LUGANO CONVENTION

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Court Case, initiated on 21 December 2009 by Belgium against Switzerland

"Belgium vs. Switzerland"

concerning the interpretation and application of the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

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Belgium vs. Switzerland

- 21 December 2009: Belgium started the abovementioned court case and initiated proceedings against Switzerland (International Court of Justice)

- Subject of dispute:
  - The interpretation and application of the Lugano Convention on jurisdiction and enforcement of judgments in civil and commercial matters

Belgium vs. Switzerland

- Origin of the dispute
  - **Parallel judicial proceedings** in Belgium and Switzerland
  - Concerning the alleged misconduct of the Swiss shareholder in Sabena
  - Swiss shareholders SAirgroup & SAirlLines (in bankruptcy)
  - Belgian shareholders Sabena (in bankruptcy)
  - Contractual exclusive jurisdiction of the Brussels Courts

Belgium vs. Switzerland

- Belgian shareholders: Brussels courts
  - Claim based on contractual liability and tort
  - Jurisdiction of the Belgian courts: Art. 17 and 5 (3) of the Lugano Convention

*"**If the parties** […] **have agreed** that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction".* - art. 17 Lugano Convention (current art. 23)

*"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**."* – art. 5 (3) Lugano Convention

Belgium vs. Switzerland

- Swiss shareholders: Zurich courts
  - Swiss shareholders: Debt-restructuring moratorium and eventually bankruptcy
  - Belgian shareholders: declaration of debt claims
    - ✓ The existence and amount of the debt claim depended on the proceedings before the Brussels court with regard to aforementioned contractual liability and tort

Belgium vs. Switzerland

- Swiss court proceedings
  - Belgian shareholders ask to stay the Swiss procedure (art. 21 (current art. 27) of the Lugano Convention):

*"**Where proceedings involving the same cause of action and between the same parties are brought in the courts of diffgerent 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. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."* – art. 21 Lugano Convention (current art. 27)

Belgium vs. Switzerland

- Swiss court proceedings; first argument
  - The Swiss Federal court reasons that the Belgian decision **could not be recognised** for the purposes of the Swiss debt-restructuring proceedings:

    *"**The Convention shall not apply to:** […] (b) **bankruptcy**, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings."*- art. 1

    Criticism: only the nature of a judgment whose recognition is sought is decisive, rather than the purpose for which the judgment is being used. The nature of the Belgian decision is clearly 'civil or commercial' and thus the Swiss courts are obliged to recognize the decision under the Lugano Convention.

Belgium vs. Switzerland

- Swiss court proceedings; second argument

  - The Swiss Federal court reasons Swiss courts have **exclusive jurisdiction** over any dispute concerning the schedule of claims and the inclusion of any claims of the Belgian shareholders, as bankruptcy is excluded from the scope of the Lugano Convention. Accordingly, there is not a case of parallel proceedings in two contracting States.

  - Criticism: The answer will depend on whether the debt-scheduling proceedings and the status of the Belghian shareholders as creditors are to be considered as issues of bankruptcy and thereby excluded from the scope of the Lugano Convention. Note that the case law regarding the Brussels I Regulation can provide with sources as the one is 'sister' to the other.

Belgium vs. Switzerland

- Swiss Federal Court Decision of 30 September 2008:
  - The Swiss Federal Court **does not stay the proceedings** (in view of the Belgian judgment).

- Belgium takes the case to the ICJ and, asserting that this decision implies:
  - a refusal to recognize the future Belgian decision;
  - a refusal to apply the Lugano Convention.

- Proceedings:
  - 21 December 2009: Begium initiates proceedings
  - 23 November 2010: Belgian Memorial
  - 18 February 2011: Swiss preliminary objections

Belgium vs. Switzerland

- Outcome?
  - Kingdom of Belgium requests the discontinuance of the proceedings based on Switzerland's statements in its preliminary objections:

    "the Swiss Confederation indicated that the reference by the Swiss Federal Supreme Court in its 30 September 2008 judgment to the non-recognizability of a future Belgian judgment ***did not have the force of res judicata*** *and* ***did not bind*** *either the lower cantonal courts or the Federal Supreme Court itself, and that there was therefore* ***nothing to prevent a Belgian judgment, once handed down, from being recognized*** *in Switzerland in accordance with the applicable treaty provisions."*
  - Accordingly, Switzerland confirms in its preliminary objections the general principles of the Lugano Convention.
  - Final outcome: on 5 April 2011, the case was (unfortunately) removed from the list.