Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 18 October 2017[1]

Case C-467/16

Brigitte Schlömp
v
Landratsamt Schwäbisch Hall

(Request for a preliminary ruling from the Amtsgericht Stuttgart (Local Court, Stuttgart, Germany)

(Area of freedom, security and justice — Judicial cooperation in civil matters — Lugano II Convention — Articles 27 and 30 — *Lis pendens* — Concept of 'court')

1. The question at the heart of the present matter is straightforward: is a 'court' seised for the purposes of *lis pendens* under the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, which was approved on behalf of the Community by Council Decision 2009/430/EC of 27 November 2008 (OJ 2009 L 147, p. 1) ('the Lugano II Convention') when an application with respect to maintenance obligations is lodged before a conciliation authority, as is obligatorily required by national procedural law? This question for a preliminary ruling referred by the Amtsgericht Stuttgart (Local Court, Stuttgart, Germany) provides the Court with a rare opportunity to interpret provisions of the Lugano II Convention.

Legal framework

International law

2. Pursuant to Article 5 in Title II ('Jurisdiction'), Section 2 ('Special jurisdiction'), of the Lugano II Convention:

'A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued:

…

2. in matters relating to maintenance:

(a) in the courts for the place where the maintenance creditor is domiciled or habitually resident; …'

3. Section 9 of Title II of the Lugano II Convention is devoted to '*Lis pendens* – related actions' and comprises Articles 27 to 30 of that convention.

1 Original language: English.

4. Article 27 of the Lugano II Convention reads as follows:

‘1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different States bound by this Convention, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.’

5. According to Article 30 of the same convention:

‘For the purposes of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or

2. if the document has to be served before being lodged with the court at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.’

6. Article 62 of the Lugano II Convention, which is to be found in Title V (‘General Provisions’), stipulates that:

‘For the purposes of this Convention, the expression “court” shall include any authorities designated by a State bound by this Convention as having jurisdiction in the matters falling within the scope of this Convention.’

7. Title VII of the Lugano II Convention, entitled ‘Relationship to Council Regulation (EC) No 44/2001 [2] and other instruments’ includes Article 64, which reads as follows:

‘1. This Convention shall not prejudice the application by the Member States of the European Community of the Council Regulation [No 44/2001], as well as any amendments thereof, of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on 27 September 1968, and of the Protocol on interpretation of that Convention by the Court of Justice of the European Communities, signed at Luxembourg on 3 June 1971, as amended by the Conventions of Accession to the said Convention and the said Protocol by the States acceding to the European Communities, as well as of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Brussels on 19 October 2005.

2. However, this Convention shall in any event be applied:

(a) in matters of jurisdiction, where the defendant is domiciled in the territory of a State where this Convention but not an instrument referred to in paragraph 1 of this Article applies, or where Articles 22 or 23 of this Convention confer jurisdiction on the courts of such a State;

2 Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (JO 2001 L 12, p. 1)

(b) in relation to *lis pendens* or to related actions as provided for in Articles 27 and 28, when proceedings are instituted in a State where the Convention but not an instrument referred to in paragraph 1 of this Article applies and in a State where this Convention as well as an instrument referred to in paragraph 1 of this Article apply;

…'

Swiss Civil Procedure Code

8. Article 62(1) of the Schweizer Zivilprozessordnung (Swiss Civil Procedure Code, 'the Civil Procedure Code')[3] deals with the start of lis pendens and is worded as follows:

'A case becomes pending when an application for conciliation, an action, an application, or a joint request for divorce is filed.'

9. According to Article 197 of the Civil Procedure Code[4]:

'Litigation shall be preceded by an attempt at conciliation before a conciliation authority.'

10. Article 209 of the Civil Procedure Code, entitled 'Authorisation to proceed' provides the following:

'(1) If no agreement is reached, the conciliation authority records this fact and grants authorisation to proceed:

…

(b) to the plaintiff …

(3) The plaintiff is entitled to file the action in court within three months of authorisation to proceed being granted.

…'

Facts, procedure and question referred

11. Ms Schlömp, who resides in Switzerland, is the daughter of Ms H. S., who receives supplementary social assistance from the Landratsamt Schwäbisch Hall (administrative authority of the district of Schwäbisch Hall) in Germany because of her care requirements.

12. Under German law, officially approved benefits are to be provided by the bodies responsible for social welfare, which may claim back those benefits from children of recipients by way of actions for recovery, subject to ability to pay.

