



Scope of application – Case 4



Does the Lugano Convention apply to the enforcement of the claim?

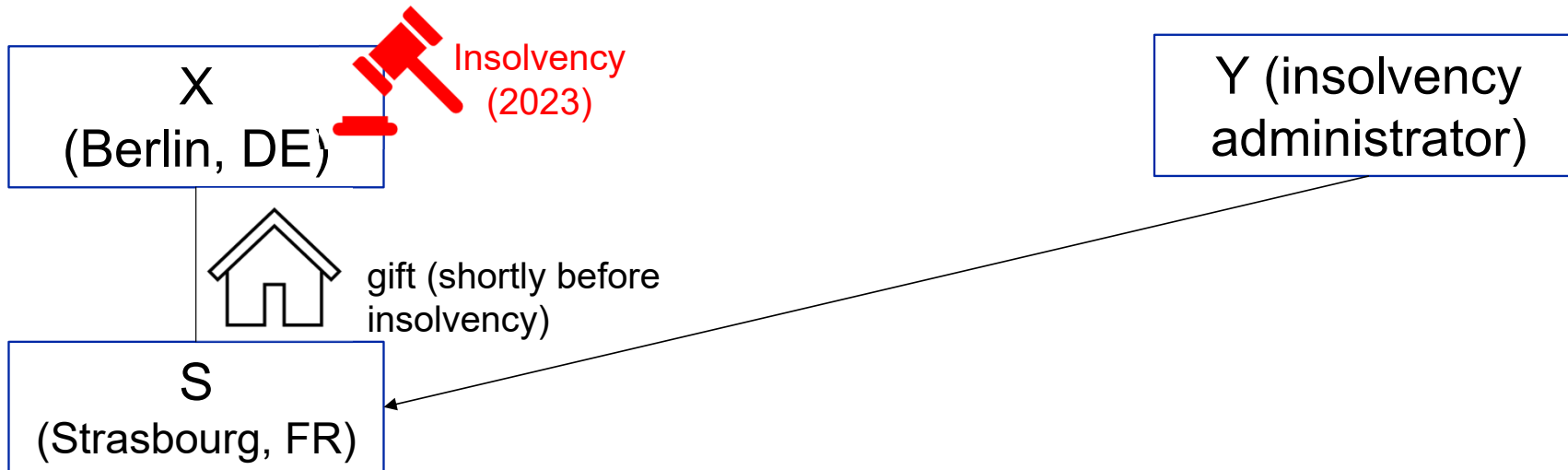


Scope of application – Case 4

- civil/commercial matter
 - relationship between private persons, no exercise of public powers
- exclusion from scope (Article 1(2)(a) LC)?
- divorce (status of legal persons) excluded, but severable part of judgment could be covered if within scope
- A's 10 million EUR claim: rights in property arising out of a matrimonial relationship (excluded) or maintenance (covered by LC)?
- ECJ *van den Boogaard/Laumen*: payment of a lump sum/transfer of ownership in certain property to a former spouse relates to maintenance if its purpose is to insure the former spouse's maintenance
- “ensuring proper provision” = maintenance purpose – LC applies



Scope of application – Case 5



How could the holiday home or its monetary value be claimed for the estate?



Scope of application – Case 5

- civil/commercial matter
 - relationship between private persons
 - *actio Pauliana*: no exercise of public powers
- exclusion from scope (Article 1(2)(b) LC/Brussels I bis Regulation)?
 - ECJ *Gourdain/Nadler*: individual proceedings are covered by the insolvency exclusion if they derive directly from the insolvency and are closely connected with the insolvency proceedings
 - *actio Pauliana* brought by insolvency administrator is covered by the insolvency exclusion (see ECJ *Gourdain/Nadler*, *Seagon/Deko Marty*, *Schmid/Hertel*)



Scope of application – Case 5

- Y could bring an *actio Pauliana* in Germany under Article 6(1) of the European Insolvency Regulation
- German judgment on *actio Pauliana* could be recognised and enforced in Switzerland (Article 174c PILA) if the defendant is not domiciled in Switzerland
- alternative possibility 1: *actio Pauliana* in Switzerland (Article 171 PILA)

