

Case C-296/20

Request for a preliminary ruling

Date lodged:

3 July 2020

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

12 May 2020

Applicant and appellant on a point of law:

Commerzbank AG

Defendant and respondent in the appeal on a point of law:

E.O.

BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE)

ORDER

[...]

of

12 May 2020

in the case of

Commerzbank AG, ...

Düsseldorf,

Applicant and appellant on a point of law,

[...]

against

E.O., ...

, Switzerland,

Defendant and respondent in the appeal on a point of law,

[...] **[Or. 2]**

the Eleventh Zivilsenat (Civil Chamber) of the Bundesgerichtshof [...] made the following order on

12 May 2020:

I. The proceedings are stayed.

II. The following questions are referred to the Court of Justice of the European Union pursuant to Article 267 TFEU on the interpretation of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters done in Lugano on 30 October 2007 ('the Lugano Convention' or 'the Convention'):

1. Is Article 15(1)(c) of the Lugano Convention to be interpreted as meaning that the 'pursuit' of a professional or commercial activity in the State bound by the Convention and in which the consumer is domiciled presupposes that the other party was already engaged in cross-border activity at the time when the contract was initiated and concluded or does that provision also apply for the purpose of determining the court having jurisdiction to hear proceedings where the parties were domiciled within the meaning of Articles 59 and 60 of the Lugano Convention in the same State bound by the Convention at the time when the contract was concluded and a foreign element to the legal relationship arose only subsequently **[Or. 3]** because the consumer relocated at a later date to another State bound by the Convention?

2. If cross-border activity at the time when the contract was concluded is not necessary:

Does Article 15(1)(c) of the Lugano Convention, read in conjunction with Article 16(2) thereof, generally preclude determination of the court having jurisdiction in accordance with Article 5(1) of the Lugano Convention in the case where the consumer relocated to another State bound by the Convention between the time when the contract was concluded and the time when the proceedings were brought, or is it also necessary for the professional or commercial activities of the other party to be pursued in or directed to the new State of domicile and for the contract to come within the scope of such activities?

Grounds:

I.

- 1 The applicant bank, a public limited company under German law registered in Frankfurt am Main, has brought proceedings against the defendant in connection with an overdrawn giro account.
- 2 In 2009, the applicant, acting through its Dresden branch, set up a giro account for the defendant, who was domiciled in Dresden at the time, which it [Or. 4] managed as a current account and for which it issued regular statements of account. The applicant subsequently issued the defendant with a credit card, the charges to which it was agreed would be paid through the aforesaid giro account. According to the findings of the court of appeal, the applicant subsequently allowed the giro account to be overdrawn when the defendant made credit card purchases against the giro account, even though there were insufficient funds available in the account. In any event, that happened on 3 September 2013, when EUR 4 977.92 was charged to the credit card.
- 3 In January 2015, the defendant, who had relocated to M. (Switzerland) in 2014, sought to close his account with the applicant. At that point the giro account was overdrawn in the amount of EUR 6 283.37. The defendant refused to pay that balance in respect of the amount charged in September 2013 on the ground that that charge to the card was due to fraudulent use of his card by third parties without his permission. The applicant contests this and notes that the user's signature on the credit card vouchers adduced is the defendant's signature.
- 4 Following several unsuccessful reminders, the applicant terminated the 'credit relationship' with immediate effect in April 2015 and issued a final statement of account showing a debit balance in its favour of EUR 4 796.56 plus interest and costs since the previous statement. The defendant failed to pay that balance.
- 5 The Amtsgericht (Local Court) dismissed the application seeking payment of EUR 4 856.61 plus interest on the ground that it lacked jurisdiction. The applicant's appeal on the merits was unsuccessful. By the appeal on a point of law, leave for which was granted by the court of appeal, the applicant is pursuing its request for payment. [Or. 5]

II.

- 6 The success of the appeal on a point of law depends on the interpretation of Article 15(1)(c) and Article 16(2) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters done in Lugano on 30 October 2007 (OJ 2009 L 147, p. 5) ('the Lugano Convention'). Before judgment can be given, the proceedings must therefore be stayed and a preliminary ruling sought from the Court of Justice of the European Union pursuant to Article 267 TFEU.
- 7 1. As the court of appeal rightly assumed, according to Article 63(1) and Article 64(2)(a) of the Lugano Convention, the international jurisdiction of the court seised in this case is determined in accordance with the provisions of the Convention, as the proceedings were initiated in November 2016, after the

Lugano Convention had entered into force for both the European Union and the Swiss Confederation ([...] judgment of the Court of Justice of 20 December 2017, *Schlömp*, C-467/16, [...] [EU:C:2017:993], paragraph 37 [...]), at which point the defendant was domiciled in Switzerland.