3 To be found in Part 1 ('General Provisions'), Title 4 ('Pendency and Effects of Withdrawal of the Action') of that code.

4 To be found in Part 2 ('Special provisions'), Title 1 ('Attempt at conciliation'), Chapter 1 ('Scope of application and conciliation authority') of that code.

13. In order to assert a claim for recovery, the Landratsamt Schwäbisch Hall lodged an application for conciliation in regard to Ms Schlömp with the conciliation authority ('Schlichtungsbehörde'), competent under Swiss law, of the Friedensrichteramt des Kreises Reiat, Kanton Schaffhausen (Magistrate's Office, District of Reiat, Canton of Schaffhausen, Switzerland, the 'Friedensrichteramt'), on 16 October 2015. In the application for conciliation, a minimum contribution of EUR 5 000 was requested, subject to corresponding amendment of the claim in the event of full provision of information by Ms Schlömp.

14. Since the parties in those proceedings could not reach a settlement, the Friedensrichteramt issued an authorisation to proceed on 25 January 2016 that was delivered to the legal representatives of the Landratsamt Schwäbisch Hall on 26 January 2016.

15. On 11 May 2016, the claim against Ms Schlömp for payment of a minimum maintenance amount and provision of additional information was brought before the Kantonsgericht Schaffhausen (Cantonal Court, Schaffhausen, Switzerland).

16. In the meantime, i.e. after the initiation of the conciliation procedure but before bringing the case before the Kantonsgericht Schaffhausen (Cantonal Court, Schaffhausen), by written pleadings dated 19 February 2016, initially received at the Amtsgericht (Familiengericht) Schwäbisch Hall (Local Court (Family Court), Schwäbisch Hall, Germany) on 22 February 2016, Ms Schlömp had lodged an application for a declaration of non-liability of maintenance obligations deriving from transferred rights.

17. The Familiengericht Schwäbisch Hall (Family Court, Schwäbisch Hall), seised under Article 3(a) and/or (b) of Council Regulation (EC) No 4/2009,[5] declared by order of 7 March 2016 that it lacked territorial jurisdiction and referred the proceedings to the Amtsgericht (Familiengericht) Stuttgart (Local Court (Family Court, Stuttgart), received at the latter on 21 March 2016.

18. Following delivery of the application to the Landratsamt Schwäbisch Hall on 26 April 2016, it requested, on 17 May 2016, the dismissal of the application since the situation of *lis pendens* in the proceedings brought in Switzerland precluded consideration of the application by the Amtsgericht (Familiengericht) Stuttgart (Local Court (Family Court), Stuttgart), for which reason the German court had to stay proceedings in accordance with Article 27(1) of the Lugano II Convention.

19. Ms Schlömp opposes any stay of the proceedings on the ground that the Schlichtungsbehörde is not a 'court' within the meaning of the Lugano II Convention.

20. It is in the context of these proceedings that, by order of 8 August 2016, received at the Court on 22 August 2016, the Amtsgericht Stuttgart (Local Court, Stuttgart) referred the following question for a preliminary ruling:

'Is a conciliation authority under Swiss law also covered by the term "court" within the scope of Articles 27 and 30 of the [Lugano II Convention]?'

21. The parties to the main proceedings submitted written observations, as did the Government of Switzerland and the European Commission. Ms Schlömp, the Government of Switzerland and the European Commission moreover presented oral argument at the hearing on 5 July 2017.

5 Regulation of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009 L 7, p. 1).

Analysis

22. By its question whether a Schlichtungsbehörde under Swiss law is covered by the term 'court' within the scope of Articles 27 and 30 of the Lugano II Convention, the referring court in essence seeks to ascertain whether in a case such as the one in the main proceedings a court has been seised within the meaning of Article 27(1) of the Lugano II Convention.

Preliminary remarks

23. The Court's case-law on the Lugano regime is somewhat sparse,[6] given that there was no jurisdiction with respect to the 1988 Lugano Convention[7] and that there have only been a few cases since the Lugano II Convention's entry into force on 1 January 2010.[8] The aim of the Lugano II Convention being to strengthen legal and economic cooperation by extending the principles laid down in Regulation No 44/2001[9] to the contracting parties, that convention is to be seen against the background of a constant interplay between the Brussels regime and the Lugano regime.

