# Lugano Convention

Last change: 11.04.2023

PDF generated on: 09.10.2026

ONLINE COMMENTARY
THE OPEN ACCESS
LEGAL COMMENTARY

# TABLE OF CONTENTS

Vorb. zu Art. 32 — 37 LC ..... 5
Art. 32 LC ..... 27

ATTENTION: This version of the commentary is an automatically generated machine translation of the original. The original commentary is in German. The translation was done with www.deepl.com. Only the original version is authoritative. The translated form of the commentary cannot be cited.

COMMENTARY ON

# Vorb. zu Art. 32 — 37 LC

A commentary by Alexander Kistler

SUGGESTED CITATION

Alexander Kistler, Vorbemerkungen zu Art. 32 - 37 LugÜ, in: Christoph Hurni (Hrsg.), Onlinekommentar zum Lugano Übereinkommen

Short citation: OK-Kistler, N. XXX zu Vorb. zu Art. 32 - 37 LugÜ.

# CONTENT

I. Subject matter and concept of recognition ..... 7
II. Scope of Application and Cognition of the Recognition Court ..... 8
III. The Principles of the Recognition System of the Lugano Convention ..... 9
A. Free movement of judgements ..... 9
B. Principle of Confidence ..... 10
C. Effective Protection of Defendants and Prevention of Inconsistent Judgments .. 10
IV. Legal consequences of recognition ..... 11
A. Determination of the legal consequences of recognition ..... 12
1. General Theories on the Consequences of Recognition ..... 12
2. legal consequences of recognition within the Lugano Convention ..... 12
a. Effect extension theory ..... 12
b. Case Law of the Federal Supreme Court ..... 14
c. Autonomous concept of res judicata ..... 14
B. Recognizable Legal Consequences ..... 18
1. Substantive legal force ..... 18
2. Effect on the form of the decision ..... 19
3. Intervention effect and effect of notice of dispute ..... 20
4. Effect of the facts ..... 20
C. Procedural assertion of the effects of the decision ..... 21
Bibliography ..... 21

# I. SUBJECT MATTER AND CONCEPT OF RECOGNITION

As a result of the principle of territoriality, judicial decisions, as acts of state sovereignty, have legal consequences exclusively in the state in which the judgment was given. In order for a decision to have legal consequences in another state, it must in principle be recognized. Recognition is an act of state sovereignty, whereby a foreign decision or certain legal consequences of the decision (in the case of partial recognition) are permitted for the domestic legal system. Accordingly, with recognition, the decision is accepted as binding and is no longer called into question. The consequence of recognition is that the foreign decision is accorded certain legal consequences in the domestic legal system. If, on the other hand, the decision is not recognised, the decision has no legal consequences in the state in which it is recognised. 1

Recognition must be distinguished from the declaration of enforceability. With the declaration of enforceability, the judgment is admitted for enforcement in the state of enforcement (cf. Art. 38 (1) Lugano Convention) and thus becomes enforceable. The declaration of enforceability can thus be regarded as an actual intermediate procedure between recognition and enforcement. The principle applies that the declaration of enforceability presupposes prior recognition. In the scope of application of the Convention, however, this principle must be relativized insofar as the grounds for refusal of recognition pursuant to Art. 34 et seq. Lugano are only to be examined if the opposing party to enforcement lodges an appeal against the declaration of enforceability already granted (cf. Art. 43 (1) Lugano in conjunction with Art. 45 (1) Lugano). Accordingly, a declaration of enforceability does not require that recognition has already been granted. Rather, it is presumed that the decision to be enforced fulfils the requirements for recognition and has an enforceable (but not necessarily recognizable) content. 2

There is no general obligation under international law to recognize foreign judgments. However, such an obligation is provided for by the provisions of Art. 32 - 37 Lugano Convention. These are the actual core provisions of the Convention. The provisions regulate the recognition of the decision of a Contracting State (so-called State of origin or State of judgment) in another Contracting State to the Lugano Convention (so-called State of recognition). As a result, treaty decisions claim validity in the entire territory of the Convention. The provisions of the Convention supersede the national law of the Contract- 3

ing States in their scope of application. National law may therefore only be invoked to the extent that the Convention itself refers to it. The regulatory content of Art. 32 ff. Lugano Convention is, however, limited. They exclusively regulate the recognition procedure and the conditions for recognition.

## II. SCOPE OF APPLICATION AND COGNITION OF THE RECOGNITION COURT

4 The scope of application of the recognition provisions is limited in a territorial-personal sense to judgments of Contracting States (Art. 32 Lugano Convention). Judgments of a State that is not a party to the Convention are not covered by the scope of application (with the exception of their blocking effect pursuant to Art. 34 para. 4 Lugano Convention). Such judgments are to be recognized according to the autonomous national law of the recognizing state (i.e. in Switzerland according to the IPRG or another applicable international law treaty). It is irrelevant, however, on which basis of jurisdiction the treaty state court based its jurisdiction. Accordingly, judgments rendered on the basis of an exorbitant jurisdiction under Art. 3 para. 2 or Art. 4 para. 2 Lugano Convention may also be recognized and declared enforceable under the provisions of the Convention. Similarly, it is not a prerequisite that the dispute underlying the decision to be recognized had an international character. Accordingly, judgments on purely domestic matters are also eligible for recognition.

5 From a substantive point of view, it is also a prerequisite that the decision to be recognized has been rendered in a legal dispute which is covered by the substantive scope of the Convention (Art. 1 Lugano Convention). It must therefore be a decision in a civil and commercial matter (Art. 1 para. 1 Lugano Convention), whereby none of the grounds for exclusion according to Art. 1 para. 2 Lugano Convention may be present.

6 Finally, special conventions governing jurisdiction, recognition or enforcement, to which all or some of the Contracting States are parties, also take precedence over the Convention (Art. 67 Lugano Convention).

7 The recognition court decides independently on the application of the recognition and enforcement provisions of the Convention. In so doing, however, the recognizing court is bound by the factual findings of the court of first instance in accordance with Art. 35, para. 2 Lugano Convention.

# III. THE PRINCIPLES OF THE RECOGNITION SYSTEM OF THE LUGANO CONVENTION

## A. Free movement of judgements

The parallel system to the Lugano system (the Brussels I system) pursues as its main purpose the free movement of judgments of Member States. This is to guarantee effective cross-border legal protection. All provisions of the Brussels I Regulation are tailored to this purpose. Thus, among other things, the standardization of the law of jurisdiction should, as far as possible, prevent objections to recognition on the grounds of lack of jurisdiction of the court of origin. The Lugano Convention similarly intends to facilitate the mutual recognition of treaty-based judgments. Accordingly, the promotion of the free movement of judgments of the Contracting States ("free movement of judgments") is the main purpose of both systems. 8

The free movement of judgments was developed within the European Community as a regulatory concept in connection with the free movement of goods and is based on the country of origin principle under Union law. The country of origin principle found its origin in the recognition of administrative acts in the admission of goods within the European Community. In application of this principle, goods and services admitted in the Member State of origin were treated in the receiving state as domestic products and services. With the principle of mutual recognition of member state decisions in the Brussels I system, this principle was transferred to procedural law. In this respect, a foreign member state judgment should be treated in the same way as a domestic judgment. Consequently, a Member State judgment should also be recognized in such a way that a review is only carried out to enforce fundamental interests of the recognizing state. 9

To achieve this goal, obstacles to recognition have been continuously abolished and the recognition procedure simplified since the conclusion of the original Brussels Convention. The same is true of the parallel Lugano system. The provisions of the Convention must therefore be interpreted in such a way as to minimize obstacles to the cross-border recognition of treaty-based judgments within the Convention. Consequently, the concept of judgment under Art. 32 Lugano Convention is to be understood comprehensively. Furthermore, judgments given in a Contracting State are to be recognized automati- 10

cally and "without any special procedure" in another Contracting State (Art. 33 (1) Lugano Convention). Finally, the grounds for non-recognition in the Convention are also to be interpreted narrowly and limited to what is strictly necessary to achieve their objective. Based on this principle, a favorability principle is sometimes assumed for the Convention, according to which national recognition law is still applicable if it contains provisions that are more favorable to recognition. However, the conclusive character of the recognition rules of the Convention speaks against such a principle of favorability. Moreover, the recognition rules also serve to protect the defendant. This protection threatens to be undermined if more recognition-friendly national law could be applied.

## B. Principle of Confidence

11 In order to guarantee such freedom of judgment, a special degree of mutual trust in the administration of justice of the Contracting States is required. Only such trust justifies the most far-reaching waiver of judicial review in the recognition of treaty decisions. The Convention's freedom of judgment is thus based on the principle of mutual trust (the so-called principle of trust). As a direct consequence of the principle of legitimate expectations, treaty-state decisions cannot in principle be reviewed by another treaty state. Consequently, the principle of mutual trust means that each Contracting State court regards the decisions of other Contracting State courts as equivalent to its own decisions. This principle is not explicitly stated anywhere in the Convention, which is why it is sometimes argued that Swiss courts are not bound by it. It should be noted, however, that numerous provisions of the Convention are based on the principle of trust. For example, the principle of confidence forms the basis for the prohibition of indirect examination of jurisdiction under Art. 35(3) Lugano Convention. Likewise, the prohibition of substantive review (prohibition of révision au fond, Art. 36 LugÜ) is based on this principle. Accordingly, it can be assumed that Swiss courts must also observe the principle of trust.

## C. Effective Protection of Defendants and Prevention of Inconsistent Judgments

12 Unrestrained free movement of judgments also entails risks. For example, in the absence of the possibility of review of the decision by the recognizing

state, the protection of party rights (especially of the defendant) may be undermined. Furthermore, sovereign interests of the recognizing state may also be jeopardized. In order to prevent such abuses, the Convention provides, on the one hand, for obstacles to recognition which are intended to ensure effective protection of the defendant. These ensure, among other things, that the defendant has been granted the right to be heard (Art. 34 No. 2 Lugano Convention) as well as that the protective jurisdictions contained in the Convention for policyholders pursuant to Art. 8 et seq. Lugano Convention and for consumers pursuant to Art. 15 et seq. Lugano Convention are complied with (Art. 35 para. 1 Lugano Convention). On the other hand, both the lis pendens bar pursuant to Art. 27 Lugano Convention and the grounds for refusal of recognition pursuant to Art. 34 nos. 3 and 4 Lugano Convention attempt to prevent mutually incompatible decisions. On the one hand, the recognition of such conflicting decisions would be unreasonable for the parties, since it would be unclear for them which decision they would have to follow in their conduct. On the other hand, conflicting rulings would also damage the reputation of the judicial institutions, reducing confidence in the uniformity of the judiciary. In order to prevent such a collision, the lis pendens bar already takes effect at the level of the cognizance proceedings. Accordingly, the Contracting State court subsequently seized must stay its proceedings if proceedings concerning the same claim are pending before different Contracting State courts (Art. 27 (1) Lugano Convention). If, despite this lis pendens bar, irreconcilable judgments are rendered, the grounds for refusal of recognition pursuant to Art. 34 No. 3 and No. 4 Lugano Convention apply at the recognition level. According to these provisions, a judgment will not be recognized if it is incompatible either with a judgment in the recognizing state (no. 3) or with an earlier judgment from another state (no. 4).

