BGH (D) 23 October 2001 – XI ZR 83/01

Lugano Convention/Brussels Convention Article 6 No. 1, Article 22(3) – Forum for jurisdiction over joinder of parties – Requirement of nexus between causes of action in the sense of Article 22(3) Lugano Convention/Brussels Convention

The applicability of Article 6 No. 1 of the Lugano Convention, just like that of Article 6 No. 1 of the Brussels Convention, presupposes a nexus between claims in accordance with Article 22(3) of the Lugano Convention/Brussels Convention.

This nexus is lacking when the relief sought against one defendant is a claim in tort while the cause of action against the other defendant is supported on grounds of contract or unjust enrichment.

Summary of the Decision

1. Facts

The German plaintiff had taken part in a "G. Futures Fund" managed by a German GmbH (limited liability company) for the execution of stock options. The second defendant, an attorney residing in Zurich (CH), served as trustee. The plaintiff transferred the subscription amount to a personal account designated by the GmbH. When he terminated his participation in the fund and asked for the return of paid-in contributions, it turned out that the GmbH had in the meantime been deleted from the trade register and no longer existed.

The plaintiff thereupon commenced an action in the German court with jurisdiction over the managing director of the GmbH as the first defendant. The suit also named the second defendant and demanded that each defendant be adjudged joint and severally liable for the refund of the contributions paid. The regional court with original jurisdiction over the case found the first defendant, the managing director, liable on the grounds of deliberate unethical injury and calculated damages in the amount of the contributions paid in by the plaintiff. It held the second defendant liable for the restitution of the amount received as trustee on grounds of unjust enrichment.

The defendant filed an appeal against this decision. He contended that the decision was in error based on the court's lack of jurisdiction. The court of first instance had improperly derived its jurisdiction on Article 6 No. 1 of the Lugano Convention, which addresses the forum for jurisdiction over the joinder of parties. The appellate court affirmed the decision of the court of first instance to that extent. As to the appeal of the second defendant, the BGH determined that the jurisdiction of German courts could not be based on Article 6 No. 1 of the Lugano Convention and therefore held the complaint against him to be inadmissible.

2. The Court's Decision

2.1. The BGH first states that the jurisdiction of German courts over causes of action against the second defendant, a Swiss resident, according to the Lugano Convention can only be based upon Article 6 No. 1 of the Lugano Convention.

For the interpretation of Article 6 No. 1 the court maintains that the case-law of the European Court of Justice pertaining to the analogously worded provision in Article 6 No. 1 of the EuGVÜ must be considered. This arises out of Article 1 of Protocol No. 1 on the uniform interpretation of the Lugano Convention, which states that the courts of each Contracting State shall, when interpreting the Convention, pay due account to the principles laid down in the leading decisions delivered by courts of the other Contracting States concerning provisions of the EuGVÜ and thereby give priority to the case-law of the ECJ. The significance of the case-law of the ECJ with regard to the Brussels Convention for the interpretation of the Lugano Convention is also underscored by the express mention of the Brussels Convention in the Lugano Convention: in the preamble, in Article 2 of Protocol No. 2, and in the declarations made by the signatory states at the time of signature. Moreover, it lies in the interest of harmonising the international application of the conventions and of their uniform interpretation if the precedents developed by the ECJ pertaining to the Brussels Convention were also considered when interpreting the parallel wording of the provisions of the Lugano Convention.

2.2. The BGH then makes concrete reference to the judicial decisions of the ECJ on the forum for jurisdiction over the joinder of parties in Article 6 No. 1 of the Brussels Convention. In accordance with a firmly established precedent of the ECJ, it is presumed that, beyond the wording Article 6 No. 1 of the Brussels Convention, a joined proceeding and decision appear required when there is a strong factual nexus between causes of action brought before the same court against multiple individuals in order to prevent the otherwise contradictory rulings that could arise were the proceedings conducted separately. This nexus requirement, which corresponds with Article 22(3) of the Lugano Convention/Brussels Convention, is justified by the fact that the forum for jurisdiction over the joinder of parties in Article 6 No. 1 Lugano Convention/Brussels Convention represents an exception to the general principle elaborated in Articles 2(1) and 3(1)of the jurisdiction of courts where the defendant is domiciled. As a lex specialis, Article 6 No. 1 should be interpreted narrowly, in order that the basic principle as such is thereby not put into question. Therefore it cannot be left to the plaintiff to make use of the forum for jurisdiction over the joinder of parties for the sole purpose of usurping the jurisdiction of the court where one of the defendants is domiciled.