24. The Court has thus previously held that the purpose of the Lugano II Convention is the same as that of Regulation No 44/2001. Their provisions implement the same system, in particular by using the same rules of jurisdiction which ensures consistency between the two legal instruments.[10]

25. Inasmuch as Regulation No 44/2001 replaces the Brussels Convention,[11] the interpretation provided by the Court in respect of the provisions of that convention is valid also for those of that regulation, whenever the provisions of those Union instruments may be regarded as equivalent.[12] The same applies to Regulations No 44/2001 and No 1215/2012.[13]

26. In my view, the same parallelism of interpretation should also, in principle, apply between the 'Brussels regime', that is to say the Brussels Convention and Regulations No 44/2001 and No 1215/2012, and the Lugano II Convention. I am well aware of the fact that, contrary to the Brussels regime, the Lugano II Convention does not only comprise EU Member States. Nevertheless, given that the rationale and clearly-defined subject matter of the Lugano II Convention clearly converge with those of the Brussels regime,[14] I do not see how one should not, as a matter of principle, draw analogies between equivalent provisions of the Lugano II Convention and Regulations No 44/2001 and No 1215/2012.

6 In Opinion 1/03 (*New Lugano Convention*) of 7 February 2006 (EU:C:2006:81), the Court held that the conclusion of the Lugano II Convention fell entirely within the sphere of exclusive competence of the (then) European Community. In judgment of 4 December 2014, *H* (C-295/13, EU:C:2014:2410, paragraph 32), the Court dealt with the delimitation between the scopes of application between Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) one the one hand and Regulation No 44/2001 and the Lugano II Convention on the other and held that, as regards this delimitation, the latter two instruments are to be interpreted in the same manner.

7 Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (88/592/EEC) (OJ 1988 L 319, p. 9).

8 It should be specified that the Lugano II Convention entered into force for the European Union, Denmark (which is a party in its own right due to its opt-out in civil matters) and Norway on that date. As for Switzerland, the entry into force was a year later on 1 January 2011. To complete the picture, with respect to Iceland, the convention entered into force on 1 May 2011.

9 Which has in the meantime been superseded by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

10 See Opinion 1/03 (*New Lugano Convention*) of 7 February 2006 (EU:C:2006:81, paragraph 152). This is furthermore reflected in recital 4 to Council Decision of 27 November 2009 concerning the conclusion of the Lugano II Convention (2009/430/EC) (OJ 2009 L 147, p. 1) where it is stated that in the light of the parallelism between the Brussels and the Lugano Convention regimes, the rules of the Lugano Convention should be aligned with those of Regulation No 44/2001 in order to achieve the same level of circulation of judgments between the EU Member States and the EFTA States concerned.

11 Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), as amended by successive conventions on the accession of further Member States to that convention.

12 See judgment of 16 June 2016, *Universal Music International Holding* (C-12/15, EU:C:2016:449, paragraph 22 and the case-law cited).

13 See judgment of 16 November 2016, *Schmidt* (C-417/15, EU:C:2016:881, paragraph 26).

14 Moreover the three non-EU States which are bound by that convention are all closely related with the EU internal market, either as members of the European Economic Area (Iceland and Norway) or through extensive bilateral agreements (Switzerland).

27. Moreover, Article 1 of Protocol 2 to the Lugano II Convention on the uniform interpretation of the Convention and on the Standing Committee [15] states that any court applying and interpreting that convention is to pay due account to the principles laid down by any relevant decision concerning the provisions or any similar provisions of the 1988 Lugano Convention and the instruments referred to in Article 64(1) of the Lugano II Convention rendered by the courts of the States bound by that convention and by the Court of Justice. Article 64(1) of the Lugano II Convention refers to Regulation No 44/2001. I infer from this a legal obligation for the courts concerned, including the Court of Justice, to ensure a converging interpretation of equivalent provisions. [16]

Applicability of the Lugano II Convention

28. Pursuant to Article 64(2)(b) of the Lugano II Convention, that convention is in any event to be applied in relation to *lis pendens* or to related actions as provided for in Articles 27 and 28, when proceedings are instituted in a State where that convention but not an instrument referred to in Article 64(1) of that convention applies and in a State where that convention as well as an instrument referred to in Article 64(1) of that convention apply.

29. Article 64(1) of the Lugano II Convention in turn refers to Regulation No 44/2001, as well as any amendments thereof.