- 8 2. The only possible basis for the international jurisdiction of the lower courts is Article 5(1) of the Lugano Convention; as the defendant was domiciled in Switzerland at the time when proceedings were brought, the German courts have no international jurisdiction either under Article 2(1) of the Lugano Convention or under Article 16(2) of the Lugano Convention. According to the facts underlying the appeal on a point of law, the requirements of Article 5(1) of the Lugano Convention are fulfilled.
- 9 (a) The proceedings concern matters relating to a contract **[Or. 6]**
- 10 As the wording of Article 5(1) of the Lugano Convention is essentially identical to the wording of Article 7(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (‘the new Regulation’) and its precursor, Article 5(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (‘the old Regulation’), the case-law of the Court of Justice on the interpretation of those provisions of EU law is relevant to the interpretation of Article 5(1) of the Lugano Convention (see judgments of 20 December 2017, *Schlömp*, C-467/16, [...] [EU:C:2017:993], paragraph 46 et seq.; of 11 April 2019, *Bosworth and Hurley*, C-603/17, [...] [EU:C:2019:310], paragraph 22; and of 2 May 2019, *Pillar Securitisation*, C-694/17, [...] [EU:C:2019:345], paragraph 27; and the order of 15 May 2019, *MC*, C-827/18, [...] [EU:C:2019:416], paragraph 19).
- 11 The concept of ‘matters relating to a contract’ must be interpreted independently in order to ensure that the Convention is applied uniformly in all the contracting States (see judgment of 14 March 2013, *Česká sporitelna*, C-419/11, [...] [EU:C:2013:165], paragraph 45 and the case-law cited) and presupposes that it is possible to identify an obligation freely assumed by one party towards another on which the proceedings concerned can be based (see judgment of 14 March 2013, *Česká sporitelna*, C-419/11, [...] [EU:C:2013:165], paragraphs 46 and 47 and the case-law cited). It suffices if the applicant can conclusively argue contractual claims (see judgments of 4 March 1982, *Effer*, 38/81, [...] [EU:C:1982:79], paragraph 7; of 28 January 2015, *Kolassa*, C-375/13, [...] [EU:C:2015:37], paragraphs 61 and 62; and of 20 April 2016, *Profit Investment SIM*, C-366/13, [...] [EU:C:2016:282], paragraph 54).
- 12 That is the case here. The applicant is seeking payment of the — albeit tolerated — overdraft on the giro account following closure of the account **[Or. 7]** and thus repayment of a loan granted, as the tolerated overdraft gave rise to an implied consumer loan agreement [...] [reference to national case-law].

- 13 (b) The granting of a loan by the applicant bank to the defendant is a service within the meaning of Article 5(1)(b), second indent, of the Lugano Convention (see judgment of the Court of Justice of 15 June 2017, *Kareda*, C-249/16, [...] [EU:C:2017:472], paragraph 34 et seq.; [...] [reference to national case-law]. According to that provision, the place of performance of the characteristic obligation of the contract is the criterion for all proceedings pursuant to the loan agreement (see judgment of 15 June 2017, *Kareda*, C-249/16, [...], [EU:C:2017:472], paragraphs 29 and 30; [...] [reference to national case-law]). In the case of a credit agreement, the characteristic obligation is the actual granting of the sum loaned, whereas the borrower's obligation to repay that sum is merely a consequence of the performance of the service by the lender (see judgment of 15 June 2017, [...] [*Kareda*, C-249/16], [EU:C:2017:472], paragraph 41; [...] [reference to national case-law]). On that basis, the relevant place for jurisdiction under Article 5(1)(b), second indent, of the Lugano Convention is Dresden, as that is where the loan was actually granted.
- 14 3. However, the question arises as to whether, as assumed by the court of appeal, the application of Article 5(1) of the Lugano Convention is precluded in the present case by Article 15(1)(c) and Article 16(2) of the Lugano Convention.
- 15 (a) Articles 15 and 16 of the Lugano Convention must be interpreted in the light of the case-law on Articles 15 and 16 of the old Regulation and on Articles 17 and 18 of the new Regulation, as those provisions are practically identical (see judgment of 2 May 2019, *Pillar Securitisation*, C-694/17, [...] [EU:C:2019:345], paragraph 27). **[Or. 8]**
- 16 (b) Jurisdiction is determined according to Section 4 of the Lugano Convention, provided that the three conditions set out in Article 15(1) thereof are satisfied. First, a party to a contract is a consumer who is acting in a context which can be regarded as being outside his trade or profession; second, the contract between such a consumer and a professional has actually been concluded and, third, such a contract comes within one of the categories referred to in Article 15(1)(a) to (c) of the Lugano Convention. All of those conditions must be fulfilled, such that, if one of the three conditions is not met, jurisdiction cannot be determined under the rules relating to consumer contracts (see judgments of 14 March 2013, *Česká sporitelna*, C-419/11, [...] [EU:C:2013:165], paragraph 30; of 28 January 2015, *Kolassa*, C-375/13, [...] [EU:C:2015:37], paragraph 23; of 23 December 2015, *Hobohm*, C-297/14, [...] [EU:C:2015:844], paragraph 24; and of 26 March 2020, *Primera Air Scandinavia*, C-215/18, [...] [EU:C:2020:235], paragraph 56).
- 17 It has to be assumed from the facts on the basis of which the appeal on a point of law has been brought that the first two conditions have been met. However, it is not clear whether the third condition has been met. As the contested loan agreement is not covered by Article 15(1)(a) and (b) of the Lugano Convention, the only criterion that may be applicable is Article 15(1)(c) of the Lugano Convention, which also covers simple credit agreements (see judgment of the