## IV. LEGAL CONSEQUENCES OF RECOGNITION

While the Convention sets out in detail the conditions and procedure for recognition, it contains no explicit provision on the legal consequences of recognition. This ultimately raises two questions: First, under what law are the legal consequences of a recognized judgment to be determined? Second, which legal consequences are amenable to recognition at all and thus eligible for recognition? 13

## A. Determination of the legal consequences of recognition

### 1. General Theories on the Consequences of Recognition

14 In doctrine it is disputed according to which legal basis the legal consequences of a recognition are determined. According to the theory of extension of effect advocated by the majority of scholars, the same legal consequences are to be accorded to the recognized decision in the state of recognition as are accorded to it in the state of origin. Accordingly, based on this theory, the effects of the decision are to be determined on the basis of the law of the state of origin. The opposite pole to the theory of extension of effect is the so-called theory of equal effect. According to this theory, the same effects are attributed to the recognized decision as to a comparable judgment in the state of recognition. Accordingly, the legal consequences of the decision would have to be determined according to the lex fori of the state of recognition. Finally, the (restrictive) accumulation theory assumes that, on the one hand, the decision in the state of recognition should not have more effects than it has in the state of origin. On the other hand, the effects of the decision must not go further than those of similar judgments in the state of recognition. Thus, the accumulation theory can be understood as the actual "intersection" of the two "circles" of the theory of extension of effects and the theory of equal effects.

### 2. legal consequences of recognition within the Lugano Convention

#### a. Effect extension theory

15 The official reports on the Brussels Convention seem to be in favor of the extension of effects theory. The Jenard Report, for example, states that recognition "attaches to judgments the effects which they have in the State in the territory of which they were given." Similar reasoning can be found in the Evrigenis & Kerameus Report.

16 The ECJ also appears to favor the extension of effects theory in its Hoffmann jurisprudence. In it, the Court adopted the above-mentioned passage from the Jenard Report and emphasized that the Convention was intended to establish, as far as possible, the free movement of judgments. However, the Court qualified this statement by stating that a recognized judgment must (only) in principle produce the same effects in the recognizing state as in the

state of origin. The phrase "in principle" implies that there are exceptions to the principle of the extension of effects. In later rulings, the ECJ upheld this relativization. In doing so, it specified that a judgment is not to be accorded legal effects upon its enforcement which it does not have in the Member State of origin or which a judgment of the same kind rendered directly in the State of enforcement does not produce. This case law is partly understood in the doctrine as an endorsement of the accumulation theory.

In the aforementioned case law, however, the ECJ clearly differentiates between the legal consequences of recognition and those of a declaration of enforceability. The aforementioned limitation of effects refers exclusively to the legal consequences of a declaration of enforceability. There are good reasons for this. In contrast to recognition, a declaration of enforceability is not intended to give a foreign judgment the same effects as in the country of judgment. Rather, the enforceability declaration confers on the foreign judgment the same effect as an enforceable domestic judgment. Accordingly, the enforceability declaration puts the foreign judgment on a par with a domestic judgment. This also follows logically from the fact that the subsequent enforcement is governed by the domestic law (lex fori) of the executing state. Accordingly, the relativization made cannot be interpreted as an endorsement of the accumulation theory in recognition. 17

Rather, it can be inferred from the case law in Hoffmann that with its relativization the Court merely wanted to clarify the differentiation between the recognition effect and the enforceability declaration effect. Thus, the ECJ was asked whether the obligation of recognition under Art. 26 of the Brussels Convention (Art. 33 of the Lugano Convention) obliges to give a judgment of a Contracting State the same effect as it has in the State of origin and whether it should therefore also be enforced in the same cases as there. The Court reformulated this question and assessed whether a judgment recognized under Article 26 of the Brussels Convention must in principle have the same effect in the requested State as in the State of origin. With this reformulation, the ECJ implies that it should first be clarified in principle whether a judgment has the same effects in the state of recognition as in the state of origin. In contrast, the Court only wanted to answer the question of whether the decision must therefore also be enforced under the same conditions as in the state of origin in a second step. This also follows from the further reasoning of the judgment, in which the Court finally states that the decision does not have to 18

be enforced if enforcement is not possible under the law of the state of enforcement.

19 Overall, therefore, the ECJ follows the theory of extension of effect for the legal consequences of recognition. However, there is an exception for the effect of enforceability. On the one hand, this effect is only conferred on the decision by the recognizing state when it is declared enforceable (Art. 38(1) Lugano Convention). On the other hand, its effect is governed by the theory of cumulation, whereby the decision is not accorded any effects with the declaration of enforceability that a decision issued in the executing state would not produce.

### b. Case Law of the Federal Supreme Court

20 In its case law, the Federal Supreme Court also seems to follow the extension of effects theory. Admittedly, the Federal Supreme Court held in BGE 135 III 670 that the recognition of a foreign judgment would, in principle, have the same effect as a domestic judgment. In its later case law, however, the Federal Supreme Court clarified, based on the Hoffmann case law, that a judgment recognized under the Lugano Convention must in principle have the same effect in the requested state as in the state of judgment.

### c. Autonomous concept of res judicata

21 It is unclear to what extent the ECJ assumes an autonomous understanding of res judicata as a further exception to the theory of extension of effect. The ECJ provided the first approaches for such an understanding in the De Wolf/Cox judgment. The Court considered it incompatible with the meaning of the recognition provisions to reopen proceedings between the same parties on a subject matter of a dispute already adjudicated by a court of a Contracting State. Otherwise, the second court could contradict an earlier treaty state judgment and thus violate the recognition obligation. Although the ECJ did not yet provide an actual autonomous definition of res judicata in this decision, it did justify the bar on res judicata on the basis of a European autonomous purpose (namely the prevention of irreconcilable judgments). Accordingly, the Court considered it necessary to provide for a ne bis in idem defense in the context of European civil procedure law in the case of complete identity of the subject matter of the dispute.

The ECJ then advocated an autonomous scope of legal force in the Gothaer judgment. The decision concerned a trial judgment in which a Belgian court declared itself without jurisdiction due to the effectiveness of a choice-of-court agreement in favor of the courts of the contracting state Iceland. For the German court, which was subsequently seized of the case, the question arose as to whether it was also bound by the preliminary assessment of the validity of the choice-of-court agreement. The Court held that in Union law the concept of res judicata encompassed not only the operative part of the decision in question, but also its reasoning, insofar as it bore the operative part of the judgment and was therefore inseparable from it. Accordingly, such a procedural decision is binding both with regard to the decision on the lack of jurisdiction of the court made in the dispositive part of the judgment and with regard to the validity of the agreement on the place of jurisdiction established in the reasons for the judgment, which is supported by the dispositive part of the judgment. The Court of Justice thus formed an autonomous concept of res judicata, which covers both the main issue judged and any preliminary issues judged. The concrete scope of this concept of res judicata is, however, highly disputed in the doctrine. The scope of this concept of res judicata depends on whether the decision was due to the particularities of the individual case or whether its findings can be generalized. 22

At least prima vista, the ECJ seems to limit its finding to decisions in which a contracting state court declares itself without jurisdiction due to the effectiveness of a choice of court agreement in favor of another contracting state. This can also be seen from the fact that the Court continues to be guided by the principle of the extension of effect theory. The arguments used by the Court, on the other hand, can certainly be generalized. On the one hand, the Court based its reasoning mainly on Article 35 (3) aEuGVVO (Article 35 (3) LugÜ), according to which the jurisdiction of the sentencing state may not be reviewed in the recognition and enforcement of a treaty state decision. According to the Court of Justice, the examination of "intermediate results" would also be contrary to this prohibition, insofar as the result would be to call into question the decision of the Contracting State court. The prohibition of indirect examination of jurisdiction applies in principle to all treaty-state jurisdiction decisions, which is why this reasoning could be extended to such jurisdiction decisions in general. However, the ECJ justifies its autonomous concept of res judicata with the fact that the decision was based on the common jurisdiction rules of the aEuGVVO. At best, this could be seen as a limitation 23

of the autonomous concept of res judicata to cases in which the decision was issued on the basis of a Convention rule on jurisdiction that applies uniformly in all member states.

24 However, as the ECJ also based its decision on the prohibition of review of the content of the judgment under Article 36 of the Brussels Convention (Article 36 of the Lugano Convention), it is at least questionable whether this understanding of res judicata is not at best even applicable to judgments on the merits. Possible indications for such a comprehensive scope of res judicata can be found in the discussion on a possible, autonomous European concept of the subject matter of a dispute. This is based on the case law of the Court of Justice on the scope of the lis pendens bar (Art. 27 (1) Lugano Convention). Here, the ECJ also assumes an autonomous scope of the lis pendens bar and focuses on whether the respective applications essentially concern the same issue (so-called core issue theory). In doing so, the Court seems to assume a blocking effect in particular if the assessment of the applications depends on the same preliminary question. Therefore, the lis pendens bar also includes both the main issue to be judged and the preliminary issue to be judged. Accordingly, it could be argued that the pendency bar and the autonomous concept of res judicata are based on the same concept of the subject matter of the dispute. However, it can be objected that an extension of res judicata to preliminary issues is a legal policy decision independent of the concept of the subject matter of the dispute. Thus, the concept of the subject matter of the dispute is decisive for the "broad effect" of res judicata, but not for its "deep effect". Accordingly, there is at least no compelling correlation between the scope of the subject matter of the dispute and the question of whether preliminary issues also participate in the binding force of res judicata.