30. At the time of the drafting and subsequent adoption of the Lugano II Convention, Regulation No 44/2001 covered maintenance obligations. The fact that Regulation No 4/2009, which was subsequently adopted, [17] is not mentioned in Article 64(1) of the Lugano II Convention, is therefore immaterial. [18]

Lis pendens

31. As is apparent from the reference for a preliminary ruling, the two procedures are congruent in that they involve the same cause and object of action between the two parties. The cause of action comprises the facts and rule of law relied on as the basis of the action [19] and the object of the action means the end that the action has in view. [20] It is sufficient that the actions have, in essence, the same subject matter: the claims are not required to be entirely identical. [21] The converse situation of an

15 OJ 2007 L 339, p. 27.

16 This is also reflected in the final recital to Protocol 2, according to which the High Contracting Parties desire to prevent divergent interpretations and to arrive at an interpretation as uniform as possible of the provisions of the Lugano II Convention and of Regulation No 44/2001 which are substantially reproduced in the Lugano II Convention.

17 According to Article 3(1)(a) of Regulation No 4/2009, in matters relating to maintenance obligations in Member States, jurisdiction lies with the court for the place where the defendant is habitually resident.

18 The reference to Regulation No 44/2001 should therefore be understood so as to cover also Regulation No 4/2009, given that Article 68(1) of Regulation No 4/2009 stipulates that that Regulation modifies Regulation No 44/2001 by replacing the provisions of the latter regulation applicable to matters relating to maintenance obligations. This is also reflected in recital 44 of Regulation No 4/2009, according to which Regulation No 4/2009 should amend Regulation No 44/2001 by replacing the provisions of the latter regulation applicable to maintenance obligations and, subject to the transitional provisions of Regulation No 4/2009, Member States should, in matters relating to maintenance obligations, apply the provisions of Regulation No 4/2009 on jurisdiction, recognition, enforceability and enforcement of decisions and on legal aid instead of those of Regulation No 44/2001 as from the date on which Regulation No 4/2009 becomes applicable.

19 See judgment of 6 December 1994, *Tatry* (C-406/92, EU:C:1994:400, paragraph 39). It should be noted that neither the English nor the German language version of Article 27 of the Lugano II Convention differentiates, unlike some of the other language versions, between the 'cause' and the 'object' of an action. The English language version limits itself to 'cause', whereas the German language version speaks of the same 'Anspruch'.

20 See judgment of 6 December 1994, *Tatry* (C-406/92, EU:C:1994:400, paragraph 41).

21 See judgment of 8 December 1987, *Gubisch Maschinenfabrik* (144/86, EU:C:1987:528, paragraph 17). Thus, on the basis of those criteria, the Court has affirmed the existence of identical claims where the first claim sought to enforce a contract and the second claim, by contrast, sought the rescission or discharge of that contract: see judgment of 8 December 1987, *Gubisch Maschinenfabrik* (144/86, EU:C:1987:528, paragraph 16).

action for a declaration of non-liability being followed by an action for damages has also been the subject of a ruling.[22] In that respect, the latter action has the same object as the former, since the question of the existence or nonexistence of liability is the focus of the proceedings. The different heads of claim do not mean that the two legal actions have different objects.[23]

32. Therefore, both the claim in Switzerland for payment and provision of information and the application for a declaration of non-liability in Germany are based on the same life circumstances, that is to say, the same maintenance relationship, resulting from a concrete family relationship, involving the question whether and to what extent Ms Schlömp has maintenance obligations deriving from transferred rights.

33. Leaving aside the Lugano II Convention, under Swiss law, a court has been seised in the case at issue, so there is clearly a situation of *lis pendens*. Pursuant to Article 62(1) of the Civil Procedure Code, a case becomes pending inter alia when either an application for conciliation or an action is filed. Article 9(2) of the Swiss Federal Code on Private International Law furthermore states that, to determine when a court in Switzerland is seised, the date of the first act necessary to institute the action is to be decisive and that the initiation of conciliation proceedings is to suffice.

34. But what about the provisions on *lis pendens* under the Lugano II Convention?

35. The rationale of these provisions is to prevent irreconcilable judgments originating in different contracting States.[24] To this end, a mechanism which aims to limit the risk of having parallel procedures in different contracting States is put in place in the Lugano II Convention.