Court of Justice of 2 May 2019, *Pillar Securitisation*, C-694/17, [...] [EU:C:2019:345], paragraph 28 et seq.) and presupposes that the other party to the contract is a person who pursues commercial or professional activities in the State bound by the Convention of the consumer's domicile or, by any means, directs such activities to that State and the contract comes within the scope of such activities. **[Or. 9]**

- 18 (c) The Court of Justice has held, with regard to the interpretation of 'directs', that, 'in order for Article 15(1)(c) of [the old Regulation] to be applicable, the trader must have manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile' and that it must therefore be determined, in the case of a contract between a trader and a given consumer, whether, before any contract with that consumer was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with those consumers (judgment of the Court of Justice of 7 December 2010, *Pammer and Hotel Alpenhof*, C-585/08 and C-144/09, [...] [EU:C:2010:740], paragraphs 75 and 76).
- 19 The present chamber is inclined to assume that the 'pursuit' of an activity within the meaning of Article 15(1)(c) of the Lugano Convention also requires the other party to have manifested its intention to establish commercial relations with consumers from another contracting State and that that condition is not met if, as here, the consumer and the other party were domiciled in the same State bound by the Convention [...] **[Or. 10]** [...] [reference to legal commentaries and national case-law].
- 20 In the present chamber's opinion, this is suggested by the fact that Article 15(1) of the Lugano Convention constitutes a derogation both from the general rule of jurisdiction laid down in Article 2(1) of the Lugano Convention and from the rule of special jurisdiction set out in Article 5(1) of the Lugano Convention for matters relating to a contract and therefore must necessarily be interpreted strictly (see judgments of 14 March 2013, *Česká sporitelna*, C-419/11, [...] [EU:C:2013:165], paragraph 26 and the case-law cited; of 28 January 2015, *Kolassa*, C-375/13, [...] [EU:C:2015:37], paragraph 28; of 23 December 2015, *Hobohm*, C-297/14, [...] [EU:C:2015:844], paragraph 32; and of 26 March 2020, *Primera Air Scandinavia*, C-215/18, [...] [EU:C:2020:235], paragraph 55). In addition, it follows from the case-law of the Court of Justice that, even if the objective of Article 15(1)(c) of the Lugano Convention is to protect consumers, that does not imply that that protection is absolute (see judgments of 7 December 2010, *Pammer and Hotel Alpenhof*, C-585/08 and C-144/09, [...] [EU:C:2010:740], paragraph 70; of 6 September 2012, *Mühlleitner*, C-190/11, [...] [EU:C:2012:542], paragraph 33; and of 23 December 2015, *Hobohm*, C-297/14, [...] [EU:C:2015:844], paragraph 32).

