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I. Historical survey on the Lugano Convention

- Lugano Convention signed on 16 September 1988
  - Extends the rules of the Brussels Conventions to most EFTA Member States
  - 1992: Enters into force for a limited number of Contracting states

- 90ties: Project of a parallel revision of the Brussels- and Lugano Convention

- Transformation of the Brussels-Convention into Brussels I-Regulation
  - Frozen negotiations with the Non-EU Lugano States
  - 7 February 2006: Opinion 1/03 of the ECJ

- New negotiations, signing of the Lugano-Convention on 30 October 2007
  - 1. January 2010: Entry into force within the EU
  - 1. January 2011: Entry into force in Switzerland together with the new unified codes on civil procedural law and penal procedural law

II. Relevant changes in the Commission's proposal

"Access to justice in the EU is overall unsatisfactory in disputes involving defendants from outside the EU. With some exceptions, the current Regulation only applies where the defendant is domiciled inside the EU. Otherwise jurisdiction is governed by national law. The diversity of national law leads to unequal access to justice for EU companies in transactions with partners from third countries: some can easily litigate in the EU, others cannot, even in situations where no other court guaranteeing a fair trial is competent. In addition, where national legislation does not grant access to court in disputes with parties outside the EU, the enforcement of mandatory EU law protecting e.g. consumers, employees or commercial agents is not guaranteed." (Explanatory memorandum, p. 3)

Goals:
- Improvement of access to justice, if defendant is domiciled outside the EU
- Guaranteeing fair trial
- Enforcement of mandatory EU Law

Impact on the Lugano Convention?
II. Relevant changes in the Commission’s proposal

- Commission’s goal to simplify access to justice in the EU for EU residents and companies:
  - Extension of the Regulation’s jurisdiction rules to third country defendants in Art. 4 proposal:
    “Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter. Persons not domiciled in any of the Member States may be sued in the courts of a Member State only by virtue of the rules set out in Sections 2 to 8 of this Chapter.”
  - Two more additional fora for disputes outside the EU (chapter 8):
    - Art 25 Proposal (location of property)
    - Art 26 Proposal (forum necessitatis)
  - Changes of the lis pendens rule

III. Relationship between Brussels I and Lugano

- Article 64 Lugano as the rule of coordination:
  - Art 64 I Lugano: Brussels shall prevail over Lugano if the proceeding is filed at a court of a EU-Member state
  - Art 64 II Lugano: Exemptions to 64 I Lugano
    - if defendant is domiciled in a non-EU contracting state,
    - where an exclusive competence applies (Art 22 Lugano),
    - where the contracting parties had agreed upon a place of jurisdiction (Art 23 Lugano), or
    - in relation to lis pendens or to related actions when the proceeding are instituted according to Art 27 and 28 Lugano
  - Art 64 III Lugano: Right to refuse recognition or enforcement
    if the ground of jurisdiction on which the judgment has been based differs from that resulting from Lugano

- Problems of interpretation:
  - What is the basic rule?
  - What are the exemptions?
III. Relationship between Brussels I and Lugano

- Similar wording like Art 54b Lugano I, but different legal context:
  - Art 54b Lugano I: Coordination between two international conventions
  - Art 64 Lugano: Coordination between an international convention and EU-regulation

- Rule of precedence of Public International Law:
  - Starting point: Lugano takes precedence
    - Art 64 I Lugano as an exemption-rule
    - Art 64 II Lugano as an exemption from the exemption

=> Similar wording, but different interpretation!

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III. Relationship between Brussels I and Lugano

- Three reasons for a narrow interpretation of Art. 64 I Lugano:
  - Art 64 I Lugano as an exemption rule:
    => Narrow interpretation of exemptions
  - Art 64 III Lugano: Right to refuse recognition or enforcement
    => A narrow interpretation of Art 64 I Lugano safeguards the central goal of Lugano to liberate, facilitate and guarantee the recognition and enforcement of judgements
  - Principle of reciprocity: reciprocal cases should lead to the same results
    => A narrow interpretation of Art 64 I Lugano safeguards the principle of reciprocity (except example 1 and 2)
III. Relationship between Brussels I and Lugano

- Article 64 Lugano as the rule of coordination
  - Art 64 I Lugano:
    Brussels shall prevail over Lugano if the proceeding is filed at a court of a EU-Member state
    - Exemption to pre-emption of international convention
  - Art 64 II Lugano:
    Exemptions from exemption: Confirmation of basic rule

Example 1:
Claimant domiciled in Switzerland files a claim against a Respondent domiciled in Spain.

\[\text{Art 2 Brussels I applies}\]

Example 2:
Claimant domiciled in Spain files a claim against a Respondent domiciled in Switzerland.

\[\text{Art 2 Lugano applies}\]

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III. Relationship between Brussels I and Lugano

- Article 64 Lugano as the rule of coordination
  - Art 64 I Lugano:
    Exemption to pre-emption of international convention
  - Art 64 II Lugano:
    Exemptions from exemption: Confirmation of basic rule

Example 3:
Claimant domiciled in CH files a claim against Respondent domiciled in Greece on an unlimited tenancy agreement of a Spanish cottage.

\[\text{Art 22 I Lugano applies: Art. 64 II a, 22 I 1 Lugano}\]

Example 4:
A consumer domiciled in Spain files a claim against a Swiss company at the consumer's domicile.

\[\text{Art 16 I Lugano applies: Art. 64 II a Lugano}\]

Example 5:
A German company files a claim against a Swiss Company based on the place of performance in Spain.

\[\text{Art 5 I Lugano applies: Art. 64 II a Lugano}\]
IV. Status of the Lugano Convention in the Commission's Draft Proposal

- Report of Hess/Pfeiffer/Schlosser of September 2007
- Commissions’ Report to the European Parliament, the Council and the Economic and Social Committee of 2009
- Analysis of the Centre for Strategy & Evaluation Service of December 2010

➡ No references to the Lugano Convention

- Draft proposal of the Commission:
  - 7th consideration of the preambles
  - Art 77 Proposal: transitional provision
  - Art 84 Proposal:
    “This Regulation shall not affect the application of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007 in Lugano.”

V. Conclusions

- The interpretation of Art 64 Lugano will gain importance

➡ Need for a clarification of principle of precedence in art 84 Proposal:
  “This Regulation shall not affect the application of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed on 30 October 2007 in Lugano which has priority over this Regulation”

- Need for a parallel revision of Lugano
  - Considering the parallelism to Lugano III?
  - Participation of the Non-EU Lugano States?

- New role of Lugano?
  - How to overcome the Pre-Savigny-approach?
  - Further Member States?
  - Possible involvement of the Hague Conference
Thank you for your attention