Swiss Supreme Court lowers threshold for forum running under the Lugano Convention

21.08.2019

Violation of Rights, Jurisdiction according to Art. 5(3) Lugano Convention Requesting Declaratory Relief, Acceptance by Appearance

4A_446/2018, 4A_448/2018 Decision of 21 May 2019

Key Take-aways

- **Art. 5(3) Lugano Convention also applies to the request for declaratory relief**
- **The former jurisprudence of the Swiss Supreme Court (SSC) additionally requiring proximity of facts and evidence ("Sach- und Beweisnähe") was abandoned**
- **SSC clarified the mirror image principle (Spiegelbildprinzip)**
- **Acceptance by appearance may already be given, if the defendant makes statements in regards to res iudicata, pendency or material jurisdiction. No acceptance by appearance is given if the defendant objects to domestic jurisdiction**
- **In case a mother company introduces a selective sales system and the daughter companies enforce such a system, jurisdiction is given at the place of the headquarter for mother company and daughter companies**

Summary of the SSC decision

In a recent case decided by the Swiss Supreme Court (SSC) the manufacturer and seller of watch parts A and B both seated in Switzerland and C seated in England ("ABC") terminated their contract with a wholesaler of watch parts seated in England ("D"). Thereafter, D sent a

letter to ABC declaring its intent to file an order at the High Court of Justice in London in case ABC would not continue to deliver watch parts until a certain deadline ("letter before action"). In the following, C asked D for an extension of deadline which was granted by D. However, one day before the deadline expired, ABC filed a claim for declaratory relief at the Commercial Court of Berne.

The SSC decided that the behavior of ABC is not considered as a violation of rights (Art. 2 Swiss Civil Code). Basically, the SSC based its reason on the fact that D was represented by a lawyer and therefore, it was well aware of the possibility of forum running.

Furthermore, the SSC decided on jurisdiction. The convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters "Lugano Convention" applied to the case. According to Art. 5(3) Lugano Convention a person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.

Under Art. 5(3) Lugano Convention a claim can be filed at the place where the harm occurred ("Handlungsort") or at the place where it arose ("Erfolgsort"). Art. 5(3) Lugano Convention also applies to the request for declaratory relief. The former jurisprudence of the SSC additionally requiring proximity of facts and evidence ("Sach- und Beweisnähe") was abandoned.

The SSC took the opportunity to clarify the mirror image principle (Spiegelbildprinzip). It stated that the request for declaratory relief and the mirrored request for action have a congruent matter in dispute. The claimant requesting declaratory relief can generally rely on the same forums as the claimant requesting an action for performance. It is however not correct, that jurisdiction based on Art. 5(3) Lugano Convention for a request for declaratory relief can only be established, if at the same forum jurisdiction for a request for action would be given.

Acceptance by appearance based on Art. 24 Lugano Convention does not require entering an appearance on the merits. It requires entering an appearance to the proceedings. Concretely, it may already be given, if the defendant makes statements in regards to res iudicata, pendency or material jurisdiction. No acceptance by appearance is given if the defendant objects to domestic jurisdiction.

In anti-trust disputes the place where the harm occurred is generally the place where the cartel was founded. In case a mother company introduces a selective sales system and the daughter companies enforce such a system, the place where the harm occurred is the headquarter. This applies to the mother company and its daughter companies.

Impacts

- The threshold for forum running is low under the Lugano Convention
- In case a letter before action is sent the risk that the recipient secures its forum is given

Find the complete SSC decision here.

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