25 A closer look at the case law of the ECJ also focuses less on a common concept of the subject matter of the dispute than on a common purpose. Thus, the Court seems to attach particular weight to the purpose of preventing irreconcilable decisions. To achieve this goal, the ECJ's case law assumes both a broad lis pendens bar and a comprehensive autonomous binding effect of res judicata. If the goal of preventing irreconcilable decisions is consistently followed, there are also good reasons for the Court to assume an international res judicata effect oriented to the core theory. Thus, as is well known, the grounds for refusal of recognition in Art. 34 Nos. 3 and 4 Lugano Convention provide that recognition may be refused if the judgment is "incompatible" with

a domestic or earlier foreign judgment. Incompatibility is assumed if the judgments in question have mutually exclusive legal consequences. In principle, however, a judgment has legal consequences only to the extent that its findings become final at all. In this sense, the recognition of a decision which is deemed to be irreconcilable within the meaning of the case law of the ECJ on lis pendens can only be prevented if the preliminary issues judged also become res judicata. Otherwise, it would be possible for a party to re-litigate the same preliminary issue, not during the trial but after its end, which would also entail the risk of a divergent assessment and thus a decision incompatible with the earlier judgment. Nevertheless, it should not be assumed that the subject matter of the dispute is identical. Thus, the blocking effect at the level of lis pendens according to Art. 27 Lugano Convention should have a broader effect than at the level of recognition according to Art. 34 No. 3 and 4 Lugano Convention. This results from the fact that during proceedings it is still unclear how the court will decide. Accordingly, there is only the risk of irreconcilable decisions. At the time of recognition, on the other hand, it is certain what the court has decided, which is why it can be conclusively assessed whether there is any conflict between the decisions. This allows the concept of irreconcilable decision to be drawn more narrowly at the level of recognition than at the level of lis pendens.

26 It is questionable, however, to what extent the ECJ is willing to pursue this purpose at the expense of other considerations of expediency. Certain limitations result at least from the previous case law of the ECJ, which explicitly prohibits the review of the jurisdiction of a court by the court of another contracting state. This case law would hardly be compatible with binding the court declared competent to the decision of the court of origin. Rather, the court declared to have jurisdiction must be able to rule independently on its own jurisdiction. On the other hand, restrictions arise from the right to the guarantee of justice as well as the right to a fair trial and the associated right to be heard in accordance with Art. 6 (1) ECHR. All contracting states are obliged to respect both the Lugano Convention and the ECHR, whereby from the Swiss perspective, in the event of a conflict with the ECHR, the relevant case law of the ECJ should not be taken into account. Accordingly, in order to preserve the right to be heard, it must at least be ensured that the parties were able to fully express their views on the relevant preliminary question.

27 Overall, based on the Gotha case law, it can (still) be assumed that the content of autonomous res judicata is limited to jurisdiction decisions on choice of court agreements. However, the ECJ seems to be generally tending in favor of a more comprehensive binding force of law. Admittedly, it must be taken into account that the ECJ has so far decided rather on a case-by-case basis in the aforementioned case law, which is why a generalization of these rulings can only be assumed with caution. Nevertheless, it is clear from the case law that the ECJ attaches great importance to the prevention of irreconcilable rulings and, to this end, is also prepared to restrain national legal understandings in favor of a uniform autonomous regulation.

## B. Recognizable Legal Consequences

28 In general, all effects of judgments under procedural law are considered to be recognizable. Accordingly, according to the general rule, substantive res judicata, the formative effect, the effect of notice of dispute and the effect of intervention are deemed to be capable of recognition. These effects are to be distinguished from the non-recognizable effects of the substantive judgment. These are not caused by the decision itself, but only by a norm of substantive law (in particular the effect of the facts).

### 1. Substantive legal force

29 Material res judicata is probably the most important effect of a judgment that must be recognized. According to Swiss law, substantive legal force means that a judgment that is formally final is decisive in any subsequent proceedings between the same parties. On the one hand, it has a blocking effect, which in principle prohibits any court in subsequent proceedings from intervening in proceedings on the same subject matter and between the same parties (Art. 59 para. 2 lit. e CCP; ne bis in idem). On the other hand, substantive res judicata has a binding effect. According to this, the court in later proceedings is bound by the content of the subject matter of the earlier proceedings. Thus, in subsequent proceedings, the court cannot contradict the subject matter of the dispute that has already been adjudicated. Therefore, if the adjudicated subject matter of the dispute arises as a preliminary question in the subsequent proceedings, the court must base its own judgment on the corresponding decision of the previous proceedings as binding. Finally, substantive res judicata has a preclusive effect. Accordingly, substantive res judicata excludes attacks

on all legally relevant facts that already existed at the time of the judgment, provided that they could have been introduced into the proceedings by the parties with reasonable diligence, but were not introduced. Such a fact can therefore not change the relevance of a judgment, even though it was not taken into account in the final decision. Accordingly, a judgment includes all facts that are normatively attributable to the subject matter of the dispute, irrespective of whether they were actually available to the adjudicating court for assessment. Under Swiss law, the scope of substantive legal force is determined objectively on the basis of the subject matter of the dispute, which consists of the legal claim and the facts of life. From a subjective point of view, res judicata is in principle only binding on the parties to the proceedings and their legal successors.

It must be borne in mind that there are significant differences between the individual legal systems of the Contracting States with regard to the scope and legal nature of res judicata. If - as is the case in the mainstream - the theory of extension of effect is followed, the scope of res judicata is determined on the basis of the law of the state of origin. If, on the other hand, the Gothaer jurisprudence of the ECJ recognizes an autonomous binding effect of res judicata, then within its scope of application both the main issue judged (according to the Swiss understanding, the subject matter of the dispute judged) and any preliminary issues become res judicata. 30

## 2. Effect on the form of the decision

Rulings on the creation, annulment or amendment of a right have a formative effect. In contrast to judgments on actions for performance or declaratory relief, which merely enforce a legal consequence that already exists outside the proceedings, a legal consequence that did not previously exist comes into being with a judgment on the form of an action. Such judgments therefore bring about the change in the substantive or procedural legal situation requested by the plaintiff. Thus, the effect of the judgment is the change in the substantive or procedural law that occurs when the judgment becomes final. The effect of the judgment is recognizable under the Convention irrespective of whether it qualifies as a procedural or substantive effect under the law of the State of origin. The scope of the formative effect is determined by the lex causae of the State of origin. 31

### 3. Intervention effect and effect of notice of dispute

32 The intervention effect presupposes that a third party intervenes in the proceedings in support of a party to the proceedings because it has its own legal interest in the success of the proceedings of the party it supports. The judgment on the dispute between the parties to the proceedings has a binding effect in subsequent proceedings between the supported party and the intervening party. In contrast to the intervening effect, in the case of the intervening effect the initiative to participate in the proceedings does not come from the intervening party but from a party to the proceedings. Accordingly, a litigant (proclaimed party) may request a third party (proclaimed party) to participate in the litigation if it believes that it has a claim against the proclaimed party if it is unsuccessful. If the proclaimed party participates in the proceedings, it shall have the status of an intervenor. The recognizability of both the intervention and the proclamation effect under the Convention follows directly from Art. II, para. 3, Protocol 1 Lugano Convention.

### 4. Effect of the facts

33 However, the factual effect is not capable of recognition. The effect is that substantive law attaches legal consequences to the existence of a judgment. It therefore represents a legal change that occurs as a result of the judgment (e.g. the start of a new limitation period under Art. 137 para. 2 CO). Similar to the effect on the form of the judgment, the effect on the facts is also effected by the substantive law. The difference, however, is that the decision on the form of the act is aimed at the effect on the form of the act. In contrast, the effect of the facts is neither the subject of the legal claim nor is it pronounced by the court in the judgment. Rather, the effect of the facts is automatically ordered by the substantive law. Accordingly, the lex causae also determines the question of which factual effects a particular foreign judgment produces. Thus, in accordance with Oberhammer, the decisive factor in assessing whether an effect is capable of being recognized should be whether the effect to be recognized was bindingly pronounced in the decision to be recognized. It is therefore essential that the legal consequence to be recognized is ordered by the judgment itself. If, on the other hand, the legal consequence occurs merely reflexively on the basis of a norm of substantive law, the legal consequence cannot be recognized. Similarly, the enforceability of a judgment is not recognizable. Under the Convention, the effect of enforceability is conferred originally

by the executing state by means of a declaration of enforceability (Article 38(1) Lugano Convention).

However, judgment effects that are unknown in the recognizing state may also be recognized. Thus, French guarantee or intervention judgments as well as Irish mareva or freezing injunctions are also recognizable in Switzerland. 34

## C. Procedural assertion of the effects of the decision

Finally, it is disputed whether the procedural assertion of the effects of the decision (e.g. whether res judicata is to be taken into account ex officio or only upon objection) is governed by the law of the state of origin or the state of recognition. According to the majority, this is determined by the lex fori of the state of recognition. If the theory of the extension of effect is followed consistently, the legal effect in the state of recognition should not be different from that in the state of origin. Accordingly, the question of administrative consideration of res judicata should also be assessed on the basis of the law of the State of origin. 35

The author would like to thank attorney Moritz B. Kocher, LL.M. for his critical review and comments.

## BIBLIOGRAPHY

Althammer Christoph, Streitgegenstand und Interesse, A civil procedural study on the German and European concept of Streitgegenstand, Tübingen 2012.

Althammer Christoph et al, Stein/Jonas, Kommentar zur Zivilprozessordnung, vol. 10 EuGVVO, GVG, 22nd ed. Tübingen 2011 (citing Stein/Jonas - Bearbeiter, Art. xx EuGVVO N. xx).

Althammer Christoph/Tolani Madeleine, New perspectives for a common European concept of res judicata in the case law of the ECJ on the EuGVVO?, ZZPInt 2014, p. 227 et seq.

Bach Ivo, Deine Rechtskraft? Meine Rechtskraft!, On the ECJ's decision to apply the Union law concept of res judicata to civil law decisions of national courts, EuZW 2013, p. 56 et seq.

Böhm Peter, Der Streitgegenstandsbegriff des EuGH und seine Auswirkungen auf das österreichische Recht, in: Bajons Ena-Marlis/Mayr Peter G./Zeiler Gerold (eds.), Die Übereinkommen von Brüssel und Lugano, Der Einfluss der Europäischen Gerichtsstands- und Vollstreckungsübereinkommen auf den österreichischen Zivilprozess, Vienna 1997.

Baumgartner Samuel/Sarah Lustenberger, Zur Zulässigkeit der alternativen objektiven Teilklagenhäufung, in: Müller Roland A., Rudolph Roger, Schnyder Anton K., von Kaenel Adrian, Waas Bernd (eds.), Festschrift für Wolfgang Portmann, Zurich 2020.

Dispatch on the Federal Decree on the Approval and Implementation of the Revised Lugano Convention on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters of February 18, 2009, BBl 2009 p. 1777 ff. (cf. Dispatch LugÜ)

Bucher Andreas (ed.), Commentaire Romand, Loi sur le droit international privé, Convention de Lugano, Basel 2011 (cit. CR LugÜ - Bearbeiter/-in, Art. xx LugÜ N. xx).

