Section 5 of the Lugano II Convention – two recent judgments

Back to European Regional Forum publications (/Regional_Fora/Regional_Fora/European_Forum/Publications.aspx)

David Munch
Advokat David Munch, Copenhagen
dm@davidmunch.dk (mailto:dm@davidmunch.dk)

Introduction

The Lugano II Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; hereinafter 'the 'Lugano Convention')[1] was signed on 30 October 2007 by the European Community, Denmark, Iceland, Norway and Switzerland. The rules concerning jurisdiction are found in Title II. Title II, section 5 (Articles 1 to 21) is entitled 'jurisdiction over individual contracts of employment', and comprises the subject matter of this article. The relevant Articles of section 5 are as follows:

• Article 18(1): 'In matters relating to individual contracts of employment, jurisdiction shall be determined by this section, without prejudice to Articles 4 and 5(5)';

• Article 19(2)(a): 'An employer domiciled in a State bound by this Convention may be sued:

...

2. in another State bound by this Convention:

(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so';

• Article 20(1): 'An employer may bring proceedings only in the courts of the State bound by this Convention in which the employee is domiciled'; and

• Article 21(1): 'The provisions of this section may be departed from only by an agreement on jurisdiction:

1. which is entered into after the dispute has arisen'.

European Union case C-603/17

On 24 January 2019 the Advocate General delivered his opinion in case C-603/17 that concerned a request for a preliminary ruling from the Supreme Court of the United Kingdom.[2] The four questions in the case concerned whether the claims in the dispute in the main proceedings were 'matters relating to individual contracts of employment' within the meaning of section 5, Article 18 (1) of the Lugano Convention. The matters in dispute concerned claims against two former directors for the harm caused by fraud allegedly committed at the expense of a group of companies. It was to be determined whether the courts of England and Wales had jurisdiction (and section 5 did not apply), as claimed by the group of companies; or, whether the courts of Switzerland had jurisdiction (and section 5, Article 20(1) did apply), which was claimed by the two former directors of the group of companies domiciled in Switzerland.

The preceding paragraph is based on the introduction of the Advocate General (items 1-3). The Advocate General's analysis contains the following points:

1. preliminary remarks (items 19-25);

2. the concept of 'individual contract of employment' (the 'second question') (items 26-60);

3. the test for determining whether claims are 'matters relating to' individual contracts of employment (the 'first question' and the 'third question') (items 61-103); and

4. the concept of 'employer', in particular within a group of companies (the 'fourth question') (items 104-110).

The Advocate General found that the two directors were not subordinated to the company and consequently the two directors did not have an 'individual contract of employment' (see Article 18(1)), irrespective of the fact that the shareholders of the company had the power to relieve the director of his duties (point two above, item 60). Therefore, the suggestions referred to in points three and four were only alternatives (see above, items 61 and 105).

As suggested by the Advocate General, the Court of Justice of the European Union (CJEU) in its decision of 11 April 2019 only decided the 'second question'. The CJEU ruled that section 5:

> 'must be interpreted as meaning that a contract between a company and a natural person performing the duties of director of that company does not create a relationship of subordination between them and cannot, therefore, be treated as an 'individual contract of employment', within the meaning of those provisions, where, even if the shareholder(s) of that company have the power to procure the termination of that contract, that person is able to determine or does determine the terms of that contract and has control and autonomy over the day-to-day operation of that company's business and the performance of his own duties'.

Decision by the Danish Western High Court

The Vestre Landsret (the Danish Western High Court; the 'High Court') has recently, and after the CJEU decision of 11 April 2019, decided that a Danish employee could sue its former Norwegian employer in Denmark in accordance with section 5, Article 19(2)(a) of the Lugano Convention.[3]

The dispute in the main proceedings in the city Court concerned provisions in a shareholders'

agreement entered into between shareholders of the Norwegian group parent company of the said employer, including employees of the group (which included the Danish employee), as employees of the group had acquired shares in the group parent company. The overall question for the High Court was whether this dispute comprised 'matters relating to individual contracts of employment', as per section 5, Article 18(1) of the Lugano Convention. The city Court had decided that the jurisdiction was in Norway, in accordance with the jurisdiction clause in the shareholders' agreement and section 7, Article 23(1) of the Lugano Convention. It is noted that section 5 would prevail over section 7 if section 5 applied, as no agreement on jurisdiction had been entered into after the dispute had arisen (see Articles 21(1) and 23(5)).

In the section entitled the 'legal basis' in the High Court's decision, it was mentioned that the Brussels I Regulation, Regulation (EC) No. 44/2001 (the 'Regulation'), was parallel to the Lugano Convention and that section 5 of the Convention corresponded to section 5 of the Regulation. Reference was made to the preliminary comments to the Regulation, items 11-13, and to items 23-24 and 94 in the opinion of the Advocate General of 24 January 2019 in C-603/17. In relation to items 11 to 13 of the Regulation, it was stated that the rules on jurisdiction should be predictable to a large extent and be based on the domicile of the sued as the principal criteria. Furthermore, it followed from said items 11-13 that, as regards insurance agreements, consumer agreements and employment agreements it was desirable to protect the weaker party by rules on jurisdiction that were more favourable to that party's interests than the ordinary rules on jurisdiction.

