Dear Readers – Happy New Year!

For a fresh start to the year, I wanted to highlight a recent judgment (dated 20 December 2017) of the Court of Justice of the European Union (the CJEU) which interprets the jurisdictional and lis pendens requirements contained in the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Lugano Convention). As most of you know, the Lugano Convention aims at extending the Brussels I Regulation’s regime on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU to Iceland, Norway and Switzerland.

With respect to the lis pendens rules, Article 27 of the Lugano Convention provides that “[w]here 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“.
In the case at hand, the German authorities initiated legal proceedings in Switzerland against Ms Schlömp, who is domiciled in Switzerland and whose mother was cared for in a German hospice. The proceedings were aimed at recovering certain costs incurred by the German authorities for the treatment of Ms Schlömp’s mother.

The German authorities lodged an application before a conciliation authority as Swiss judicial procedural law requires plaintiffs to attempt to settle a civil case through conciliation before initiating a litigation phase. After the conciliation phase failed (but before the start of the litigation phase before the Swiss courts), Ms Schlömp filed an action before a German Court seeking to obtain a negative declaration to be freed from her reimbursement obligation.

The German court, however, was uncertain whether the Swiss conciliation authority was a “court” for the purpose of Article 27 of the Lugano Convention and whether the initiation of conciliation proceedings in Switzerland pre-empted the German court from exercising jurisdiction. In order to clarify this matter, the German court referred this issue to the CJEU for a preliminary reference.

Ms Schlömp objected to the application of Article 27 of the Lugano Convention on the ground that the Swiss conciliation authority was not a “court” under Article 62 of the Lugano Convention which provides that the word “court” includes “any authorities designated by a State bound by [the Lugano Convention] as having jurisdiction in the matters falling within [its] scope”.

The CJEU found, however, that a “court” is to be defined by the “functions” its carries out rather than its formal classification under national law. Examining the “functions” of the Swiss conciliation authority, the CJEU found (i) that the failure to comply with the obligation to recourse to conciliation prior to initiating a civil action may result in
the inadmissibility of the legal proceedings; and (ii) that the conciliation proceedings may result in a binding judgment, a draft judgment (which may become final in the absence of challenge) or the signing of a conciliation agreement. Based on those elements, the CJEU concluded that the Swiss conciliation authority was therefore a “court” for the purposes of the Lugano Convention.

Consequently (and since the conciliation proceedings were initiated prior to the claim brought before the German court), the German court will have to stay the proceedings pending before it.

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For the sake of completeness, I note that, earlier in 2017, the CJEU rendered a judgment in a closely similar case in which it was asked to examine whether interlocutory proceedings brought before the courts of one EU Member State pre-empted legal proceedings to be brought before the courts of the other Member States in a dispute involving the same parties and the same cause of action.

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