Czech Supreme Court applies Lugano Convention

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(→ unalex CZ-212)

Legal conclusions of the Supreme Court

Article 5(3) and Article 6(1) Lugano II Convention[1], in cases of delictuous or quasi-delictuous liability provide for two independent sets of jurisdiction rules, both rules representing a jurisdiction of choice for the claimant.

Delictuous or quasi-delictuous liability, as provided for in Article 5(3) Lugano II Convention, also comprises claims for unjust enrichment received as a result of conduct contrary to good morals or based on a decision of a null resolution of a general meeting (i.e. by means other than as a result of an invalid contract or contract that had ceased to exist). Similarly, damage claims resulting from a breach of obligation of a controlling person and statutory suretyship of a member of a statutory body of a controlling person (as per Article 66(a)(15) Czech Commercial Code) also fall within the category of delictuous or quasi-delictuous liability.

The court competent to try a case related to delictuous or quasi-delictuous liability (i.e. based on Article 5(3) Lugano II Convention, cannot assess the matter based on a different legal title, e.g. as a claim arising from a contract, unless it is also competent to try the matter under that other legal title, i.e. unless it is also competent under Article 5(1) Lugano II Convention.

On 28 August 2019, the Supreme Court of the Czech Republic decided on a matter that quite rarely appears before the Czech courts involving the application of the Lugano II Convention. The matter is registered with the Supreme Court under file No. 27 Cdo 4352/2017. The claimant in the case is a former major player in the Central European or even European coal mining industry, unique in the Czech Republic, a major employer in the Czech Republic, now insolvent. Its insolvency proceedings, the fate of coal mining in the Czech Republic and also its disputes with former shareholders and managers involving large sums of money are monitored by the Czech media. The sum involved in this case exceeds CZK 24 billion, i.e. almost a billion EUR. With the various aspects taken into account, it is a rare case for the Czech courts in many ways.

Factual background of the case

The case relates to a damages and unjust enrichment claim filed by a Czech company in insolvency against a legal entity domiciled in the UK (the first defendant) and a Swiss resident (the second defendant). The second defendant was also a member of the statutory body of the first defendant. The claimant was a subsidiary of the first defendant.

The claimant sought damages from the first defendant who is a shareholder of the claimant for a breach of law and conduct against good morals resulting from a decision on the distribution of profit and other funds in the form of dividends. According to the claimant, by doing so, the first defendant received unjust enrichment at the expense of the claimant. Since according to the claimant, the second defendant was the ultimate controlling person and beneficiary of the amount, the second defendant also received unjust enrichment at the expense of the claimant. The claimant further argued that it was due the claimed amount as damages caused to it by the defendant in their position of controlling persons. Finally, the claimant also argued that the second defendant, in the position of a member of its statutory body, breached the duty of care and loyalty vis-à-vis the claimant and, as a result, is obliged to compensate the claimant for the damage caused in this way.

The matter was filed before a Regional court in Ostrava, Czech Republic. It seems from the publicly available text of the decision of the Supreme Court that the first defendant at that point in time did not argue either on jurisdiction or on the merits of the case. The second defendant, being a Swiss resident, raised, among others, an objection of the lack of international jurisdiction of the courts of the Czech Republic and suggested the proceedings be discontinued accordingly. The first as well as the second instance courts dismissed the objection on jurisdiction presented by the second defendant and following an extraordinary appeal of the second defendant, the matter ended up with the Supreme Court of the Czech Republic.

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[1] Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters done at Lugano on 30 October 2007.

Assessment of Jurisdiction of Czech Courts

1. Applicable Jurisdiction Rules

The extraordinary appeal of the second defendant comprised of numerous arguments, including those relating to the wrongful application of the Lugano II Convention. With respect to the application of the Lugano II Convention, the second defendant argued that the courts incorrectly interpreted the provisions of the Lugano II Convention on the existence of international jurisdiction of the courts of the Czech Republic and argued that Czech courts do not and may not have jurisdiction to adjudicate the matter in respect of the second defendant.

First, the Supreme Court, similar to the lower courts, had to deal with the issue of applicable law that would determine whether or not the Czech courts had jurisdiction to adjudicate the matter before them. In that context, it had to deal with the applicability of the Lugano II Convention and the manner and rules of its interpretation. The Supreme Court, as well as the lower courts, quite correctly came to the conclusion that the Lugano II Convention must be interpreted in the same way as the same rules contained in the Brussels I Recast Regulation[2]. The Supreme Court further confirmed that the case law of the CJEU on interpreting the Brussels Convention[3], the Brussels I Regulation[4] and the Brussels I Recast Regulation is also fully applicable to the interpretation of those rules.