Czernich Dietmar/Kodek Georg E./Mayr Peter G., Europäisches Gerichtsstands- und Vollstreckungsrecht - Brüssel Ia-Verordnung (EuGVVO 2012) und Übereinkommen von Lugano 2007, 4th ed. Vienna 2015

Dasser Felix / Oberhammer Paul (eds.), Stämpfli Handkommentar, Lugano Convention - Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 3rd ed. Bern 2021 (cf. SHK LugÜ - Bearbeiter/-in, Art. xx LugÜ N. yy).

Domej Tanja, Der "Lugano - Zahlungsbefehl" - Titelllose Schuldbetreibung in der Schweiz nach der LugÜ-Revision, ZZPInt 2008, p. 167 et seq.

Donzallaz Yves, La Convention de Lugano du 16 septembre 1988 concernant la competence judiciaire et l'exécution des decisions et matière civile et commerciale, Volume II, Paragraphes 1737 - 4328, Bern 1997.

Droese Lorenz, Res iudicata ius facit, Investigation on the objective and temporal limits of res judicata in Swiss civil procedural law, Bern 2015.

Gaudemet-Tallon Hélène/Ancel Marie-Élodie, Compétence et exécution des jugements en Europe, 6th ed. Paris 2018.

Geimer Reinhold, International Civil Procedure Law, 8th ed. Cologne 2020.

Geimer Reinhold / Schütze Rolf A. (eds.), European Civil Procedure Law - Commentary on the EuGVVO, EuEheVO, EuZustellungsVO, EuInsVO, EuVT-VO, on the Lugano Convention and on National Competence and Recognition Law, 4th ed. Munich 2020 (cit. Geimer/Schütze - Bearbeiter/-in, Art. xx EuGVVO N. xx).

Hausheer Heinz/Walter Hans Peter (eds.), Berner Kommentar zum schweizerischen Privatrecht, Schweizerische Zivilprozessordnung, Bern 2012 (cite BK ZPO - Bearbeiter/-in).

Hess Burkhard, European Civil Procedure Law, 2nd ed. Berlin/Boston 2021.

Jakowski Victoria Maria, Das Anerkennungsregime des europäischen Zivilprozessrechts für mitgliedsstaatliche Entscheidungen, Eine Analyse der Verordnung EuGVVO, EuVTVO, EuMahnVO und EuGFVO unter dem Blickwinkel des deutschen Zivilprozessrechts, Berlin 2020.

Jametti Monique, Der Begriff der Entscheidung im schweizerischen internationalen Zivilverfahrensrecht, Diss. Basel 1997.

Jenard Paul, Report of 5 March 1979 on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ EC 1979, C 59, p. 1 ff (cf. Jenard Report).

Kerameus K. D., Report of 24 November 1986 on the Accession of the Hellenic Republic to the EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ EC 1986, C 298, p. 1 ff. (cite Evrigenis/Kerameus Report).

Kistler Alexander R. E. / Daphinoff Michael, The Arbitration Exclusion of the EuGVVO and the Lugano Convention, SRIEL 2020, p. 477 et seq.

Koops Tilman, Der Rechtskraftbegriff der EuGVVO - Zur Frage der Unvereinbarkeit der Entscheidung Gothaer Allgemeine Versicherung ./. Samskip GmbH mit der EuGVVO, IPRax 2018, p. 11 et seq.

Kren Kostkiewicz Jolanta (ed.), Orell Füssli Kommentar Bundesgesetz über das Internationale Privatrecht, Lugano-Übereinkommen und weitere Erlassen, 2nd ed. Zurich 2019 (cf. OFK IPRG/LugÜ - Bearbeiter/-in, Art. xx LugÜ N. yy).

Kropholler Jan/von Hein Jan, Europäisches Zivilprozessrecht, Kommentar zu EuGVO, Lugano-Übereinkommen, EuVTVO, EuMVVO und EuGFVO, 9th ed. Frankfurt a.M. 2011 (cf. Kropholler/von Hein, Art. xx N. xx).

Krüger Christian, Europäischer Rechtskraftbegriff, Überlegungen zu Existent, Reichweite und Erforderlichkeit, Tübingen 2020.

Linke Hartmut/Hau Wolfgang, International Civil Procedure Law, 8th ed. Cologne 2021.

Loyal Florian, On the structure and dogmatics of the recognition of foreign court decisions, ZZP 2018, p. 373 et seq.

Markus Alexander R., International Civil Procedure Law, 2nd ed. Berne 2020.

Markus Alexander R., The Revised European Jurisdiction Regulation, A "Lugano View," AJP 2014, p. 800 et seq. (citing Markus, Lugano View).

Markus Alexander R./Giroud Sandrine, A Swiss Perspective on West Tankers and Its Aftermath - What about the Lugano Convention, ASA Bulletin 2010, p. 230 et seq.

Martiny Dieter, Handbuch des Internationalen Zivilverfahrensrechts, Vol. III/1, Recognition of Foreign Judgments under Autonomous Law, Tübingen 1984.

Oberhammer Paul, International Lis pendens, Set-off and Objective Limits of Res judicata in Europe, IPRax 2002, p. 424 et seq. (citing Oberhammer, International Lis pendens).

Oberhammer Paul, Objective Limits of Material Legal Force: Binding and Preclusion, Juristische Blätter (JBL) 2000, p. 205 ff. (citing Oberhammer, Material Legal Force).

Oberhammer Paul/Koller Christian/Slonina Michael, § 15 Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters, in: Stefan Leible/Jörg Philipp Terhechte (eds.), Enzyklopädie Europarecht, vol. 3, Europäisches Rechtsschutz- und Verfahrensrecht, Zurich/Baden-Baden/Vienna 2014.

Oberhammer Paul/Domej Tanja/Haas Ulrich (eds.), Kurzkommentar Schweizerische Zivilprozessordnung, 3rd ed. Basel 2021 (cf. KuKo ZPO - Bearbeiter/-in, Art. xx ZPO N. yy).

Oetiker Christian / Weibel Thomas (eds.), Basler Kommentar, Lugano Convention, 2nd ed. Basel 2016 (cf. BSK LugÜ - Bearbeiter, Art. xx LugÜ N. xx).

Paulus David / Pfeiffer Evgenia / Pfeiffer Max, European Jurisdiction and Enforcement Regulation (Brussels Ia), Commentary on Regulation (EU) No. 1215/2012 (EuGVVO), Munich 2017 (cite Paulus/Pfeiffer/Pfeiffer - Bearbeiter/-in, Art. xx VO (EU) No. 1215/2012 N xx).

Pfeiffer Max Christoph, Cross-Border Title Validity in the European Union, The Effects of Recognition, Declaration of Enforceability and Enforceability of Foreign Judgments and Community-wide Titles, Berlin 2012.

Pocar Fausto, Explanatory Report of 23 December 2009 on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ EC 2009, C 319 pp. 1 et seq. (citing Pocar Report).

Rauscher Thomas (ed.), European Civil Procedure and Conflict of Laws EuZPR/EuIPR, Commentary, Volume I - Brussels Ia Regulation, 5th ed. Cologne 2021 (cit. Rauscher - Bearbeiter/-in, Art. xx Brussels Ia Regulation N. xx).

Rauscher Thomas / Krüger Wolfgang, Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen, vol. 3, §§ 946 - 1117, EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht, 5th ed. Munich 2017 (cit. MüKo ZPO - Bearbeiter/-in, Art. xx Brussels Ia Regulation N. xx).

Roth Herbert, Europäischer Rechtskraftbegriff im Zuständigkeitsrecht?, IPRax 2014, p. 136 et seq.

Schack Haimo, "Anerkennung" ausländischer Entscheidungen, in: Caroline Meller-Hannich/Lutz Haertlein/Hans Friedhelm Gaul/Ekkehard Becker-Eberhard (eds.), Rechtslage - Rechtserkenntnis Rechtsdurchsetzung, Festschrift für Eberhard Schilken zum 70. Geburtstag, Munich 2015 (cit. Schack, Anerkennung).

Schack Haimo, European Legal Force?, in: Rolf A. Schütze (ed.), Fairness Justice Equity, Festschrift für Reinhold Geimer zum 80. Geburtstag, Munich 2017 (citing Schack, European Legal Force?).

Schack Haimo, International Civil Procedure Law - with International Insolvency Law and Arbitration Law, 6th ed. Munich 2014.

Schnyder Anton K., DIKE Commentary, Lugano Convention on International Civil Procedure Law, Zurich 2011 (cite Schnyder - Bearbeiter/-in, Art. xx LugÜ N. xx).

Seperrer Sophia, Der Rechtskrafteinwand in den Mitgliedstaaten der EuGVO, Tübingen 2010.

Siehr Kurt, International Private Law - German and European Conflict of Laws for Study and Practice, Heidelberg 2001.

Simons Thomas / Hausmann Rainer, Unalex Kommentar, Brüssel I-Verordnung: Kommentar zur VO (EG) 44/2001 und zum Übereinkommen von Lugano, Munich 2012 (cit. Unalex Kommentar LugÜ - Bearbeiter/-in, Art. xx LugÜ N. yy).

Spühler Karl/Rodriguez Rodrigo, International Civil Procedure Law, Jurisdiction, Procedure, Lugano Convention, Recognition and Enforcement, Mutual Assistance, International Bankruptcy Law, Appeals, 2nd ed. 2013 Zurich.

Tsikrikas Dimitrios, Cross-border Binding Effect of Trial Judgments in the European Judicial Area, in: ZZPInt 2017, p. 213 et seq.

Walter Gerhard/Domej Tanja, International Civil Procedure Law of Switzerland, 5th ed. Bern/Stuttgart/Vienna 2012.

Wieczorek Bernhard/Rolf A. Schütze, Zivilprozessordnung und Nebengesetze, vol. 13/2, Brussels Ia Regulation, 4th ed. 2019 Berlin (cit. Wieczorek/Schütze - Bearbeiter, Art. xx Brussels Ia Regulation N. xx).

ATTENTION: This version of the commentary is an automatically generated machine translation of the original. The original commentary is in German. The translation was done with www.deepl.com. Only the original version is authoritative. The translated form of the commentary cannot be cited.

COMMENTARY ON

# Art. 32 LC

A commentary by Alexander Kistler

SUGGESTED CITATION

Alexander Kistler, Kommentierung zu Art. 32 LugÜ, in: Christoph Hurni (Hrsg.), Onlinekommentar zum Lugano Übereinkommen

Short citation: OK-Kistler, N. XXX zu Art. 32 LugÜ.

