German Federal Supreme Court: Adversary Proceedings in the State of Origin necessary for Recognition under Brussels I Regulation

In its decision of 21 December 2006 (IX ZB 150/05) the German Federal Supreme Court held that provisional measures can only be recognised and enforced under the Brussels I Regulation if the judicial decision was the subject of an inquiry in adversary proceedings in the State of origin and thus declared the ECJ's case law (Denilauler) on the Brussels Convention to be applicable also with regard to the Brussels Regulation.

In the present case, the Federal Supreme Court had to deal with a Swedish order of attachment which had been declared enforceable in Germany even though the debtor had neither been heard nor been served with the document instituting the proceedings. The decision on the application for a declaration of enforceability has been appealed by the debtor according to Art. 43 Brussels I Regulation. However, the German appellate court, the Higher Regional Court Schleswig, dismissed the appeal by arguing that also provisional measures had to be recognised under the Brussels I Regulation and that the *Denilauler* judgment of the ECJ on Artt. 25, 27, 46 No. 2 Brussels Convention was not applicable with regard to Artt. 32 et seq. Brussels I Regulation. The appellate court argued, the fact that the European legislator did maintain the broad wording of the former Art. 25 Brussels Convention in Art. 32 Brussels I Regulation showed that the legislator did not aim to adhere to the ECJ's decision in *Denilauler* – otherwise provisional measures would have been excluded from Artt. 32 et seq. Brussels I Regulation.

This reasoning has been rejected by the Federal Supreme Court. The Court pointed out that provisional measures do – in general – fall within the scope of Art. 32 Brussels I Regulation. However, this was only the case if the judicial decision was subject of an adversary proceeding in the State of origin – which had

been held by the ECJ in *Denilauler*. This could – under the Brussels Convention – be derived from Art. 27 no. 2, Art. 46 no. 2 and results now from Art. 34 no. 2 Brussels I Regulation (which corresponds to the former Art. 27 no. 2 Brussels Convention) as well as Art. 54 (in conjunction with Annex V) Brussels I Regulation.

Since the relevant provisions of the Brussels I Regulation correspond to the ones of the Convention, the ECJ's findings in *Denilauler* could be transferred to Artt. 32, 34 no. 2 Brussels I Regulation. Thus, provisional measures cannot be recognised and enforced under the Brussels I Regulation if the debtor has not been granted the right to be heard.