Translation of a Request for an Advisory Opinion from Fürstliches Landgericht, Liechtenstein
Registered at the EFTA Court under Case E-6/13-1
Original language: German

PRINCIPALITY OF LIECHTENSTEIN
FÜRSTLICHES
LANDGERICHT
(PRINCELY COURT OF JUSTICE)

ORIGINAL

Please include the case number in all communications
06 CG.2012.276
document number 26

Order
In the proceedings between

the applicant:	Metacom AG, Landstrasse 105, 9490 Vaduz
and	
the defendant:	Rechtsanwälte Zipper & Collegen, Carl-Benz-Strasse 5, D-68723 Schwetzingen, represented by Ritter + Wohlwend Rechtsanwälte AG, Pflugstrasse 16, 9490 Vaduz
in the matter of:	EUR 1 000 together with interest thereon/reimbursement of costs

1. The present subsidiary proceedings concerning the reimbursement of costs are stayed pending receipt of the advisory opinion of the EFTA Court sought in accordance with paragraph 2 below.

2. Pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in connection with the present proceedings, the following questions are referred to the EFTA Court for an advisory opinion.

2.1 Can a European lawyer bringing proceedings in another EEA State in his own name and not pursuant to the mandate of a third party rely on Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17)?

2.2 Is an obligation on European lawyers to register with the authorities of the host State (as provided for here in Article 59 of the Liechtenstein Lawyers Act (*Rechtsanwaltsgesetz*)) compatible with Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17) and, in particular, with Article 7 of that directive?

2.3 If Question 2.2 is answered in the affirmative: Having regard to Directive 77/249/EEC, may a failure to register in the host State on the part of a European lawyer engaged in the provision of services result in the consequence that the lawyer concerned may not claim lawyers' fees in accordance with the scale of fees provided for in the host State (in Liechtenstein the fees provided for in the Lawyers' Fees Act (*Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten*) and the Lawyers' Fees Regulation (*Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten*))?

2.4 Where a European lawyer engaged in the provision of services has registered with the authorities in the host State only at a later date may this subsequent registration result in the consequence that the lawyer may claim fees in accordance with the scale of fees provided for in the host State only in relation to the period following that registration but not in relation to procedural steps taken prior to that date?

2.5 Having regard to Directive 77/249/EEC, does the answer to Questions 2.3 and 2.4 depend on whether at the start of the proceedings the court of the host State referred the European lawyer engaged in the provision of services to the obligation under the law of that State to register with the authorities?

Grounds

1. On 20 July 2012, Metacom AG brought proceedings against the firm of lawyers Rechtsanwälte Zipper & Collegen, D-68723 Schwetzingen, for derecognition of a debt and seeking the following relief (document 1, page 16):

   'The Princely Court of Justice shall order an inter partes hearing, take evidence from the parties and in its judgment order that

   (a) there is no legal basis for the claim for EUR 1 000 together with interest thereon claimed by the applicant in the debt enforcement proceedings 08 RÖ.201227 and now defendant in the proceedings for derecognition and, as a consequence, the debt is derecognised and the order of the Princely Court of Justice of 29 June 2012 set aside and

   (b) the defendant in the derecognition proceedings shall reimburse to the applicant in the derecognition proceedings the costs of the proceedings payable to its representatives within 14 days otherwise execution will be levied'.

   Thereupon, an inter partes hearing was ordered for 12 September 2012 for the purposes of taking evidence (document 2).

   On 13 August 2012, the defendant issued a written reply to the action for derecognition which addressed simply the issue of locus standi in relation to the debt claimed (document 3).

By communication of 17 August 2012, the applicant withdrew the action for derecognition.

By order of the present court of 21 August 2012, the withdrawal of the action for derecognition was noted and the hearing scheduled for 12 September 2012 was cancelled (document 5). On 31 August 2012, service of that decision on the defendant was effected in the framework of the procedure for judicial cooperation (document 6).

On 3 September 2012, the defendant issued a comprehensive defence to the action and, in that connection, claimed that the action for derecognition should be dismissed and that the applicant should pay the costs (document 7).

By order of the present court of 14 September 2012, the defendant's pleadings of 3 September 2012 (document 7) were rejected. At the same time, the defendant's request for reimbursement for costs was also rejected. In that connection, it was held, in essence, that as a result of lodging the withdrawal of the action on 21 August 2012 (document 4), as a matter of law, the proceedings were to be regarded as having been resolved. Thus, the defence to the action issued by the defendant on 3 September 2012 and lodged with the court on 11 September 2012 (document 7) had to be rejected as out of time. That finding was not affected by the fact that the service of the order of the present court of 21 August 2012 declaring the matter to have been resolved and the pleadings issued by the defendant on 3 September 2012 (document 7) had possibly crossed. Moreover, although in light of the withdrawal of its action for derecognition the applicant was to be regarded, in principle, as the unsuccessful party, none the less no order could be made awarding costs to the defendant. The 'reply' not demanded by the court and issued by the defendants on 13 August 2012 for the purposes of defending their position was unnecessary and, in any event, argument to the same effect could have been advanced at the inter partes hearing scheduled for 12 September 2012 (document 2). As for the defendant's pleadings of 3 September 2012 (document 7), those were rejected and, as a result, costs also could not be awarded in relation to that procedural step. Moreover, in relation to the reimbursement of costs, the law of the forum applied and, pursuant to Articles 58 and 59 of the Liechtenstein Lawyers Act, the defendant, as a firm of German lawyers, was required to nominate a lawyer included on the list of Liechtenstein lawyers as an address for service in Liechtenstein and to furnish their registration with the head of the chamber of Liechtenstein lawyers stating their intention to provide services in Liechtenstein (document 8).