This can no doubt be determined from the explicit wording of the Preamble of the Lugano II Convention as well as its Protocol 2 on the uniform interpretation of the Convention that, for the purposes of the interpretation of the rules of the Lugano II Convention, one can refer to the Brussels Convention and the Brussels I Regulation. The jurisdictional provisions of the Lugano II Convention, both relating to the general rules as well as rules of special jurisdiction and protective rules, are almost identical not only to those contained in the Brussels I Regulation but also in the Brussels I Recast Regulation. Therefore, from that perspective, it is also possible to apply the case law of the CJEU, interpreting all three instruments to the pertinent provisions of the Lugano II Convention.

The Czech courts seized by the claimant were the courts of the domicile of the claimant. It follows not only from the case law of the CJEU but also from the commentaries and most importantly from the preamble of the Brussels I Recast Regulation itself that one of the fundamental principles of determining jurisdiction of the courts of a pertinent country is the protection of the defendants as the weaker party. This principle means not only that the rules enabling the claimant to sue elsewhere than in the defendant's domicile are to be narrowly interpreted but an interpretation of the rules on jurisdiction that would allow the claimant to sue in its own courts should also be just as strict or even stricter.[5] This same principle should be respected when applying the rules of the Lugano II Convention.

2. Determination of Competent Courts

The Czech courts, having found the applicable legislation to determine their jurisdiction, now had the task to review and assess whether or not indeed they had jurisdiction to decide the matter, despite the fact that they are the courts of the claimant. The Supreme Court split the jurisdictional matters at hand into two groups based on the nature of the claim: a) claim relating to breach of law and conduct against good morals resulting in damages and unjust enrichment and b) compensation of damages for conduct that breached the duties of a member of a statutory body.

a) Jurisdiction relating to the claim for damages and unjust enrichment caused by undue payment of dividends

With respect to the claim relating to the breach of law and conduct against good morals resulting in undue payment of dividends, the Supreme Court confirmed that such a claim for damages as the present case, i.e. a claim for damages caused by a breach of the controlling entity's (i.e. the first defendant) obligations and a claim for statutory liability of a member of a controlling person's statutory body (i.e. the second defendant) falls within the definition of a claim for "delictuous or quasi-delictuous" liability[6].

As regards the forum, it further concluded that the claimant was free to choose a forum where the harmful event occurred even in cases where there are more than one potential offenders (defendants). The Supreme Court concluded that jurisdiction may be established under Article 5(3) of the Lugano II Convention and the Brussels I Regulation Recast also against several defendants residing in different Member States, or signatory states as the case may be, where the legal basis of the action is such delictuous or quasi-delictuous liability. The determining indicator is the place where the harmful event occurred or may occur and as such points also to the forum of the place of the event or act causing the damage, i.e. the place of origin of such damage. In this connection the Supreme Court referred to several cases of the CJEU[7]. The Supreme Court in concurrence with previous CJEU case law confirmed that this Article 5(3) of the above cited pieces of legislation is a separate and independent jurisdiction rule that may be applied at the discretion of the claimant even if other possible

[2] 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.

[3] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968.

[4] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[5] Dickinson A., Lein, E.: The Brussels I Regulation Recast, Oxford University Press 2015, First Edition, para 1.61, page 22.

[6] The Supreme Court in this connection referred, among others to the following CJEU case law: judgment of 18 July 2013 , in Case C-147/12, *ÖFAB* and the judgment of 13 March 2014, in Case C-548/12, *Marc Brogsitter* and by analogy applied conclusions of the CJEU in case C-519/12, *Hochtief Solution AG.*

[7] For example the judgment of the CJEU of 10 June 2004 in Case C-168/02, *Kronhofer,* the judgment of the CJEU of 21 April 2016, in Case C-572/14, *Austro-Mechana* or the judgment of the CJEU of 16 June 2016, in Case C-12/15, *Universal Music International Holding*.