**TITLE III: RECOGNITION AND ENFORCEMENT**

**Art. 32**

For the purposes of this Convention, 'judgment' means any judgment given by a court or tribunal of a State bound by this Convention, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

# CONTENT

I. Subject-matter and concept of judgment ..... 29
A. Cross-border effects ..... 30
B. Contracting State Court (Art. 62 Lugano Convention) ..... 31
II. Special Issues ..... 34
A. Decisions of conciliation authorities ..... 34
B. Exequatur decisions ..... 35
C. Decisions of the SchKG ..... 35
1. Decisions in connection with bankruptcy proceedings ..... 35
2. Enforcement measures ..... 35
3. Limitation to the initiated enforcement proceedings ..... 36
4. Order for payment ..... 37
5. Decisions to open a case ..... 39
6. Arrest ..... 40
D. Litigation Settlements ..... 41
E. Decisions in connection with arbitration ..... 42
F. Authentic Instruments ..... 43
G. Decisions on costs ..... 44
Bibliography ..... 44

## I. SUBJECT-MATTER AND CONCEPT OF JUDGMENT

In the case of a request for recognition under Article 33 of the Lugano Convention, the applicant bears the burden of proving that a judgment within the meaning of the Convention has been given. This is a positive requirement for recognition. Art. 32 Lugano is autonomous in determining which legal instruments are deemed to be judgments within the meaning of the Convention and can therefore be recognized and declared enforceable. However, Art. 32 Lugano Convention offers little guidance as to what the criteria are for the existence of a judgment. Thus, the article merely states that the term "judgment" covers any judgment rendered by a court of a Contracting State. Furthermore, the provision provides a non-exhaustive list of the legal acts covered by the concept of a judgment. Otherwise, Art. 32 Lugano Convention does not contain any requirements as to the content of the decision. Rather, the concept of a decision is not intended to be interpreted restrictively. 1

In principle, therefore, both the name of the decision and the type of proceedings in which it was given are irrelevant to its eligibility for recognition. Thus, decisions on the granting of legal protection in clear cases pursuant to Art. 257 of the Code of Civil Procedure are also covered by Art. 32 of the Lugano Convention. The concept of decision includes both final decisions, which terminate the proceedings (before the relevant instance), and partial decisions, which assess exclusively a part of the objectively or subjectively accumulated claims. Likewise, interim decisions which rule on individual preliminary issues without concluding the main proceedings before the relevant instance are in principle recognizable. Finally, the form and the content are not relevant for the qualification as a decision in the sense of Art. 32 Lugano Convention. In this sense, no substantive review of the merits of the asserted claim is required, which is why judgments by default can in principle be recognized and declared enforceable under the Convention. 2

Despite the lack of substantive requirements, however, it must at least be assumed that the judgment has legal consequences that can be recognized or declared enforceable across borders. Therefore, in order to qualify as a decision within the meaning of Art. 32 Lugano Convention, it is required on the one hand that the decision has legal consequences that are amenable to cross-border recognition or a declaration of enforceability. On the other 3

hand, the decision must have been issued by a court within the meaning of Art. 62 Lugano Convention.

## A. Cross-border effects

4 Only (potentially) cross-border effects are amenable to recognition or a declaration of enforceability under the Convention. Thus, legal instruments that have only an internal effect (such as orders to take evidence or procedural orders that decide only on the progress of the proceedings) cannot be recognized or declared enforceable under the Convention. The same applies to judgments whose subject matter is confined to the territory of the sentencing State.

5 On the other hand, for a judgment to be recognized or declared enforceable under the Convention, there is no requirement that the judgment must have acquired the force of res judicata. Accordingly, a judgment may be recognized if an ordinary appeal has been lodged against it in the State of origin. Art. 37 (1) Lugano Convention provides for this situation that the recognition court "may" suspend the proceedings. However, it does not have to do so. For the declaration of enforceability, however, it is at least required that the judgment is provisionally enforceable in the State of origin (Art. 38 (1) Lugano Convention). Enforceability from a legal point of view is sufficient. On the other hand, it is irrelevant whether the judgment cannot be enforced in the State of origin for factual reasons. This is due to the fact that the Convention only regulates admission to enforcement and not enforcement per se. The latter is reserved to the national law of the executing state.

6 Also covered by the concept of a judgment are precautionary measures. In order for such measures to be recognized and enforced under the Convention, it is a prerequisite, according to the case law of the ECJ, that the opposing party has been granted the right to be heard. However, the required right to be heard is already ensured if there was still the possibility to raise objections against the decision or to lodge an appeal. Therefore, for a decision to be recognizable, only the possibility of an adversarial proceeding must exist, and this before the question of its recognition or enforcement arises. Superprovisional measures that are issued without hearing the opposing party are therefore not recognizable.

In the case of provisional measures issued on the basis of Art. 31 Lugano Convention, there are additional requirements according to the case law of the ECJ, which must also be examined in the context of the enforceability declaration procedure. On the one hand, there must be a real link between the subject matter of the measure and the territory of the jurisdiction claimed for the issuance of the measure. On the other hand, the provisional character of the measure must be preserved. In the case of performance measures, this presupposes that repayment is guaranteed in the event that the applicant loses on the merits. The Court of Justice links these conditions to the recognizability or enforceability of such measures. If these conditions are not met, such measures cannot be recognized or declared enforceable under the provisions of the Convention. 7

It is disputed to what extent procedural decisions (i.e. decisions which decide on the existence of a procedural requirement) are recognizable. In its Gotha jurisprudence, the ECJ held that a decision by which a Member State court declined its (international) jurisdiction on the basis of a choice-of-court agreement was covered by the concept of a decision under Article 32 aEuGVVO [Article 32 Lugano Convention]. It is unclear whether this means that all procedural decisions are eligible for recognition. The reasoning of the Gotha judgment does point out that the concept of judgment should be broadly defined in the sense of promoting the free movement of judgments and should therefore in principle cover all trial judgments. However, an exception should apply insofar as the content of the procedural judgment is intended to have only intra-territorial effect and precisely no international effect (e.g., a decision on lack of jurisdiction due to a failure to grant leave to bring an action or due to a lack of subject-matter jurisdiction). 8

## B. Contracting State Court (Art. 62 Lugano Convention)

The definition of a treaty court is derived from Art. 62 LugÜ, which is independent of the treaty. In contrast to the aLugÜ, which in principle qualified only judicial authorities as courts within the meaning of the Convention, Art. 62 LugÜ extends the concept of court also to administrative authorities. According to Art. 62 Lugano Convention, the term "court" includes any authority which has been designated by a Contracting State as having jurisdiction over the matters covered by the Convention. It follows from this definition that, in principle, any state authority ("any authority") which is competent to judge a 9

civil or commercial matter is covered by the concept of a court under Art. 62 Lugano Convention.

10 For the qualification as a court in the sense of Art. 62 or Art. 32 Lugano Convention, the function exercised by the state authority and not its formal, organizational classification in national law is therefore decisive (so-called functional concept of court). Accordingly, the designation of the authority in national law or the type of jurisdiction is not relevant. Consequently, decisions of criminal or administrative courts are also eligible for recognition under the Convention, provided they are covered by the material scope of application. For example, decisions of a criminal court on civil claims in the context of an action for adhesion may well be recognized under the Convention. Similarly, the decision need not have been issued by a judge either. Decisions of a court clerk or an otherwise competent judicial officer may also be recognized. However, the functional approach presupposes that the authority also has a corresponding judicial function. In the sense of the ECJ case law in Solo Kleinmotoren, it is therefore a prerequisite for decisions that the authority itself, by virtue of its mandate, can decide on the points in dispute between the parties.

11 Based on this consideration, the qualification as a court in the sense of Art. 32 Lugano Convention requires two things: On the one hand, it must be a state authority. In this context, it must be taken into account that the European Union itself is considered a contracting state to the Convention. Consequently, the various courts and offices of the EU are also covered (such as the European Union Intellectual Property Office [EUIPO] or the ECJ; cf. Art. 1 para. 3 Lugano Convention). Also covered are joint courts of several Contracting States (such as the Benelux Court of Justice), insofar as jurisdictional tasks have been assigned to them by the Contracting States. Furthermore, decisions of other supranational courts or authorities (such as the ECHR bodies) are not courts within the meaning of Art. 62 Lugano Convention, since such institutions are not courts of a Contracting State. Furthermore, private courts (such as arbitral tribunals, courts of associations or ecclesiastical courts) do not qualify as courts within the meaning of Art. 62 Lugano Convention. On the other hand, it must be assumed that the deciding authority has a decision-making power for the case in question. Accordingly, at least a basis of authorization in a sovereign act must be presupposed, which declares the deciding authority competent to decide the dispute in question.

It is unclear to what extent a judicial procedure must precede the decision. Thus, with regard to the concept of a decision within the meaning of Article 2(1)(a) of the Regulation, the ECJ stated that the principle of legitimate expectations requires that decisions are taken in a judicial procedure which guarantees independence and impartiality and in which the principle of adversarial proceedings is respected. Similarly, it is also demanded by the majority that the deciding authority must fulfill the requirements of an independent and impartial court in accordance with Art. 6 ECHR. However, these considerations cannot be applied to the concept of a court in the Lugano Convention without further ado. Similar to the aLugÜ, the concept of court in the EuGVVO is also limited to judicial authorities. Accordingly, it seems justified to define this concept on the basis of the characteristics of a court according to Art. 6(1) ECHR. Thus, the expression of a European rule of law standard and thus also of a minimum standard to be applied to a court can certainly be recognized in Art. 6(1) ECHR. 12

Within the framework of the Lugano Convention, however, the requirement of a court as the deciding authority was expressly dispensed with. Consequently, at least the Convention itself does not impose any further requirements on the proceedings to be conducted. However, such an obligation can be inferred from the ECHR, which provides for various procedural guarantees in Article 6(1) ECHR. Recognition of decisions that violate these procedural guarantees can be refused on the basis of the formal public policy reservation pursuant to Art. 34 No. 1 Lugano Convention. Art. 6 para. 1 ECHR provides, inter alia, for the right of every party to have its civil claims adjudicated by an independent, impartial and law-based tribunal in a fair trial. It can be deduced from this that the person concerned must at least have the possibility of challenging measures before a court that can decide on all relevant questions of fact and law. However, it is perfectly compatible with this provision to consider an administrative order as a decision in the sense of Art. 32 Lugano Convention, provided that prior to the recognition there was at least the possibility of a judicial review of the order in the state of origin. 13