- 21 In the present chamber's opinion, moreover, the fact that Article 15(1)(a) and (b) of the Lugano Convention was retained, even though all types of contract are included in Article 15(1)(c) of the Lugano Convention, suggests that the types of contract referred to under (a) and (b) also cover cases in which no foreign element existed on conclusion of the contract, whereas the contracts covered by (c) presuppose that the other party was already engaged in cross-border activity at that time. Lastly, in terms of that requirement, the Convention makes it clear that 'pursuit' is a particular form of 'direction' rather than an absolute concept [...] **[Or. 11]** [reference to legal commentaries].
- 22 However, the correct application of Article 15(1)(c) of the Lugano Convention is not so obvious as to dispel all scope for reasonable doubt (see judgments of the Court of Justice of 6 October 1982, *CILFIT and Others*, 283/81, [...] [EU:C:1982:335], paragraph 16, and of 15 September 2005, *Intermodal Transports*, C-495/03, [...] [EU:C:2005:552], paragraph 33). In the request for a preliminary ruling on which the Court of Justice delivered judgment on 17 November 2011 (*Hypotecni banka*, (C-327/10, [...] [EU:C:2011:745]), the referring court assumed that the loan agreement there contested in the main proceedings was a consumer contract within the terms of Article 15(1)(c) of the old Regulation (see Opinion of Advocate General Trstenjak of 8 September 2011, *Hypotecni banka*, C-327/10, [EU:C:2011:561], points 41 and 87) and the Court interpreted the old Regulation on that basis as meaning that, in a situation such as that in the main proceedings, the courts of the Member State in which the consumer had his last known domicile have jurisdiction pursuant to Article 16(2) of the old Regulation in certain circumstances (see judgment of 17 November 2011, *Hypotecni banka*, C-327/10, [...] [EU:C:2011:745], paragraph 55). In the main proceedings in that case, the consumer, as in the present case, was domiciled in the same Member State as the other party (the subsequent applicant) at the time when the contract was concluded (see judgment of 17 November 2011, *Hypotecni banka*, C-327/10, [...] [EU:C:2011:745], paragraphs 20 and 22).
- 23 (d) If the other party's activities are 'pursued' within the meaning of Article 15(1)(c) of the Lugano Convention even where the consumer and the other party were domiciled/registered in the same State at the time when the contract was concluded, the further question then arises as to whether, after the consumer's relocation from **[Or. 12]** that State to another State bound by the Convention, Article 16(2) of the Lugano Convention establishes the exclusive jurisdiction of the courts in the consumer's new State of domicile without any further requirements [...] [reference to commentaries and case-law] or whether it is also necessary for the other party to pursue professional or commercial activities in, or direct such activities to, that State [...] [reference to commentaries and case-law].
- 24 In the present chamber's opinion [...] [reference to legal commentaries], the general objective of ensuring that the attribution of jurisdiction is predictable referred to in the eleventh recital of the old Regulation and in the fifteenth recital of the new Regulation suggests that such an additional **[Or. 13]** condition must be satisfied (see judgments of the Court of Justice of 28 January 2015, *Kolassa*,

C-375/13, [...] [EU:C:2015:37], paragraph 29; of 23 December 2015, *Hobohm*, C-297/14, [...] [EU:C:2015:844], paragraph 39, and of 26 March 2020, *Primera Air Scandinavia*, C-215/18, [...] [EU:C:2020:235], paragraph 62). Unlike Article 15(1)(a) and (b) of the Lugano Convention, Article 15(1)(c) of the Lugano Convention enables the trader to control its jurisdictional risk by making the attribution of jurisdiction to the courts of the consumer's State of domicile contingent upon the need for a connection between the trader's activities and that State at the time when the contract was concluded [...] [reference to legal commentaries]. That control would not be guaranteed if, once the contract had been concluded, exclusive jurisdiction pursuant to Article 16(2) of the Lugano Convention moved, with the consumer's domicile, to another State to which the trader was not directing its activities at the time when the contract was concluded [...] [reference to legal commentaries]. On the other hand, the requirement that the trader itself must have established an adequate link to that State by pursuing its activities in or directing its activities to the new State of domicile strikes a balance between consumer protection under Article 16 of the Lugano Convention and the trader's interests in predictability and forward planning [...] [reference to legal commentaries].

- 25 Thus, Schlosser (Report on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, OJ 1979 C 59, p. 71) [...] also assumes that, where the consumer relocates to another State [**Or. 14**] after the contract has been concluded, the Section on 'Jurisdiction over consumer contracts' in the first Convention of Accession of 9 October 1978 ('the old version'), applies automatically pursuant to Article 13(1), point 3, of the old version in the cases regulated by Article 13(1), points 1 and 2, of the old version, but only where the conditions laid down in that provision are satisfied in the new State of domicile [...] [reference to legal commentaries].
- 26 (e) If 'pursuit' within the meaning of Article 15(1)(c) of the Lugano Convention presupposes that the trader was already engaged in cross-border activities at the time when the contract was concluded, its conditions would not be satisfied here according to the facts on the basis of which the appeal on a point of law was brought, with the result that, contrary to the decision arrived at by the appeal court, jurisdiction pursuant to Article 5(1) of the Lugano Convention would not be excluded.
- 27 If, however, Article 15(1)(c) and Article 16 of the Lugano Convention apply even where the consumer and the other party were domiciled in the same State at the time when the contract was concluded and, after the consumer had relocated, Article 16 of the Lugano Convention depended exclusively on his new domicile, proceedings before [**Or. 15**] the court having jurisdiction pursuant to Article 5(1) of the Lugano Convention would be precluded in this case and the court of

appeal's assumption that the German courts lack international jurisdiction would ultimately be correct.

[...] [Signatures]

[Proceedings before the lower courts]

WORKING DOCUMENT