jurisdiction rules are available to the claimant, such as e.g. Article 6(1) of the Lugano II Convention. Therefore, in such cases, despite the general aim of the various legal instruments to avoid the forum of the claimant, the courts of the Czech Republic were correctly chosen by the claimant and have jurisdiction over both defendants.

b) Breach of the obligations of a member of the board of directors of the claimant by the second defendant

The Supreme Court concluded that the claim relating to a breach of obligations of a member of a board of directors falls by its nature under Article 5(1) of the Lugano II Convention, i.e. it is in its nature a claim arising from a breach of contractual obligation. The Supreme Court further held that it is not possible to establish international jurisdiction of the Czech courts for matters relating to contractual liability based on jurisdiction determined pursuant to Article 5(3) of the Lugano II Convention relating to the rules applicable to delictuous or quasi-delictuous liability. This must be the case even though both claims form a part of the same litigation, i.e. all claims are raised in one action against the same defendants.[8] This conclusion of the Supreme court was the only one where its legal assessment differed from that of the lower courts and where it therefore felt obliged to change legal conclusions of the lower courts and accept the objections of the appellant.

Nevertheless, the Supreme Court still concluded that the lower courts correctly assessed their jurisdiction in the matter despite the flawed legal assessment. The Supreme Court considered the fact that the second defendant performed the obligations arising from the function of a member of the board of directors predominantly in the Czech Republic and concluded that the courts of the Czech Republic have jurisdiction also to hear the part of the action relating to the breach of the obligations of the function of a member of the board of directors (pursuant to Article 5(1) of the Lugano II Convention).

In the end, despite the generally applied and respected principle of the narrow interpretation of jurisdiction rules allowing for the forum of the claimant to be the competent forum, the Supreme Court confirmed the jurisdiction of the Czech courts for both types of claim.

3. Assessment

The Supreme Court confirmed the judgement of the appellate court and used CJEU case law extensively to justify its conclusions. It indeed appears that most of the matters in the reviewed case were decided clearly and with knowledge and the appropriate manner of interpretation and application of the Lugano II Convention as well as the applicable CJEU case law.

The decision of the Supreme Court is certainly well reasoned and logical in all aspects. Given all the effort the Supreme Court took to justify all its conclusions, it may be slightly unfortunate that it did not deal in more detail and depth with the potential implications and aftermath of the *Holterman* case[9]. The Supreme Court quite rightly referred to this case when assessing the nature of the claim against a member of a statutory body. However, this case further develops previous CJEU case law regarding the definition and understanding of the term "employee" within the meaning and context of European legislation and opened another route for the Supreme Court worth exploring when it comes to assessing the potential liability of a statutory body.

In the *Holterman* case, the CJEU elaborated on potential effects of a statutory body being understood as an employee under EU legislation and the implications regarding the application of jurisdiction rules in this context. In respect of the nature of the relationship of a company and its directors and the jurisdiction rules stemming therefrom, the conclusions of the CJEU in Case C-47/14, *Holterman Ferho Exploitatie and others* are as follows:

34 It must be stated at the outset that the issue of the application of the special rules for determining jurisdiction, laid down in that section of Regulation No 44/2001, arises in the present case only if Mr Spies von Büllesheim can be considered to be bound, through an 'individual contract of employment' for the purposes of Article 18(1) of that regulation, to the company of which he was a director and manager, and could thus be classified as a 'worker' for the purposes of Article 18(2).

35 It must be noted, first, that Regulation No 44/2001 does not define either 'individual contract of employment' or 'worker'.

36 Secondly, the issue of classifying the connection between Mr Spies von Büllesheim and that company cannot be resolved on the basis of national law (see, by analogy, judgment in Kiiski, C-116/06, EU:C:2007:536, paragraph 26).

37 In order to ensure the full effectiveness of Regulation No 44/2001, in particular Article 18, the legal concepts that regulation uses must be given an independent interpretation common to all the Member States (judgment in Mahamdia, C-154/11, EU:C:2012:491, paragraph 42). […]

48 If, after examining all the factors mentioned above, the referring court were to find that Mr Spies von Büllesheim, in his capacity as director and manager, had a bond with Holterman Ferho Exploitatie through an individual contract of employment for the purposes of Article 18(1) of Regulation No 44/2001, it would be for that court to apply the rules on jurisdiction laid down in Chapter II, Section 5 of Regulation No 44/2001.