## II. SPECIAL ISSUES

### A. Decisions of conciliation authorities

14 Conciliation authorities can be qualified as courts within the meaning of Art. 62 or Art. 32 Lugano Convention. However, in order to qualify as a decision in the sense of Art. 32 Lugano Convention, it is necessary that the conciliation authority has a decision-making competence in the sense of Art. 210 ff. ZPO. The ECJ did hold in Schlömp that for the purpose of establishing lis pendens under Art. 30 (1) Lugano Convention, conciliation authorities are to be qualified as courts. However, this finding is only in appearance contradictory to the statutory decision-making power to be presupposed. It must be remembered that Art. 62 Lugano Convention follows precisely a functional approach and thus focuses on the function to be exercised according to the statutory basis. In Swiss civil procedural law, the conciliation authority generally has the function of initiating proceedings (Art. 197 ZPO). In this respect, the filing of a conciliation request also triggers the lis pendens in Swiss civil procedure law (Art. 62 para. 1 CCP). In contrast, the conciliation authority, with the exception of the constellations of Art. 210 et seq. ZPO, the conciliation authority does not have the power to decide the civil dispute pending between the parties. Accordingly, outside of these constellations, conciliation authorities do not qualify as courts within the meaning of Art. 32 Lugano Convention. Therefore, for example, a grant of leave to bring an action (apart from the fact that this only has an effect within the proceedings and therefore does not have any effects which can be recognized) does not constitute a decision within the meaning of Art. 32 Lugano Convention. In the case of proposed judgments, the situation is less clear. Thus, according to Art. 211 para. 1 CCP, a proposed judgment is deemed to be accepted and has the effects of a final decision if it is not rejected by either party within twenty days. However, if one of the parties rejects the proposed judgment, the conciliation authority is retroactively deprived of its decision-making authority. In this case, the conciliation authority no longer has a decision-making function, which is why it can no longer be regarded as a court within the meaning of Art. 32 Lugano Convention. Accordingly, a proposed judgment should only be considered a decision within the meaning of Art. 32 Lugano Convention after the expiry of the 20-day period and the determination of res judicata by the conciliation authority.

## B. Exequatur decisions

Decisions which recognize or declare enforceable judgments of other Contracting States (so-called exequatur decisions) are not eligible for recognition under Art. 32 et seq. Lugano Convention (so-called prohibition of double exequatur). This follows from the fact that, on the basis of the recognition and enforceability declaration provisions of the Convention, each Contracting State must decide independently whether the conditions for recognition are fulfilled. The same applies to decisions recognizing or declaring enforceable a judgment of a third state. Such decisions also do not participate in the Convention's freedom of movement. 15

On the other hand, treaty-based judgments that modify a treaty-based or third-country judgment are eligible for cross-border recognition or a declaration of enforceability. It is essential, however, that the earlier judgment between the same parties and on the same subject matter of the dispute be replaced or modified in result. 16

## C. Decisions of the SchKG

### 1. Decisions in connection with bankruptcy proceedings

In connection with decisions arising from SchKG proceedings, first of all, Art. 1(2)(b) LugÜ must be taken into account. Accordingly, bankruptcy, compositions and similar proceedings are excluded from the material scope of the Convention. Judgments arising from such proceedings are also not covered by the Convention. 17

### 2. Enforcement measures

It should also be borne in mind that Swiss debt enforcement and bankruptcy law is characterized by a particularly close intertwining of the cognition and enforcement proceedings. Thus, the Swiss debt enforcement proceedings have a dual nature as title production and title enforcement proceedings. This gives rise to significant difficulties in the assignment to the system of recognition and declaration of enforceability of the Convention. 18

On the one hand, within the framework of the SchKG, the demarcation between pure enforcement measures and enforcement titles is particularly difficult. The concrete distinction must be made autonomously and according to 19

functional criteria. Measures that serve the initiation or execution of enforcement proceedings are considered enforcement measures. It is essential that such measures do not resolve a dispute between the parties and serve exclusively to enforce the law by force. Due to the fact that the actual enforcement is exclusively a matter of national law, pure enforcement measures are also not amenable to recognition and enforcement according to Art. 32 et seq. Lugano Convention.

20 Therefore, in my opinion, a distinction must be made between enforcement measures and actual enforcement instruments according to the following criteria. Enforcement acts that serve exclusively to enforce a legal claim that has already been recognized by a court are to be qualified as enforcement measures (this includes, for example, attachment orders). However, if the enforcement action also includes a decision on a disputed point between the parties, the action must be qualified as an enforcement order covered by Art. 32 Lugano Convention.

### 3. Limitation to the initiated enforcement proceedings

21 On the other hand, legal titles under the SchKG are also difficult to classify insofar as their effects under debt enforcement law are limited to the initiated domestic debt enforcement proceedings. Therefore, if legal titles only have effects under debt collection law and no effects under substantive law (such as the decision to initiate legal proceedings or the uncontested and unchallenged order for payment), the decision itself is limited in terms of its subject matter to the initiated debt collection proceedings. Because of this (factual and, as a result, also territorial) limitation, it is sometimes argued in doctrine that such titles cannot be recognized and declared enforceable under the provisions of the Convention.

22 On the one hand, such a view is entirely justifiable and finds some confirmation in the case law of the ECJ on the legal consequences of a declaration of enforceability. Thus, the ECJ has stated that it is not appropriate to grant a decision legal effects upon its declaration of enforceability that it does not have in the state of origin. In the case of a declaration of enforceability, however, a purely debt enforcement title under the SchKG would be granted a more far-reaching effect in the state of enforcement than in the state of origin. Thus, by means of the enforceability declaration, the title (in contrast to Switzerland) would also have an effect outside the ongoing debt enforcement proceedings.

On the other hand, this restriction is also due to the peculiarity of the Swiss debt enforcement proceedings, according to which the debtor's entire assets located in Switzerland can already be accessed during the ongoing proceedings. There is therefore no reason per se to initiate further debt collection proceedings based on the same title. As a result, this is a territorial limitation of the effects of an order for payment imposed by national law. However, it is at least questionable whether the provisions on the free movement of judgments of the Convention are at all within the disposition of the contracting states. Thus, the national law of a Contracting State should in itself be precluded from excluding the recognition and enforcement of a judgment under the Lugano Convention. Accordingly, in the sense of the free movement of judgments, an international perspective is to be preferred with respect to this restriction. Accordingly, it must be examined whether, irrespective of the restriction imposed by national law on the debt collection proceedings, the judgments have legal consequences that are amenable to cross-border recognition or declaration of enforceability.

## 4. Order for payment

If the uncontested order for payment was issued on the basis of a judgment or judgment surrogate (so-called titled order for payment), the order for payment does not constitute an independent enforcement title. Rather, it merely shows that the underlying decision is enforceable. Therefore, only the underlying decision that is deemed enforceable on the basis of the order for payment participates in the Convention's freedom of movement (insofar as it is covered by the material scope of application) (Art. 38 para. 1 Lugano Convention). 23

It is much more controversial whether an uncontested order for payment is to be regarded as a decision within the meaning of Art. 32 Lugano Convention. In some cases it is argued that the order for payment is a pure enforcement measure. However, it must be taken into account that the order for payment has a dual nature. First of all, it is merely an official demand for payment and thus initiates the intended enforcement proceedings. In this function, the order for payment is only a part of the compulsory enforcement proceedings and is in fact a pure enforcement measure. However, if the debtor does not raise a legal objection or if a possible legal objection is eliminated, the payment order becomes "final" and a de facto enforcement title. The broad concept of a decision according to Art. 32 Lugano Convention covers all enforce- 24

ment titles. This also follows from the case law of the ECJ, in which enforcement orders functionally equivalent to the Swiss order for payment (such as the Italian decreto ingiuntivo) were qualified as judgments within the meaning of Art. 32 Lugano Convention. Moreover, as is well known, Art. 32 LugÜ mentions the order for payment as an example of a judgment, whereby the concept of judgment per se has been extended to include orders for payment. Based on this, it cannot be assumed that the Swiss order for payment is a mere enforcement measure within the meaning of the Convention. On the contrary, it is an enforcement order which can in principle participate in the free movement of titles under the Convention.

25 It is also irrelevant that the order for payment is issued by a debt collection office and not by an actual court. As is well known, the concept of court was extended to administrative authorities by Art. 62 LugÜ. Instead, based on the functional concept of a court, the function of the debt collection agency to be exercised according to the legal basis is to be taken into account. In this context, it is noticeable that the debt collection authority is not declared competent by Swiss law (more precisely: by the SchKG) to decide a dispute existing between the parties. Based on the Solo Kleinmotoren jurisprudence of the ECJ, this initially speaks against a qualification of the order for payment as a decision in the sense of Art. 32 LugÜ. However, the uncontested and untitled order for payment becomes an enforcement title by operation of law. Accordingly, in this constellation, the debt collection authority has the authority by operation of law to issue an enforcement order. Consequently, in this constellation the debt collection authority is also competent to decide on a point in dispute between the parties (namely the enforceability of the claim), which is why it is to be regarded in this respect as a court within the meaning of Art. 62 Lugano Convention. Accordingly, although the order for payment would not be amenable to recognition, it would be amenable to a declaration of enforceability abroad.

26 Similarly, the fact that the uncontested and untitled order for payment is not preceded by adversarial proceedings is not decisive. According to the case law of the ECJ, only the possibility of adversarial proceedings before the time of the application for recognition or declaration of enforceability is required. This possibility exists without further ado in the case of an order for payment; the debtor can either raise a legal objection or have it established at any time in court proceedings that the claim on which the order for payment is based

does not exist (Art. 85a para. 1 SchKG). This possibility also safeguards the right to judicial proceedings within the meaning of Article 6 ECHR.

