THE LUGANO II CONVENTION – PROSPECTS FOR UKRAINE

ZENIV Mariia,
Ph.D. student at the
Jagiellonian University

The Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters was concluded in Lugano on 30 October 2007 (*hereinafter: Lugano II Convention*). This Convention replaced the previously binding Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 dated of 1988 (*hereinafter: Lugano I Convention*). The text of the new Convention to a large extent reflects the revised Brussels Convention of 27 September 1968. It is underlined in the doctrine that the adoption of a new version of the Lugano Convention aimed at providing harmonization of the legislation and resolving the problems that had emerged in practice in the course of the application of these international legal acts and their interpretation by the Court of Justice of the European Union [6, p. 2-4].

As the scope of application and content of the Lugano II Convention corresponds very closely to the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (*hereinafter: the Brussels I Regulation*), they are therefore referred to as «parallel conventions». Namely, a considerable number of its provisions are reproduced from the Brussels Convention. It is important to note that the Court of Justice of the European Union is conferred with a power to decide matters that belong to the scope of application only of the mentioned Brussels Regulation. Namely, this jurisdiction to rule on the interpretation of the Brussels Convention was granted under the 3 June 1971 Protocol on the uniform interpretation of the Brussels Convention. Nevertheless, when applying the Lugano Convention, the courts of the EU Member States should adhere to the interpretation of the Brussels Convention and the Brussels Regulation rendered by the Court of Justice of the European Union [7, p. 2-4; 9, p. 74-75].

The main difference between the mentioned international legal acts is the scope of their territorial application. The Brussels I Regulation refers to only the European Union's Member States. The 2007 Lugano Convention applies to relations between EU Member States and Contracting States of the Convention that are non-EU Member States. At present, it applies to relations with such countries as Iceland, Norway and Switzerland, which are the Member States of the European Free Trade Association. It should be also noted that after the date of Brussels Ia Regulation came into force the currently binding Lugano II Convention has not been revised yet. As a result, the regimes of these two international legal instruments are slightly divergent, although both the Brussels and Lugano Conventions are devoted to civil and commercial matters [8].

To be more precise, the maintenance obligations are covered by provisions of the Lugano Conventions. However, the maintenance obligations were excluded from the Brussels Ia Regulation and covered within a separate legal instrument, i.e. the Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. The purpose for that was to abolish the exequatur procedure for maintenance claims in order to accelerate proceedings and subsequently enabling a creditor to recover their claims swiftly. In accordance with this Regulation, the decisions relating to maintenance obligations, that are given in the Member State bound by the 2007 Hague Protocol, shall be recognised and regarded as en-

forceable in all other Member States. Any procedure or any form of control on the substance are not to be required in the Member State of enforcement. At the same time, for decisions on maintenance obligations given in the Member State which are not bound by the 2007 Hague Protocol, the procedure for recognition and declaration of enforceability shall still be provided. Furthermore, it is to be noted that such a procedure is modeled on the grounds for refusing recognition and enforcement set out in the Brussels I Regulation (recital 26 in the preamble of this Maintenance Regulation No 4/2009).

It is also worth noting that the 2007 Lugano Convention was signed by the European Union as a Party acting on behalf of its Member States. The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts was signed on 2 October 1997. Under its provisions the European Union has been conferred the exclusive power to conclude such a convention [1, p. 5; 4]. As it is stated in doctrine, such an implied external competence to conclude international agreements on jurisdiction and recognition and enforcement of judgments in civil and commercial matters was confirmed by the EU Court of Justice by its Opinion of 7 February 2006 on the competence of the European Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (case No. 1/03). As a result, the EU Member States' right to undertake obligations with third countries which affect those rules or alter their scope was confined substantially. At that regard, the EU as the regional economic integration organization acceded to the following Conventions adopted within the framework of the Hague Conference on Private International Law: the Hague Convention on the Choice of Court Agreements of 30 June 2005, the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, and the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance [5, p. 129-148].