36. Pursuant to Article 27(1) of the Lugano II Convention, where proceedings involving the same cause of action and between the same parties are brought in the courts of different States bound by that convention, any court other than the court first seised is of its own motion to stay its proceedings until such time as the jurisdiction of the court first seised is established. Article 27(2) of the Lugano II Convention in turn stipulates that where the jurisdiction of the court first seised is established, any court other than the court first seised is to decline jurisdiction in favour of that court.

37. Article 27 of the Lugano II Convention therefore contains a 'first come first served system' in favour of a court first seised. That provision instructs a court not first seised to stay proceedings.

38. The question as to *when* a court is first seised is addressed by Article 30 of the Lugano II Convention.

39. That provision stipulates in its point 1 that a court is deemed to be seised at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant.

40. The previous system of establishing *lis pendens* under the 1988 Lugano Convention did not contain a provision comparable to Article 30 of the Lugano II Convention. There was no independent definition of the moment in which an action should be considered to be pending before a court. As a consequence, it was for national law to determine the moment at which a court was to be considered to have been seised of a case.[25]

22 See judgment of 6 December 1994, *Tatry* (C-406/92, EU:C:1994:400, paragraph 43).

23 Ibid.

24 See Mabillard, R., in Oetiker, Chr., Weibel, Th. (eds), *Basler Kommentar Lugano-Übereinkommen*, 2nd ed., Helbing Lichtenhahn Verlag, Basel, 2016, Art. 27, point 1.

25 See judgment of 7 June 1984, *Zelger* (129/83, EU:C:1984:215, paragraph 15).

41. Under the Lugano II Convention [26] there is therefore now an autonomous definition of the moment when a court is first seised.

Conciliation procedure

42. However, neither Article 27 nor Article 30 of the Lugano II Convention contain any indication as to how to proceed in a situation where national law requires a judicial procedure to be preceded by a conciliation procedure.

43. While the wording of those provisions ('the court first seised' and 'lodged with the court') may appear clear, my view is that one should not schematically focus on the term 'court', but rather interpret the procedure which is established by those provisions in a functional manner.

44. In such a situation, I do not think that one should take the view that it is only for national law to determine whether there is *lis pendens*. As has been seen with the introduction of Article 30 of the Lugano II Convention, there is a trend towards further 'autonomising' the provisions on *lis pendens*. Reverting to national law on some outstanding questions would go against that trend.

45. Nor do I think that one should take a formalist and static reading of the term 'court' in Articles 27 and 30 of the Lugano II Convention, with the result of automatically excluding procedures before authorities which do not qualify as a 'court' in the abstract sense of the term.

46. The answer to the problem is, in my view, to be found in the middle of the two possible extremes just described. A functional interpretation should be adopted.

47. One should thus accept a situation of *lis pendens* where, as in the case at issue, a conciliation procedure is an obligatory first step which has to be followed before a case can be brought before a court and where a conciliation procedure and an ensuing procedure before a court are considered as comprising of two separate (and complementary) parts of the judicial procedure. This is in my view the only way to respect the rationale of the Lugano II Convention provisions on *lis pendens*, which is that a court first seised deals with a matter.

48. I therefore submit that it is immaterial whether or not a Schlichtungsbehörde per se constitutes a 'court' in the abstract sense of the term. In a situation such as the one in the case at issue, where that authority issues an authorisation to pursue legal proceedings, what is crucial is that the procedure before it constitutes an integral part of proceedings before a(n) (ordinary) court. Therefore, seising the Schlichtungsbehörde amounts to seising a court within the meaning of Articles 27 and 30 of the Lugano II Convention.

49. Along the line of observations of the Commission, I would, however, like to add a further criterion: if no agreement is reached before the Schlichtungsbehörde and the latter grants authorisation to proceed to the plaintiff, entitling him to file the action in court within three months, there is only *lis pendens* if that plaintiff has undertaken all necessary steps incumbent on him to continue the procedure before a court.

26 Which in this respect incidentally reproduces Article 30 of Regulation No 44/2001. On that provision, see judgment of 4 May 2017, *HanseYachts* (C-29/16, EU:C:2017:343, paragraph 30), where the Court states that the aim of that provision is to reduce the problems and legal uncertainties caused by the wide variety of arrangements which existed in the Member States for determining the time when a court is seised, by means of a substantive rule permitting the easy and standardised identification of that time.