The only question is whether the order for payment can also have cross-border effects. The order for payment is in itself limited to the initiated debt collection proceedings and does not enable further debt collection proceedings to be initiated. The untitled and uncontested order for payment therefore only creates an enforcement title for the pending debt collection (and not in general) and is therefore also inseparably connected to it. However, in the sense of the free movement of judgments, an international perspective is to be preferred here, as already mentioned, according to which the untitled and uncontested order for payment is nothing other than a temporally limited enforcement title. Since time-limited enforceable titles are amenable to a declaration of enforceability under the Convention, I believe that such orders for payment can participate in the cross-border free movement of titles. 27

## 5. Decisions to open a case

If a legal proposal that has been raised is eliminated by means of a (provisional or definitive) decision to initiate legal proceedings or an action for recognition, this decision takes the place of the order for payment. 28

In the case of a definitive decision to initiate legal proceedings, this is an exequatur decision that declares the underlying judgment or judgment surrogate in the corresponding debt enforcement proceedings to be enforceable and eliminates the legal advance. Accordingly, this decision is neither recognizable nor enforceable under the Convention due to the prohibition of double exequatur. On the other hand, the legal title on which the decision opening the proceedings is based is in principle amenable to cross-border recognition and a declaration of enforceability under the Convention. 29

It is true that the provisional opening of proceedings also deals with the question of whether the public deed or acknowledgement of debt submitted fulfils the conditions for enforcement under Art. 82 SchKG. Thus, the judge opening the proceedings does not decide on the existence of the claim, but only on its enforceability. Nevertheless, this is basically (and contrary to the opinion of the Federal Supreme Court) a (summary) finding procedure that takes place within the framework of the debt enforcement proceedings. Thus, the opposing party is also free to assert substantive objections against the existence of 30

the claim (Art. 82 para. 2 SchKG). As a result of the fact that summary judgments are also amenable to a cross-border declaration of enforceability under the Lugano Convention, the provisional judgment opening proceedings can in principle be declared internationally enforceable together with the order for payment under the Convention.

31 In this context, the existing limitation to the initiated debt enforcement proceedings should again be mentioned. Thus, the decision to initiate legal proceedings does not impose an obligation to make a monetary payment, but grants provisional initiation of legal proceedings in a specific debt collection for a specific amount of money. The effects of the decision are therefore once again limited to the debt collection proceedings initiated and serve solely to eliminate the legal objection raised. However, an international perspective is also preferable here, whereby the provisional decision to initiate legal proceedings (like the uncontested order for payment) also represents an enforcement title limited in time. It is true that the provisional judgment opening the proceedings is not in itself final upon its issuance, but is only provisionally enforceable (depending on the failure to raise an action for revocation). However, under the Convention, judgments that are merely provisionally enforceable are also amenable to a declaration of international enforceability. Accordingly, international enforceability must also be assumed here in favor of the greatest possible freedom of movement of titles.

### 6. Arrest

32 The attachment is a precautionary security measure under the SchKG. It is used to officially seize the debtor's assets. It is well known that precautionary protective measures are amenable to cross-border declaration of enforceability under the Convention. In this respect, protective measures such as the sequestro conservativo of Italian law or the freezing injunction of Irish law are deemed to be judgments within the meaning of Art. 32 Lugano Convention. The Swiss attachment pursuant to Art. 271 et seq. SchKG (in contrast, for example, to the attachment under German law pursuant to § 916 et seq. of the German Code of Civil Procedure) is limited in its subject matter to certain assets located in Switzerland to be named in the request for attachment (Art. 271 para. 1 SchKG). Accordingly, an international enforceability of the attachment is rejected by the majority of the courts. However, a declaration of enforceability under the Convention should at least be considered if assets already

subject to attachment in Switzerland are transferred abroad. This, however, only insofar as the debtor was given the opportunity to oppose the attachment prior to the requested declaration of enforceability.

## D. Litigation Settlements

In principle, court settlements are not eligible for recognition under Art. 32 et seq. Lugano Convention. They are governed separately by Art. 58 Lugano Convention and are only amenable to a declaration of enforceability. This poses difficulties in particular for Contracting States (such as Switzerland) where the court settlement has the force of res judicata. Thus, on a strict interpretation, the settlement under the CCP could have no legal effect under the Convention. Moreover, even the recognition court could not refuse to recognize a judgment on the ground that its content is inconsistent with such a court settlement. However, it is unclear to what extent the European legislator had in mind the court settlement according to the ZPO. Thus, Art. 58 LugÜ seems to be rather oriented towards settlements which do not become final and only have an enforceable content (as it is known in German or Austrian law). 33

It is therefore questionable whether the settlement under Art. 241 CCP in conjunction with a court order to set aside (Art. 241 para. 3 CCP) has an effect that can be recognized under Art. 32 et seq. LugÜ can be granted a recognizable effect. As is well known, in Solo Kleinmotoren, the ECJ based its decision on the fact that the decision is issued by a contracting state judicial body which, by virtue of its mandate, itself decides on the dispute existing between the parties. According to the ECJ, this requirement is not met in the case of a court settlement even if it is concluded before a court and ends a legal dispute. The lawsuit settlement is essentially contractual in nature, since its content is determined primarily by the will of the parties. Accordingly, it is decisive for the Court whether the court itself decides on the disputed issues or whether it is primarily the will of the parties that leads to the settlement of the dispute. It could be argued in favor of recognizability that the court's decision to write off the settlement documents a judicial review of the contents of the settlement. Thus, the judge has to examine the contents of the settlement at least summarily and rudimentarily and to refuse the write-off if what has been agreed upon in terms of content is manifestly incompatible with the law. It is true that the settlement in itself constitutes the actual act generating legal 34

force. Nevertheless, the settlement only has an effect if this effect is certified by a write-off resolution. In the absence of such a writ of execution, the opposing party could, in the event of an appeal to the settlement, also argue that, in the opinion of the competent court, there was no effective settlement of the proceedings by declaration of the parties due to the non-existence of a writ of execution. However, it is doubtful whether this (limited) judicial review is already sufficient to nullify the "contractual nature" of the lawsuit settlement. Thus, despite the limited legal review power of the court, the content of the litigation settlement under Art. 241 CCP is essentially determined by the parties. Furthermore, the newly introduced Art. 2 lit. b EuGVVO into the parallel system of Brussels I has to be taken into account. This refers to a court settlement (instead of a court settlement) and defines this, among other things, as a settlement that has been "approved" by a court of a member state. In the end, also the settlement according to Art. 241 ZPO is approved by the court "for the sake of good order" in principle or the proceedings are written off. Therefore, it can be assumed that the court settlement, even with a court order to write off the proceedings, is not to be regarded as a decision in the sense of Art. 32 et seq. LugÜ is to be regarded.

35 It should be noted, however, that the boundary between a court settlement within the meaning of Art. 58 LugÜ and a decision within the meaning of Art. 32 LugÜ is fluid. If the judicial activity is not limited exclusively to the approval (or certification) of the settlement and the contents of the settlement are included in the judgment, such a judgment may constitute a decision within the meaning of Art. 32 Lugano Convention. This is at least the case if only the decision and not the settlement has legal effect. Judgments which are issued at the request of both parties (such as the Irish judgment by consent) should also be recognizable. In these constellations, the effects that can be recognized are only generated by an act of state authority, which is why a "purely contractual nature" can no longer be assumed.

## E. Decisions in connection with arbitration

36 Arbitration is excluded from the material scope of the Convention (Article 1(2) (d) LugÜ). However, the exclusion of arbitration is formulated in an extremely vague manner and is therefore open to interpretation. It is undisputed that the Convention does not bind arbitral tribunals, which is why arbitral awards are not covered by the Lugano Convention. Rather, such judgments are in princi-

ple to be recognized and enforced under the New York Convention ("NYC"). In addition, certain state court proceedings closely related to arbitration may also be covered by the arbitration exclusion. Thus, judgments that are an indispensable prerequisite for the conduct of a specific arbitration proceeding are not covered by the substantive scope of the Convention. Thus, inter alia, judicial decisions to appoint or dismiss an arbitrator, to determine the place of arbitration or to extend the time limit for rendering an award are excluded from the scope of arbitration. Furthermore, the Convention does not apply to decisions on disputes relating to an arbitral award (such as actions for annulment of an arbitral award). On the other hand, the Convention applies when arbitration is merely the subject of a preliminary issue. Accordingly, unfortunately, substantive decisions rendered in disregard of an arbitration agreement are also deemed to be recognizable under the Convention. This represents a blatant violation of Art. II para. 3 of the NYT.

37 In general, the legal nature of the subject matter of the dispute seems to be decisive for the Court in determining whether a decision is covered by the material scope of the Convention. However, how the legal nature of the subject matter of the dispute is to be determined cannot be conclusively clarified on the basis of ECJ case law. In Van Uden, for example, the ECJ held, limited to precautionary measures, that the legal nature of the claims to be secured determines whether they fall within the scope of application. In its West Tankers case law, the ECJ then seemed to generally determine the legal nature of the subject matter of the dispute on the basis of the legal nature of the claims to be secured. Accordingly, I believe that it must be assumed that the Court of Justice determines the affiliation of a proceeding, and thus also of its decision, to the substantive scope on the basis of the legal nature of the claims to be secured.

## F. Authentic Instruments

38 Authentic instruments do not constitute judgments within the meaning of the Convention. They are therefore not capable of recognition under the Convention, but are only amenable to a declaration of enforceability under Article 57 of the Lugano Convention.

## G. Decisions on costs

39 It already follows from the wording of Art. 32 Lugano Convention that decisions which determine the costs of proceedings are recognizable and enforceable under the Convention. This is justified insofar as the allocation of costs is often decided in the proceedings before the court. However, it is a prerequisite that the relevant proceedings are covered by the substantive scope of the Convention.

The author would like to thank Natalie Lisik for her critical review.

## BIBLIOGRAPHY

Althammer Christoph et al, Stein/Jonas, Kommentar zur Zivilprozessordnung, vol. 10 EuGVVO, GVG, 22nd ed. Tübingen 2011 (citing Stein/Jonas - Bearbeiter, Art. xx EuGVVO N. xx).

Amonn Kurt/Walther Fridolin, Grundriss des Schuldbetreibungs- und Konkursrechts, 9th ed. Berne 2013.

Atteslander-Dürrenmatt Agnes H., Der Prozessvergleich im internationalen Verhältnis, Unter besonderer Berücksichtigung anerkennungs- und vollstreckungsrechtlicher Fragen im grenzüberschreitenden Rechtsverkehr der Schweiz, Diss. Tübingen 2006.

Bettler Ronnie, Der gerichtliche Vergleich nach Art. 241 ZPO, Begriff, Inhalt und insbesondere Umfang der gerichtliche Prüfung, AJP 2018, p. 1486 et seq.

Bitter Anna-Kristina, Enforceability Declaration and Enforcement of Foreign Titles in the European Union, Tübingen 2009.

Dispatch of 18 February 2009 on the Federal Decree on the Approval and Implementation of the Revised Lugano Convention on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters, BBl 2009 p. 1777 ff. (cf. Dispatch LugÜ).

Dispatch of 28 June 2006 on the Swiss Code of Civil Procedure, BBl 2006 p. 7221 ff. (cit. Dispatch ZPO).

Bucher Andreas (ed.), Commentaire Romand, Loi sur le droit international privé, Convention de Lugano, Basel 2011 (cit. CR LugÜ - Bearbeiter/-in, Art. xx LugÜ N. xx).