The BGH then refers to the ECJ decision in *Réunion Eu-*

ropéenne,[1] in which the Court of Justice determined that the requisite nexus is lacking in a case in which a claim for damages as to one defendant rests on a contractual basis while the same claim is grounded in tort liability as to another defendant. The same logic must hold true in the instant case, in which the plaintiff raised a cause of action in tort against the first defendant while against the second defendant the complaint was an action for unjustified enrichment. Tortious liability for damages and a settlement for unjust enrichment may be legally somewhat more distinct from one another than a claim for damages calculated according to a uniform rule for damages being supported in one case on a contractual basis and in another case on a basis of liability in tort. Absent a nexus between the claims validly made against both defendants, jurisdiction over the claim against the second defendant can thus not be grounded upon Article 6 No. 1 of the Lugano Convention and must be rejected as inadmissible.

Thomas Simons

Extract from the decision: "(...)

4. Die Rechtsprechung des Europäischen Gerichtshofs zur Auslegung des EuGVÜ hat das Berufungsgericht jedoch, wie die Revision mit Recht rügt, nur unzureichend berücksichtigt.

a) Wie das Berufungsgericht nicht verkannt hat, setzt die Anwendbarkeit des Art. 6 Nr. 1 EuGVÜ über den Wortlaut der Vorschrift hinaus voraus, dass zwischen den Klagen gegen mehrere Personen, die vor einem Gericht erhoben werden sollen, ein Zusammenhang besteht, der eine gemeinsame Verhandlung und Entscheidung geboten erscheinen lässt, um zu verhindern, dass in getrennten Verfahren widersprechende Entscheidungen ergehen könnten. Diese zusätzliche Voraussetzung, die inhaltlich dem Art. 22 Abs. 3 EuGVÜ entspricht, trägt dem Umstand Rechnung, dass das Übereinkommen in seinen Art. 2 Abs. 1 und 3 Abs. 1 von dem Grundsatz der Zuständigkeit der Gerichte des Wohnsitzstaats des Beklagten ausgeht und dass die in Art. 6 Nr. 1 vorgesehene Sonderzuständigkeit eine Ausnahme darstellt, die so auszulegen ist, dass sie das Bestehen des Grundsatzes nicht in Frage stellen kann. Einem Kläger darf es daher nicht freistehen, eine Klage gegen mehrere Beklagte allein zu dem Zweck zu erheben, einen dieser Beklagten der Zuständigkeit der Gerichte seines Wohnsitzstaates zu entziehen.

Diese Grundsätze entsprechen der gefestigten Rechtsprechung des Europäischen Gerichtshofs[2] und sind auch auf den mit Art. 6 Nr. 1 EuGVÜ wortgleichen Art. 6 Nr. 1 LugÜ anwendbar.

b) Die Frage, wann im einzelnen zwischen den Klagen gegen unterschiedliche Beklagte ein so enger Zusammenhang besteht, dass zur Vermeidung widersprechender Entscheidungen eine gemeinsame Verhandlung und Entscheidung geboten ist, hat der Europäische Gerichtshof zunächst nicht näher präzisiert, sondern der Beurteilung durch die nationalen Gericht überlassen.[3] Später hat er jedoch – was das Berufungsgericht übersehen hat – die Ansicht vertreten, dass der für die Anwendung des Art. 6 Nr. 1 EuGVÜ erforderliche Zusammenhang nicht gegeben ist, wenn von zwei im Rahmen einer einzigen Schadensersatzklage gegen verschiedene Beklagte gerichteten Klagebegehren das eine auf vertragliche, das andere aber auf deliktische Haftung gestützt wird.[4]

Diese Rechtsauffassung muss nach den oben dargelegten Grundsätzen auch der Auslegung des Art. 6 Nr. 1 LugÜ zugrunde gelegt werden. Sie kann für den hier vorliegenden Fall, dass von zwei in einer Klage gegen unterschiedliche Beklagte zusammengefassten Klagebegehren das eine auf eine deliktische und das andere auf eine bereicherungsrechtliche Anspruchsgrundlage gestützt wird, umso mehr Geltung beanspruchen, als hier die rechtliche Verschiedenheit der Anspruchsgrundlagen noch größer ist, als bei vertraglichen und deliktischen Schadensersatzansprüchen, für die die allgemeinen schadensersatzrechtlichen Grundsätze gleichermaßen bedeutsam sind.

c) Im vorliegenden Fall kann daher entgegen der Ansicht des Berufungsgerichts der für die Anwendung des Art. 6 Nr. 1 LugÜ erforderliche enge Zusammenhang der Klagen gegen die beiden Beklagten nicht bejaht werden. Daraus folgt, dass für die Klage gegen den Beklagten zu 2) die internationale Zuständigkeit deutscher Gerichte nicht gegeben und die Klage deshalb unzulässig ist. (...)"

1 ECJ 27 October 1998 – C-51/97 – *Réunion européenne*.

2 EuGH 27. 9. 1988 – Rs. 189/87 – *Kalfelis*, sowie EuGH 27. 10. 1998 – Rs. C-51/97 – *Réunion européenne*.

3 EuGH 27. 9. 1988 – Rs. 189/87 – *Kalfelis*, Rn. 12.

4 EuGH 27. 9. 1988 – Rs. 189/87 – *Kalfelis*, Rn. 50.