50. It should also be added that Swiss practice and legal writings predominantly follow the proposed functional approach in seeing the moment of seisure of the Schlichtungsbehörde as the determining moment under Articles 27 and 30 of the Lugano II Convention. [27] Moreover, the High Court of Justice of England and Wales (Chancery Division) has also followed this approach in a case involving a Schlichtungsbehörde. [28]

51. In conclusion, therefore, a court within the meaning of Articles 27 and 30 of the Lugano II Convention is seised when in circumstances such as those before the referring court, the Schlichtungsbehörde is seised. Another approach would systematically put at a disadvantage a party wanting to introduce proceedings in a country with a system such as the one in the case at issue. This could pose a problem as far as the equality of arms between two parties is concerned.

52. My proposed answer to the question of the referring court is, therefore, that in a situation such as that in the main proceedings, where a conciliation procedure is an obligatory step which has to be followed before a case can be brought before a court and where a conciliation procedure and an ensuing procedure before a court are considered as comprising two separate parts of the judicial procedure, a court has been seised under Articles 27 and 30 of the Lugano II Convention at the moment the conciliation authority is seised, provided that the plaintiff has undertaken all necessary steps incumbent on him to continue the procedure before a court.

Schlichtungsbehörde as a 'court'?

53. As a consequence, it is not necessary to analyse whether, in abstract terms, a Schlichtungsbehörde, as provided for under Swiss civil procedural law, qualifies as a court within the meaning of Articles 27 and 30 of the Lugano II Convention. The analysis which follows is therefore on a hypothetical basis only.

54. While Ms Schlömp considers that the Schlichtungsbehörde does not constitute a 'court' within the meaning of Articles 27 and 30 of the Lugano II Convention, the Swiss Government considers this to be the case. As for the Commission, that institution does not reply to this question in abstract terms, given that it focuses its intervention merely on the question whether or not there is a situation of *lis pendens*.

55. It is necessary at this stage to take a closer look at the competencies and types of decisions of the Schlichtungsbehörde. Pursuant to the relevant provisions of the Swiss Civil Procedure Code, there are four possible ways to end a conciliation procedure: [29] first, an agreement reached between the parties [30] has the effect of a binding decision. [31] Secondly – as in the case at issue – if no agreement is reached between the parties, the Schlichtungsbehörde records this fact and grants authorisation to proceed. [32] Thirdly, for claims not exceeding 2 000 Swiss francs (CHF), the Schlichtungsbehörde issues a binding judgment of first instance. [33] And fourthly, for claims not exceeding, in general, CHF 5 000 (i.e. for cases like the present one), the Schlichtungsbehörde submits a proposed judgment to the parties, which becomes a binding judgment if the parties do not contest it within 20 days.

27 See Kren Kostkiewicz, J., *LugÜ (Kommentar)*, orell füssli Verlag, Zürich, 2015, Art. 30, point 3; Bucher, A., in Bucher, A. (ed), *Convention de Lugano*, Basel, 2011, Art. 30, point 4; Dasser, F., in Dasser, F., Oberhammer, P. (eds), *Lugano-Übereinkommen (LugÜ)*, 2nd ed., Stämpfli Verlag AG, Bern, 2011, Art. 27, point 21; Mabillard, R., op. cit., Art. 30, point 11. Regarding the functional equivalent in Regulation No 1215/2012, see Fentiman, R., in Magnus, U., Mankowski, P. (eds), *Brussels I bis Regulation*, Verlag Otto Schmidt, Cologne, 2016, Art. 32, point 6. The question at issue is left open by Leible, S., in Rauscher, Th. (ed), *Brüssel Ia-VO*, 4th ed., Verlag Otto Schmidt, Cologne, 2016, Art. 29, point 6.

28 Judgment of 6 August 2014, *Lehman Brothers Finance AG v Klaus Tschira Stiftung GmbH & Anor* [2014] EWHC 2782 (Ch).

29 See Articles 208 to 212 of the Civil Procedure Code.

30 In the form of a settlement, acceptance or unconditional withdrawal of the action, see Article 208(1) of the Civil Procedure Code.

