which the Convention/Regulation does not apply arises as a preliminary issue
- Consequences of inapplicability
  - jurisdiction, parallel proceedings, and recognition and enforcement governed by other applicable treaties/legislative acts or by national law
  - in case of severability: LC/Brussels I bis Regulation may be applicable to a severable part of the action or judgment that does fall within the scope
  - a judgment given in a matter outside the scope of the Convention/Regulation can constitute a ground for refusal of recognition and enforcement under Article 34(3) or 34(4) LC/Article 45(1)(c) or 45(1)(d) Brussels I bis Regulation

### **Case 1**

In 1943, German troops perpetrated a massacre in the municipality of Kalavrita (Greece). They killed 676 inhabitants. Children of victims sued Germany for damages in a Greek court.

*Does the lawsuit fall within the scope of the Brussels I bis Regulation?*

### **Case 2**

The Swiss investor I acquired sovereign bonds issued by Greece with a nominal value of EUR 35,000. The purchase was executed through a Swiss custodian bank. Subsequently, in the context of a serious financial crisis and as part of a package of measures aimed at ensuring the financial stability of the Euro area, Greece enacted a "haircut law". As a consequence, I's bonds were replaced with new sovereign bonds of a lower value against I's will. I wants to sue Greece for fulfilment of the terms of the bonds acquired by her or compensation for non-fulfilment of those terms.

*Does the lawsuit fall within the scope of the Lugano Convention?*

### **Case 3**

P, a company owned by the town of Pula (Croatia), is responsible for the management of the town's public parking spaces. T, a tourist domiciled in Switzerland, parks his vehicle in such a parking space and obtains a parking ticket, but does not pay the parking fee.

*Does the Lugano Convention apply to a lawsuit for payment of the parking fee?*

### **Case 4**

A and B were married and lived in Ireland. The marriage broke up, and the couple were divorced. In the decree of divorce, the Irish court ordered B to pay 10 million EUR to A to ensure "proper provision" for A and to enable A to retain the previous standard of living.

Subsequently, B moves to Switzerland. As B has not yet paid the full 10 million EUR to A, A wants to obtain enforcement against B in Switzerland.

*Does the Lugano Convention apply to the enforcement of A's claim?*

### **Case 5**

X lives in Berlin, where he ran a business. In 2023, a Berlin court opened insolvency proceedings against X.

Y, the insolvency administrator appointed by the German court, finds out that X used to be the owner of a holiday home in the Swiss canton of Valais, which he gifted to his sister S (domiciled in Strasbourg, France) shortly before the opening of the insolvency proceedings.

*Y wants to know how the holiday home or its monetary value could be claimed for the estate.*

### **Case 6**

The Dutch municipality D made social assistance payments to H (domiciled in D), the former husband of W (domiciled in Switzerland), and their child C (living with H in D). The local authority of D now wants to bring a lawsuit against W for payment of maintenance obligations under a right of recourse (i.e., based on legislation that provides for a transfer of maintenance claims to a public authority making social assistance payments to the maintenance creditor).

*Does the Lugano Convention apply to D's lawsuit?*

### **Case 7**

G AG (domiciled in Germany) and U Ltd (domiciled in the United Kingdom) concluded a contract on the sale of crude oil. The contract contained an arbitration clause in favour of an arbitral tribunal seated in Zurich. Under the contract, each party had to designate a member of the arbitral tribunal. U claimed that the oil delivered by G was contaminated, and initiated arbitral proceedings. G refused to designate a member of the arbitral tribunal. Therefore, U wants to initiate court proceedings in Zurich for the appointment of an arbitrator.

*Which rules govern the jurisdiction of the Zurich court?*

G brings an action for negative declaration against U in a German court. The German court considers the arbitration clause to be invalid and issues a judgment on the merits in favour of G.

*Which rules govern the recognition of the German judgment in Switzerland?*