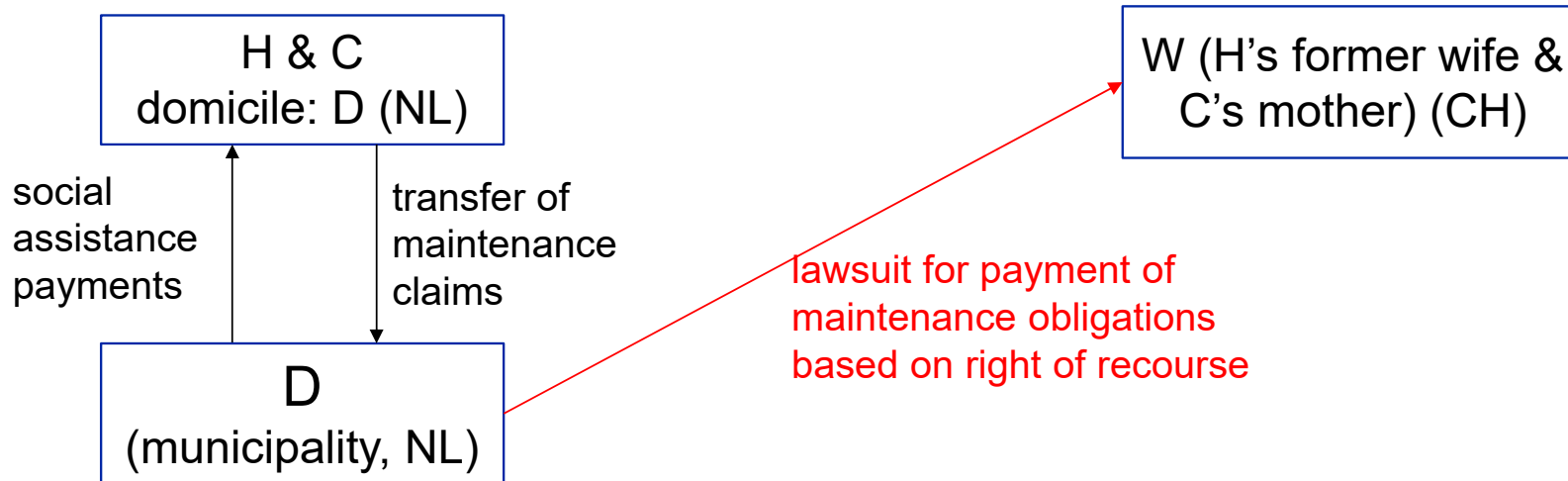


Scope of application – Case 5

- alternative possibility 2: assignment of *actio Pauliana* claim to a creditor or third party → insolvency exclusion no longer applies (ECJ *F-Tex*)
 - Factors leading to the application of LC/Brussels I *bis* Regulation to an insolvency-related/derived claim:
 - assignee can freely decide whether to enforce the claim
 - assignee acts for own interest and personal benefit (even if there is a contractual obligation to pay part of the proceeds into the estate)
 - closure of insolvency proceedings has no effect on assignee's right



Scope of application – Case 6



Does the Lugano Convention apply to D's lawsuit?



Scope of application – Case 6

- civil/commercial matter
 - relationship between public body (municipality) and private person
 - exercise of public powers? → ECJ *Gemeente Steenberg/Baten*
 - action based on a right of recourse is a civil matter if the basis for the claim and the procedure are **governed by the ordinary law in regard to maintenance obligations**
 - **no** civil/commercial matter if the public body has a “**prerogative of its own**” (e.g., a right to disregard agreements lawfully entered into by the parties)

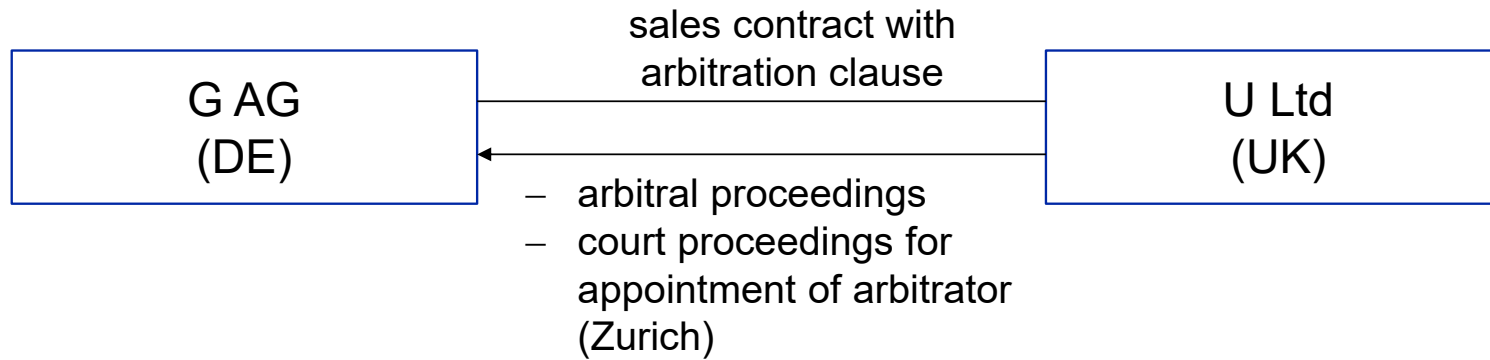


Scope of application – Case 6

- exclusion from scope (Article 1(2)(c) LC/Brussels I *bis* Regulation)?
 - ECJ *Gemeente Steenberg/Baten*: “In view of the link between the Brussels Convention and Community law [...], regard must be had to the substance of that concept in Community law”
 - recovery from third persons of sums paid as benefits does not fall within the scope of the social security exclusion, even if those benefits as such do fall within that scope
 - note: maintenance matters, including recourse claims brought by public bodies, are excluded from the scope of the Brussels I *bis* Regulation under its Article 1(2)(e); within the EU, the Maintenance Regulation applies to such claims
- note: Article 5.2 LC does not apply to recourse claims brought by public bodies (ECJ *Freistaat Bayern/Blijdenstein*), i.e. D would have to sue in Switzerland (W’s domicile state)



Scope of application – Case 7(1)



Which rules govern the jurisdiction of the Zurich court?