Items 23-24 and 94 in the 'legal basis' of the High Court's decision read as follows (in the English version):

> '23. One of the particular objectives of section 5 is to protect employees, who are regarded as the weaker party to the contract, by rules of jurisdiction that are more favourable to their interests. To that end, that section deprives the employer of any jurisdictional option to bring his claim and gives the employee the advantage of being able to be sued, in principle, only in the courts which are deemed to be the most familiar to him.
>
> 24. … In that regard, Article 18(1) of the Lugano II Convention applies, I would reiterate, to claims "in matters relating to individual contracts of employment". Two conditions flow from that wording: first, there must be a "contract" between the parties and, secondly, the claim must relate, in some way or other, to that "contract".'

And:

> '94. Consequently, I am of the opinion that a claim is a "matter relating to an individual contract of employment", for the purposes of section 5, where, in the light of the facts, there is a material link between the claim and such a "contract". This is the case if the claim relates to a dispute arising in connection with the employment relationship, whether or not the claimant bases his claim on the "contract", and whether or not it is necessary to establish the content of the contractual obligations in order to decide on its merits. That condition must be given a broad interpretation. In other words, to the extent that that condition is fulfilled, even a claim based on tort rules … of the Brussels I Regulation or the Lugano II Convention, falls within section 5.'

In accordance with the Advocate General's proposal for the decision in C-603/17, the High Court

found that when interpreting whether there is a matter concerning an individual contract of employment within the meaning of the Lugano Convention, it must be emphasised whether the matter concerns a dispute arising in connection with the employment relationship.

Furthermore, the High Court found that where there was such a 'content context' between the employment relationship and the dispute concerning provisions in the shareholder's agreement, the dispute must be regarded as arising in connection with the employment relationship and consequently a matter concerning an individual contract of employment. The Court ruled that the Danish employee was entitled to sue the former Norwegian employer in the city Court (in Denmark), in accordance with Article 19(2)(a) of the Lugano Convention and therefore the matter was to continue in the city Court. Said 'content context between employment relationship and the dispute' appears to be in accordance with: 'there is a material link between the claim and such a "contract"' in item 94 of the opinion of the Advocate General.

The influence of Case C-603/17 and the Danish High Court decision

It has been seen that the CJEU only decided the second question, whether there was an individual contract of employment within the meaning of section 5, Article 18(1) of the Lugano Convention, in its decision of 11 April 2019. The Danish Western High Court has made a decision concerning the first and third questions: the test for determining whether claims are 'matters relating to' individual contracts of employment, in accordance with section 5, Article 18(1) of the Lugano Convention.

It transpires from the preamble of Protocol No. 2 to the Lugano Convention that it is considered 'that the Convention becomes part of Community rules and that therefore the Court of Justice of the European Communities has jurisdiction to give rulings on the interpretation of the provisions of this Convention as regards the application by the courts of the Member States of the European Community'; and 'that the revised text of the Brussels Convention has been incorporated, ... into Regulation (EC) No 44/2001'; and 'that this revised text also constituted the basis for the text of this Convention'.

Article 1 of Protocol No. 2 to the Lugano Convention states: 'Any court applying and interpreting this Convention shall pay due account to the principles laid down by any relevant decision concerning the provision(s) concerned ... rendered by the courts of the States bound by this Convention and by the Court of Justice of the European Communities'.

The decision of the Danish Western High Court is therefore relevant when courts of a contracting state are to determine whether a claim is a matter relating to an individual contract of employment; the decision of the CJEU in C-603/17 is relevant when courts of a contracting state are to determine whether there is an individual contract of employment for the purposes of section 5 of the Lugano Convention.

Notes

[1] OJ L339, 21.12.2007, pp 3–41.

[2] Case C-603/17 *Peter Bosworth, Colin Hurley v Arcadia Petroleum Limited and Others* [11 April 2019] CJEU 2019/C 206/07.

[3] Opion of Advocate General Saugmandsgaard øe delivered on 24 January 2019 (1) on Case C-603/17. Available at **http://curia.europa.eu/juris/document/document.jsf?text=&docid=210190&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8590016 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=210190&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8590016)**

Similar topics

European Forum (/Search/Taxonomy.aspx?Taxonomy=European Forum&TaxonomyUid=60365999-ea4f-4ea9-89cf-2b8678d1116c), **Newsletters (/Search/Taxonomy.aspx?Taxonomy=Newsletters&TaxonomyUid=319939b0-dcbe-4420-b79e-30e32824ed07)**

Similar articles

Financing acquisitions post-BEPS - Taxes Committee newsletter article
(/Article/Detail.aspx?ArticleUid=07190951-7e2f-464f-ad2a-0c48dd9921ad)

Tax Administration - Taxes Committee newsletter article, October 2015
(/Article/Detail.aspx?ArticleUid=64cfb660-7e26-4969-b6a1-954e6e60a29c)

Recent cross-border mergers and acquisitions and restructuring transactions - Taxes Committee conference report
(/Article/Detail.aspx?ArticleUid=99d11848-8ecb-4aa0-8328-7e6a1a71fcf0)

When tax audits (or voluntary disclosure) would result in double taxation: Ways to obtain relief - Taxes Committee, October 2015
(/Article/Detail.aspx?ArticleUid=c4951d05-591f-4ffe-a185-a0351a2148b5)

Wealth Management Workshop: Succession Planning Strategies for Closely Held & Family Businesses - Taxes Committee, October 2015
(/Article/Detail.aspx?ArticleUid=1489b7e1-e0b8-4175-9d49-99cfa54c5208)