[8] The Supreme Court referred to case law of the CJEU, namely the judgment of the CJEU of 10 September 2015, Case C-47/14, *Holterman Ferho Exploitatie and others*, paragraphs 53 and 54, as well as the judgment of the CJEU of 6 October 1976 in Case 14/76, *De Bloos, SPRL v Société en commandite par actions Bouyer*, and the judgment of the CJEU of 13 March 2014 in Case C-548/12, *Marc Brogsitter*, paragraphs 22 to 26.

[9] Case C-47/14, *Holterman Ferho Exploitatie and others.*

49 In the light of all the foregoing considerations, the answer to the first question is that, in a situation such as that at issue in the main proceedings in which a company sues a person, who performed the duties of director and manager of that company, in order to establish misconduct on the part of that person in the performance of his duties and to obtain redress from him, the provisions of Chapter II, Section 5 (Articles 18 to 21) of Regulation No 44/2001 must be interpreted as meaning that they preclude the application of Article 5(1) and (3) of that regulation, provided that that person, in his capacity as director and manager, for a certain period of time performed services for and under the direction of that company in return for which he received remuneration, that being a matter for the referring court to determine.

The CJEU developed its previous case law on the notion and understanding of the term "worker" used in various European legislation[10]. It can be derived from the now constant case law of the CJEU that, regardless of the fact that the person in question is perceived by national legislation as a statutory body and not an employee, such person could be entitled to benefits granted to employees under European legislation, including the benefit of being sued only in the country of his/her domicile. The CJEU specifically concluded in respect of jurisdiction that should the nature of activities of the statutory body in question fall within the definition of an employee, as understood and interpreted under European legislation, the various jurisdiction rules laid down in Article 5 of the Brussels I Regulation may not be applied and the sole jurisdiction to sue such a director pertain to the courts of the place of his domicile as per Article 20(1) of the Brussels I Regulation.

The conclusions of the CJEU can be applied when interpreting the jurisdiction rule relating to employees contained in the Lugano II Convention. The second defendant was a member of a statutory body of the claimant. The claim in part also related to a breach of his duties connected to the performance of his obligations as a member of the statutory body of the claimant.

In this European context, it would have been certainly interesting and worth further investigation for the Supreme Court to plunge into the nature of the relationship between the second defendant and the claimant and investigate whether the second defendant was in fact an employee of the claimant and whether possibly courts of his domicile would have sole jurisdiction over this part of the dispute. Unfortunately, based on the facts of the case and the reasoning as described in the Supreme Court decision, it appears that the Supreme Court did not explore this route, and the nature of the relationship between the second defendant and the claimant from the perspective of its potential labour/employment aspects has been left unaddressed. It is certainly unclear from the publicly available facts of the case whether the second defendant would have fulfilled the criteria laid down by the CJEU to be considered an employee within the meaning of the Lugano II Convention. It may very well be that the conclusions regarding the jurisdiction of the Czech courts would have remained unchanged in any case. However, in light of the general principle of interpreting the provision of the jurisdiction instruments strictly and avoiding the jurisdiction of the courts of the claimant as much as possible, the Supreme Court should have looked into this, should have investigated whether it is possible to avoid jurisdiction of the courts of the claimant. This one omission of the Supreme Court is an unfortunate deficiency in an otherwise well-reasoned and founded decision.

[10] See e.g. judgment in Danosa, C-232/09, EU:C:2010:674, paragraph 39.

Civil Procedure

Court of Justice of the European Union 11 November 2020 – C-433/19 – Ellmes Property Services Limited v. SP

(→ unalex EU-865)

Brussels Ia Regulation 1215/2012[1] **Articles 7(1)(a) and 24(1)** – Jurisdiction, recognition and enforcement of judgments in civil and commercial matters – Exclusive jurisdiction in matters relating to rights in rem in immovable property – Special jurisdiction in matters relating to a contract – Legal action brought by a co-owner seeking an order that another co-owner cease the use, for touristic purposes, of immovable property subject to co-ownership

[1] 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).

1. Point 1 of Article 24 Brussels Ia Regulation 1215/2012 must be interpreted as meaning that an action by which a co-owner of immovable property seeks to prohibit another co-owner of that property from carrying out changes, arbitrarily and without the consent of the other co-owners, to the designated use of his or her property subject to co-ownership, as provided for in a co-ownership agreement, must be regarded as constituting an action 'which has as its object rights *in rem* in