Czernich Dietmar/Kodek Georg E./Mayr Peter G. (eds.), European Jurisdiction and Enforcement Law - Brussels Ia Regulation (EuGVVO 2012) and Convention of Lugano 2007, 4th ed. Vienna 2015 (cit. Czernich/Kodek/Mayr - Bearbeiter/-in, Art. xx EuGVVO N. xx).

Dasser Felix / Oberhammer Paul (eds.), Stämpfli Handkommentar, Lugano Convention - Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 3rd ed. Bern 2021 (cf. SHK LugÜ - Bearbeiter/-in, Art. xx LugÜ N. xx).

Domej Tanja, Der "Lugano - Zahlungsbefehl" - Titelllose Schuldbetreibung in der Schweiz nach der LugÜ-Revision, ZZPInt 2008, p. 167 et seq.

Donzallaz Yves, La Convention de Lugano du 16 septembre 1988 concernant la compétence judiciaire et l'exécution des décisions et matière civile et commerciale, Volume II, Paragraphs 1737 - 4328, Berne 1997.

Geimer Reinhold / Schütze Rolf A. (eds.), European Civil Procedure Law - Commentary on the EuGVVO, EuEheVO, EuZustellungsVO, EuInsVO, EuVTVO, on the Lugano Convention and on National Competence and Recognition Law, 4th ed. Munich 2020 (cit. Geimer/Schütze - Bearbeiter/-in, Art. xx EuGVVO N. xx).

Gilliéron Pierre-Robert, Commentaire de la foi fédérale sur la poursuite pour dettes et la faillite, vol. I, art. 1 - 88, Lausanne 1999.

Jametti Greiner Monique, Der Begriff der Entscheidung im schweizerischen internationalen Zivilverfahrensrecht, Diss. Basel 1998.

Jametti Greiner Monique, Overview of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, ZBJV 1992, p. 42 ff. (cf. Jametti Greiner, ZBJV).

Jenard Paul, Report of 5 March 1979 on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ EC 1979, C 59, p. 1 ff (cit. Jenard Report).

Kistler Alexander R. E. / Daphinoff Michael, The Arbitration Exclusion of the EuGVVO and the Lugano Convention, SRIEL 2020, p. 477 et seq.

Kren Kostkiewicz Jolanta, Recognizable and Enforceable Titles under IPR Law and the Lugano Convention, in: Schwander Ivo/Stoffel Walter A. (eds.),

Beiträge zum schweizerischen und internationalen Zivilprozessrecht, Festschrift für Oscar Vogel, Fribourg 1991, p. 419 ff.

Kren Kostkiewicz Jolanta (ed.), Orell Füssli Kommentar Bundesgesetz über das Internationale Privatrecht, Lugano-Übereinkommen und weitere Erlasse, 2nd
ed. Zurich 2019 (cf. OFK IPRG/LugÜ - Bearbeiter/-in, Art. xx LugÜ N. xx).

Kren Kostkiewicz Jolanta/Rodriguez Rodrigo, The uncontested order for payment in the revised Lugano Convention, Jusletter 26 April 2010.

Kropholler Jan/von Hein Jan, European Civil Procedure Law, Commentary on EuGVO, Lugano Convention 2007, EuMTVO, EuMVVO and EuGFVO, 9th ed. Frankfurt a.M. 2011.

Markus Alexander R., The Revised European Jurisdiction Regulation, A "Lugano View", AJP 2014 p. 800 et seq. (cf. Markus, Lugano View).

Markus Alexander R., International Civil Procedure Law, 2nd ed. Berne 2020.

Markus Alexander R., Problems of the EuGVVO - Revision: Concept of Decision and Abolition of the Exequatur Procedure, in: Lorandi Franco/Staehelin Daniel (eds.), Innovatives Recht, Festschrift für Ivo Schwander, Zurich 2011 (cite Markus, FS Schwander).

Markus Alexander R., Lugano - Übereinkommen und SchKG-Zuständigkeiten, Provisorische Rechtsöffnung, Aberkennungsklage und Zahlungsbefehl, Diss. Basel 1996 (cf. Markus, LugÜ).

Markus Alexander R., Zahlungsbefehl als Mahntitel nach dem revidierten Lugano - Übereinkommen, in: Kren Kostkiewicz Jolanta/Markus Alexander R./Rodriguez Rodrigo (eds.), Internationaler Zivilprozess 2011, Zusammenspiel des revLugÜ mit dem revSchKG und der schweizerischen ZPO, Bern 2011 (citing Markus, Zahlungsbefehl).

Markus Alexander R./Renz Frauke, Conciliators are Judges under the LugÜ, Lis pendens after Case Schlömp C-467/16, AJP 2017, pp. 1350 et seq.

Meier Isaak, Arrest in International Law, SZZP/RSPC 2005, p. 417 et seqq (cit. Meier, Arrest).

Meier Isaak, Besondere Vollstreckungstitel nach dem Lugano Übereinkommen, in: Schwander Ivo (ed.), Das Lugano-Übereinkommen, Europäisches

Übereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen, St. Gallen 1990, p. 157 ff.

Meyer-Ladewig Jens/Nettesheim Martin/von Raumer Stefan (eds.), ECHR European Convention on Human Rights, Handkommentar, 4th ed. Basel 2017 (cit. HK ECHR - Bearbeiterin/-in, Art. xx ECHR N. xx).

Nauman Ingrid, English anti-suit injunctions to enforce arbitration agreements, Diss. Tübingen 2008.

Oberhammer Paul/Koller Christian/Slonina Michael, § 15 Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters, in: Stefan Leible/Jörg Philipp Terhechte (eds.), Enzyklopädie Europarecht, vol. 3, Europäisches Rechtsschutz- und Verfahrensrecht, Zurich/Baden-Baden/Vienna 2014.

Oetiker Christian / Weibel Thomas (eds.), Basler Kommentar, Lugano Convention, 2nd ed. Basel 2016 (cf. BSK LugÜ - Bearbeiter, Art. xx LugÜ N. xx).

Phurtag Sejee, Precautionary Measures in International Civil Procedure Law, with Special Consideration of Swiss and English Law, Diss. Bern 2019.

Pocar Fausto, Explanatory Report of 23 December 2009 on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ EC 2009, C 319 pp. 1 et seq. (citing Pocar Report).

Rauscher Thomas (ed.), European Civil Procedure and Conflict of Laws EuZPR/EuIPR, Commentary, Volume I - Brussels Ia Regulation, 5th ed. Cologne 2021 (cit. Rauscher - Bearbeiter/-in, Art. xx Brussels Ia Regulation N. xx).

Rauscher Thomas / Krüger Wolfgang (eds.), Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen, vol. 3, §§ 946 - 1117, EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht, 5th ed. Munich 2017 (cit. MüKo ZPO - Bearbeiter/-in, Art. xx Brussels Ia Regulation N. xx).

Schlosser Peter, Report of 5 March 1979 on the Convention of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland on the Accession to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and on the Protocol concerning the Interpretation of that Convention by the Court of Justice signed in

Luxembourg on 9 October 1978, OJ No. C 59, p. 71 et seq. (cite Schlosser - Report).

Schnyder Anton K. (ed.), DIKE Commentary, Lugano Convention on International Civil Procedure Law, Zurich 2011 (cite Schnyder - Bearbeiter/-in, Art. xx LugÜ N. xx).

Schlosser Peter F., Report of 5 March 1979 on the Convention of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland on Accession to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and on the Protocol on the Interpretation of that Convention by the Court of Justice of 9 October 1978 (cit. Schlosser - Report).

Schlosser Peter F./Hess Burkhard (eds.), EU Civil Procedure Law, EuGVVO, EuVTVO, EuMahnVO, EuBagVO, HZÜ, EuZVO, HBÜ, EuBVO, EuKtPVO, 4th ed. Munich 2015.

Simons Thomas / Hausmann Rainer (eds.), Unalex Kommentar, Brüssel I-Verordnung: Kommentar zur VO (EG) 44/2001 und zum Übereinkommen von Lugano, Munich 2012 (cite Unalex Kommentar - Bearbeiter/-in, Art. xx LugÜ N. xx).

Sogo Miguel, Internationale Vollstreckbarkeit provisorischer Rechtsöffnungsentscheide nach LugÜ, AJP 2005, p. 808 et seq.

Sogo Miguel, Kleine Arrestrevision, große Auswirkungen - zur geplanten Anpassung des Arrestrechts im Rahmen der Revision des Lugano - Übereinkommens, SZZP/RSPC 2009, p. 75 ff. (cit. Sogo, SZZP).

Spühler Karl, The Judicial Settlement, Zurich 2015.

Spühler Karl/Tenchio Luca/Infanger Dominik (eds.), Basler Kommentar, Schweizerische Zivilprozessordnung, 1st ed. Basel 2010 (cf. BSK ZPO (1st ed.) - Bearbeiter, Art. xx ZPO N. xx).

Staehelin Adrian/Bauer Thomas/Staehelin Daniel (eds.), Basler Kommentar, Bundesgesetz über Schulbetreibung und Konkurs I, vol. I, Art. 1 - 158 SchKG, 2nd ed. Basel 2010 (cf. BSK SchKG - Bearbeiter/-in, Art. xx SchKG N. xx).

Staehelin Daniel, Die internationale Zuständigkeit der Schweiz im Schuldbetreibungs- und Konkursrecht, AJP 1995, p. 259 ff.

Stoffel Walter A., Ausschliessliche Gerichtsstände des Lugano-Übereinkommens und SchKG-Verfahren, insbesondere Rechtsöffnung, Widerspruchsklage und Arrest, in: Schwander Ivo/Stoffel Walter A. (eds.), Beiträge zum schweizerischen und internationalen Zivilprozessrecht, Festschrift für Oscar Vogel, Fribourg 1991, p. 357 ff.

Walder Hans Ulrich, Anerkennung und Vollstreckung von Entscheidungen, in: Schwander Ivo (ed.), Das Lugano-Übereinkommen, Europäisches Übereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen, St. Gallen 1990, p. 135 ff.

Walter Gerhard/Domej Tanja, International Civil Procedure Law of Switzerland, 5th ed. Bern/Stuttgart/Vienna 2012.

Wieczorek Bernhard/Rolf A. Schütze (eds.), Zivilprozessordnung und Nebengesetze, vol. 13/2, Brussels Ia Regulation, 4th ed. 2019 Berlin (cit. Wieczorek/Schütze - Bearbeiter, Art. xx Brussels Ia Regulation N. xx).