31 See Article 208(2) of the Civil Procedure Code.

32 See Article 209 of the Civil Procedure Code.

33 See Article 212(1) of the Civil Procedure Code.

56. Without it being necessary to define the term 'court' in Articles 27 and 30 of the Lugano II Convention in an abstract manner, it is, I believe, difficult to deny an authority such as the Schlichtungsbehörde such a qualification, for the simple reason that such an authority, which is fully governed by the Civil Procedure Code, issues binding decisions. [34]

57. The Lugano II Convention does not contain a positive definition of what constitutes a 'court', given that, I would submit, that it is almost impossible to come up with one in a succinct legislative text. Neither do Regulations No 44/2001 and No 1215/2012.

58. However, the concept of 'court' in the Lugano II Convention differs from that in Regulations No 44/2001 and No 1215/2012, as that convention contains an article which has no parallel in the latter two instruments: Article 62 of the Lugano II Convention states that the expression 'court' is to include any authorities designated by a State bound by that convention as having jurisdiction in the matters falling within the scope of that convention. According to the Explanatory Report of Professor Pocar on the Lugano II Convention, [35] that wording of Article 62 of the Lugano II Convention is intended to give a broader meaning to the term 'court' than the comparable provision under the 1988 Lugano Convention. [36] In fact, Article Va of Protocol 1 [37] to the 1988 Lugano Convention had expressly included the Danish, Icelandic and Norwegian administrative authorities under the term 'courts'. As the Explanatory Report of Professor Pocar on the Lugano II Convention specifies, '[u]nlike the specific provision in Article Va of Protocol 1 – and the parallel provision in Article 62 of the Brussels I Regulation – the new Article 62 has a general character which will cover even administrative authorities other than those that currently exist'. [38]

59. Ergo, now, under the Lugano II Convention, the 'courts' that are to apply the convention are identified by the function they perform, rather than by their formal classification in national law. [39] Although it appears to me that the rationale of Article 62 of the Lugano II Convention is to include under the term 'court' those bodies which, in some States, are completely outside the judicial system, [40] it cannot be denied that that provision was intended to be construed widely and that Member States are entitled to designate authorities as having jurisdiction in the matters falling within the scope of the Lugano II Convention. [41]

60. As a consequence, I would submit that an authority vested with the competences of a Schlichtungsbehörde and which is designated by a Member State to perform judicial functions, does indeed constitute a 'court' within the meaning of Articles 27 and 30 of the Lugano II Convention.

34 Certainly in the first and third situations described in the previous paragraph, that is to say (1) when an agreement is reached: settlement, acceptance or unconditional withdrawal of the action, which by virtue of Article 208(2) of the Code of Civil Procedure is binding or (2) when claims do not exceed CHF 2 000.

35 Obviously, this report is explanatory in nature and not legally binding. It is, however, being resorted to in support of argument in Court decisions, see judgment of 21 May 2015, *El Majdoub* (C-322/14, EU:C:2015:334, paragraph 34) or by Advocates General, see, by way of example, Opinion of Advocate General Jääskinen in *CDC Hydrogen Peroxide* (C-352/13, EU:C:2014:2443, footnote 115).

36 See Explanatory Report of Professor Pocar on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 (OJ 2009 C 319, p. 1, paragraph 175).

37 On certain questions of jurisdiction, procedure and enforcement.

38 See Explanatory Report of Professor Pocar, op. cit.

39 Ibid.

40 And are not, as in the case of a Schlichtungsbehörde, in some way or another integrated into the judicial system.

41 As a consequence, it is not impossible that a body which does not qualify as a 'court' under the Brussels regime, could qualify as one under the Lugano II Convention. On the concept of 'court' under Regulation No 1215/2012, see judgment of 9 March 2017, *Pula Parking* (C-551/15, EU:C:2017:193) and Opinion of Advocate General Bobek in *Pula Parking* (C-551/15, EU:C:2016:825, point 68 et seq.).

Conclusion

61. In the light of the foregoing considerations, I propose to answer the question of the Amtsgericht Stuttgart (Local Court, Stuttgart, Germany) as follows:

In a situation such as that in the main proceedings, where a conciliation procedure is an obligatory step which has to be followed before a case can be brought before a court and where a conciliation procedure and an ensuing procedure before a court are considered as comprising two separate parts of the judicial procedure, a court has been seised under Articles 27 and 30 of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, which was approved on behalf of the Community by Council Decision 2009/430/EC of 27 November 2008, at the moment the conciliation authority is seised, provided that the plaintiff has undertaken all necessary steps incumbent on him to continue the procedure before a court.