The special attention should also be drawn to the requirements the candidate's state shall meet in order to become a party to the Lugano Convention. Under the provisions of the article 70 thereof it refers to the state which, at the time of the opening of the Convention for signature, is a members of the European Communities or the European Free Trade Association (EFTA), or a state which, after that time, is to become a member of the above mentioned groups, or any other state, under the conditions laid down in Article 72. The Articles 70-72 of the 2007 Lugano Convention contain the conditions to be fulfilled in order to accede to this Convention. The Article 72 of the Lugano Convention stipulates that any State wishing to become a Contracting Party hereto shall provide the Depositary with the information on, in particular: (1) their judicial system, including information on the appointment and independence of judges; (2) their internal law concerning civil procedure and enforcement of judgments; and (3) their private international law relating to civil procedure. In accordance with provisions of the mentioned Convention the Depositary shall invite the State concerned to accede only if it has obtained the unanimous agreement of the Contracting Parties. It is necessary for the Contracting Parties to give their consent at the latest within one year after the invitation by the Depositary [1].

In this regard, the Poland's experience of accession to this Convention deserves mentioning. Namely, regardless of being the EFTA Member State and before entering the European Union, Poland became the Party to the Lugano Convention. The process of accession thereto consisted of several stages to be followed and requirements to be met. To start with, on 15th of November 1993, the Netherlands requested the Swiss Federal Council, i.e. the Depositary State, for inviting Poland. The longest stage of this process related to obtaining the

approval of 18 States for inviting Poland to accede to the Convention. Eventually, in March 1998 Poland received a formal invitation to accede thereto. On 26 August 1999 the Lugano Convention was ratified by the President of the Republic of Poland and the ratification document had been deposited with the Swiss Federal Council. There were no objections from the Member Parties to the Lugano Convention concerning Poland's accession hereto. In relations between Poland and the Member States this Convention came into force on the first day of the third month following the deposit of the document of accession, i.e. on 1 February 2000 [2].

Reasoning from the above, the following conditions for the accession to the Lugano Convention should be mentioned: (1) a request to the Depositary State made by one of the Contracting States, (2) communication by the State concerned, in accordance with Article 72 of the Convention, (3) a unanimous acceptance of the Depositary State's invitation for accession to the Lugano Convention made by its Contracting States [2].

A conclusion may be made that it is possible to anticipate further cooperation between Ukraine and EU Member States in the field of «judicial cooperation in civil matters». In this regard, the accession by Ukraine to the 2007 Lugano Convention should be considered as a proper preliminary international instrument. The comprehensive elaboration concerning the sphere of the Ukrainian civil procedure and its proper functioning is essential in order to make possible for Ukraine to become party to the Lugano Convention. It would also enable Ukraine to develop a legal framework corresponding to the existing one within the European Union, including introduction of the common rules on recognition and enforcement of foreign judgments. As a result, it is anticipated the facilitation of mutual cooperation, legal assistance in civil and commercial matters and circulation of judgments in these matters in the European Union and Ukraine.

References:

1. The Explanatory Report on the 2007 Lugano II Convention, prepared by Prof. Fausta Pocara, Official Journal of the European Union. 23.12.2009. C 319/01.

2. For more information about the process and activities aiming at acceding to the 1988 Lugano Convention, see on the webpage of Poland's Ministry of Justice: URL: http://bip.ms.gov.pl/pl/ministerstwo/wspolpraca-miedzynarodowa/konwencja-z-lugano/accession-to-the-lugano-convention/.

3. Mączyński A. Jednolite europejskie normy o jurysdykcji krajowej i skuteczności orzeczeń zagranicznych [w]: Księga pamiątkowa. I Kongres Notariuszy Rzeczypospolitej Polskiej. Kluczbork, 1993. P. 137—154.

4. P. Mostowik, Międzynarodowe prawo prywatne i postępowanie cywilne w dekadę po wejściu w życie Traktatu Amsterdamskiego. Przegląd Sądowy. 2010. P. 33-60.