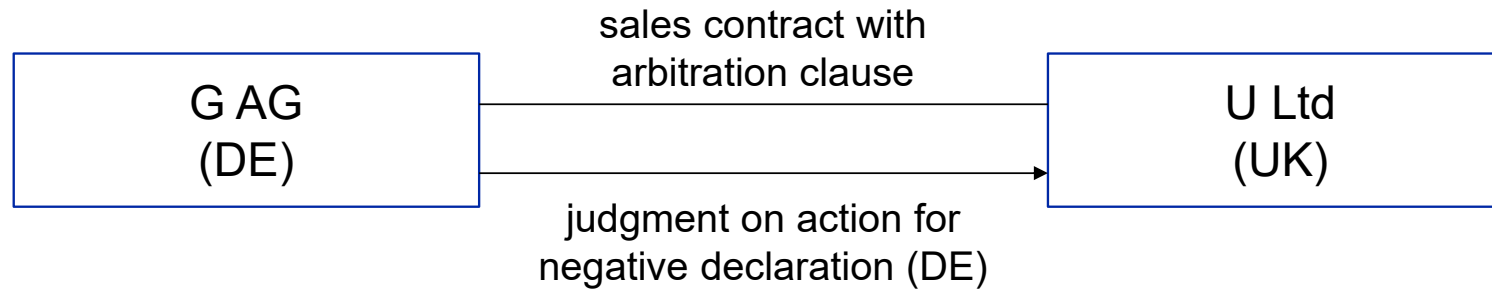


Scope of application – Case 7(1)

- civil/commercial matter
 - relationship between private persons
 - no exercise of public powers by a party
- exclusion from scope (Article 1(2)(d) LC/Brussels I *bis* Regulation)?
 - ECJ *Marc Rich*: wide interpretation of the exception – not only arbitral proceedings and awards themselves are covered, but also ancillary proceedings before state courts (such as proceedings for the appointment of an arbitrator)
 - but see ECJ *van Uden*: provisional measures not excluded from scope based on an arbitration agreement



Scope of application – Case 7(2)



Which rules govern the recognition of the German judgment in Switzerland?



Scope of application – Case 7(2)

- civil/commercial matter
 - relationship between private persons
 - no exercise of public powers by a party
- exclusion from scope (Article 1(2)(d) LC/Brussels I *bis* Regulation)?
 - recognition and enforcement of judgments on the merits given by state courts is governed by the LC/Brussels I *bis* Regulation even if the dispute was covered by an arbitration agreement
 - unclear: can recognition and enforcement of a judgment be refused if the court disregarded a valid arbitration clause?
 - unclear: handling of conflicts between judgments and arbitral awards (see ECJ London Steam-Ship Owners' Mutual Association Limited)
 - see also recital 12 of the Brussels I *bis* Regulation



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Examination as to jurisdiction (Articles 25 and 26 LC)



Introduction

- A starting point for common procedural rules?
- General principles
 - protection of exclusive jurisdiction
 - in other cases: defendant's burden to dispute jurisdiction
 - if the defendant does not enter an appearance, the court must examine its jurisdiction *ex officio*
 - jurisdiction is determined by the object of the claim, not by preliminary or incidental matters and not by defence submissions



Scenarios

- Scenario 1: exclusive jurisdiction of a court in another CS/MS
- Scenario 2: no exclusive jurisdiction of a court in another CS/MS, defendant domiciled in other CS/MS
 - Scenario 2a: defendant does not participate in the proceedings
 - Scenario 2b: defendant participates in the proceedings but contests jurisdiction
 - Scenario 2c: defendant participates in the proceedings and does not contest jurisdiction in a timely manner
- Scenario 3: no exclusive jurisdiction of a court in another CS/MS, defendant domiciled in forum state or third state



***Ex officio* examination of jurisdiction**

- frictions/unclear relationship between autonomous requirements and national rules
- application of the law regardless of whether the issue is raised by a party
- establishment of facts
 - no reliance on plaintiff's unproven allegations
 - consideration of all available information
 - (probably) no obligation to actively investigate



German-speaking jurisdictions' approach to facts relevant for jurisdiction

- “singly-relevant facts”: only relevant for establishing jurisdiction
 - establishment at the “admissibility stage”
- “doubly-relevant facts”: relevant for jurisdiction *and* merits
 - assumed to be true at the “admissibility stage”, examination only at the “merits stage”
 - compatibility with LC/Brussels I *bis* Regulation not entirely clear