5. Niedźwiedź M., Mostowik P. Implications of the ECJ «Lugano II» Opinion for European Union's External Actions Concerning Private International Law. Yearbook of Polish European Studies. 2010. № 13. P. 129—148. URL: http://www.ce.uw.edu.pl/pliki/pw/y13_niedzwiedz.pdf.

6. Fausto POCAR, The New Lugano Convention on Jurisdiction and the Recognition and Enforcement Of Judgments in Civil and Commercial Matters, Yearbook of Private International Law. 2008. Volume 10. P. 1-17.

7. The Report on the 1988 Lugano I Convention, prepared by Mr P. Jenard and Mr. G. Moller, Official Journal of the European Communities. 28.7.1990, No. C 189/57, P. 89—90. URL: http://aei.pitt.edu/1464/1/Commercial_reports_Jenard_OJ_C_189_90.pdf.

8. Weitz K. Przedmiotowy zakres zastosowania konwencji lugańskiej, Kwartalnik

Prawa Prywatnego. Rok IX: 2000. Z. 2. P.427—470.

9.Włosińska A. Orzecznictwo Trybunału Sprawiedliwości Wspólnot Europejskich dotyczące Konwencji Brukselskiej a Konwencja z Lugano. Ruch prawniczy, ekonomiczny i socjologiczny. Rok LXI. 1999. Zeszyt 3, 4. P. 69—80.

ПРОБЛЕМИ ВИЗНАЧЕННЯ РОЗМІРУ ВІДШКОДУВАННЯ ЗА ЗАВДАНУ МОРАЛЬНУ ШКОДУ

ОСТАПЧУК Владислав Ігорович,
магістрант Київського університету права Національної академії наук України

Однією з ключових теоретичних і практичних проблем, що постають у контексті наукового дослідження та практичного застосування норм чинного законодавства, якими передбачено право учасників цивільних відносин на відшкодування завданої їм моральної (немайнової) шкоди, є пошук оптимальних моделей установлення справедливого розміру майнової компенсації, належної потерпілій особі. Проте, за всього розмаїття запропонованих законодавцем, судовою практикою та правовою наукою критеріїв і способів визначення її обсягу, незважаючи на чималий досвід здійснення судочинства у справах відповідної категорії та попри впровадження у різний час доволі різноманітних моделей законодавчого регулювання відносин з відшкодування моральної шкоди (специфічних щодо окремих правових ситуацій зокрема), у науці цивільного права й понині залишається актуальним завдання з виявлення основних напрямів притаманного всім цим підходам дійсного або потенційного регулювального впливу та встановлення ступеня їх відповідності суті даного різновиду цивільних охоронних правовідносин. Реалізація означеної мети, своєю чергою, потребує певної систематизації наявних точок зору щодо вирішення вищезгаданої проблеми.

У цивільному праві проблеми компенсації моральної шкоди досліджували у своїх працях С.А. Бєляцкій, О.В. Грищук, І.М. Забара, О.М. Ерделєвський, М.М. Малеїна, М.С. Малеїн, Т.В. Лісніча, О.В. Крикун, Л.О.Корчевна, Н.В. Павловська, В.П. Паліюк, В.Д. Примак, Р.О.Стефанчук, В.Д. Чернадчук, М.Я. Шиминова, С.І. Шимон та ін. Водночас, незважаючи на таку наукову популярність, інститут компенсації моральної шкоди все ще залишається недостатньо вивченим, особливо це стосується методів визначення компенсації моральної шкоди.

О.М. Ерделєвський виробив єдину методику, дотримуючись якої будь-який суд міг визначити розмір презюмованої моральної шкоди для кожного конкретного правопорушення, що дало змогу надалі, з урахуванням інших критеріїв, закріплених у законі, визначати розмір конкретної моральної шкоди. Як зазначав науковець, застосування шкали компенсації презюмованої моральної шкоди може сприяти встановленню одностайності у правозастосовній практиці при визначенні розміру компенсації моральної шкоди в грошовій формі.

В основу своєї методики О.М. Ерделєвський поклав презюмовану моральну