On 24 September 2012, the defendant, now represented by the lawyers Ritter Wohlwend Rechtsanwälte AG, 9490 Vaduz, applied for costs amounting to CHF 676.75. This was based primarily on the argument that the defendant had mandated the lawyers Ritter + Wohlwend Rechtsanwälte AG, Vaduz, to represent it at the hearing scheduled for 12 September 2012. Dr Ursula Wächter had intended to attend the hearing when she was informed by the court that, as a result of the withdrawal of the action, the hearing had been cancelled. Until that date the defendant was unaware of the withdrawal of the action and of the cancellation of the hearing as the documents to that effect were not served until 18 September 2012 in the framework of the procedure for judicial cooperation (document 11).

2. By decision of 4 December 2012, in an appeal brought by the defendant against the decision of the Princely Court of 14 September 2012 (document 8), the Princely Court of Appeal (Fürstliches Obergericht) set aside paragraph 2 of the operative part of that decision and declared it null and void. In reaching that assessment, the Court of Appeal held, in essence, that at the time at which the first instance court delivered the contested order, that is on 14 September 2012, an application by the defendant for the reimbursement of costs pursuant to the second sentence of section 245(3) of the Code of Civil Procedure (*Zivilprozessordnung*) on which the first instance court could have decided had not been made and, in fact, could not have already been made as the defendants only became aware of the withdrawal of the action and the corresponding termination of the proceedings on 19 September 2012 when the relevant order of the first instance court of 21 August 2012 (document 5) was served in the framework of the procedure for judicial cooperation. Moreover, a decision on the reimbursement of costs pursuant to the second sentence of section 245(3) of the Code of Civil Procedure – that is, in the present case, on the defendants' application of 24 September 2012 for the reimbursement of costs (document 11) – could only be reached after hearing the parties, mandatory, in any event, in the case of annulment on other grounds pursuant to point 4 of section 446(1) of the Code of Civil Procedure (document 20).

   Thereupon, in light of the findings of the appellate court, a hearing was scheduled for 6 February 2013 for the purposes of hearing argument on costs pursuant to the second sentence of section 245(3) of the Code of Civil Procedure. Whereas the applicant, although duly invited, did not attend the hearing of 6 February 2013, the defendant was represented by a trainee lawyer from the duly mandated firm of lawyers Ritter + Wohlwend Rechtsanwälte AG, 9490 Vaduz (document 23). At the hearing, the defendant produced a new schedule of costs and applied for a decision on costs (documents 23 and 23a).

   By order of the present court of 7 February 2013, the defendant was given 14 days within which to produce its registration with the chamber of lawyers together with all attendant evidence required pursuant to Article 59 of the Lawyers Act otherwise it would be presumed that no such registration had been effected. At the same time, the defendant was also given 14 days within which to submit observations on its claim to be entitled to costs in accordance with the scale provided for in the Lawyers' Fees Act and the Lawyers' Fees Regulation (document 24).

   By fax to the court of 26 February 2013, the defendant produced the following certificate from the chamber of Liechtenstein lawyers dated 26 February 2013 (annex to document 25):

   'This is to certify that the lawyer Manfred Zipper of Carl-Benz-Strasse 5, D-68723 Schwetzingen, has registered with the head of the chamber of Liechtenstein lawyers his intention to provide cross-border services as a lawyer in the Principality of Liechtenstein from 20 February 2013 and satisfies the legal requirements prescribed in that regard'.

In that connection, the defendant indicated also that had it been informed prior to the start of the proceedings of the requirement to register with the chamber of lawyers such step would indeed have been completed prior to the start of the proceedings. The defendant claimed that one reason why it was unaware of that requirement was the fact that in the previous exercise of cross-border activities in the framework of the freedom to provide services in EU Member States such as Austria and France no registration whatsoever had been necessary (document 25).

3. In those circumstances, the following considerations apply:

Pursuant to section 245(3) of the Code of Civil Procedure, the effect of withdrawing an action is that the action shall be regarded as inexpedient and the applicant shall reimburse to the defendant all its legal costs with the exception of those costs which the defendant has already been ordered to pay by court order not subject to appeal. Pursuant to the second sentence of that provision, on application for the reimbursement of costs the court shall issue a decision following a hearing of the parties.

The Liechtenstein scheme governing the withdrawal of an action deviates in several respects from the Austrian provision (section 237(3) of the Austrian Code of Civil Procedure) on which it is based. Above all, under Liechtenstein procedural law, in the event of an action being withdrawn, a decision on an application for costs shall be made following a hearing of the parties. The omission of this mandatory hearing results in the nullity of the proceedings and the decision, a matter which must also be recognised by a court of its own motion. A defendant's entitlement to reimbursement of costs in the event of a withdrawal of the action presupposes, unless agreement has been reached on this point, that an application to that effect is made in a timely manner. The applicant shall be given the opportunity to respond to the application for costs. If the schedule of costs is contested, a subsidiary dispute subsequent to the resolution of the main proceedings results concerning the costs which are to be reimbursed. The party that is successful in that subsidiary dispute shall be entitled, pursuant to section 41 et seq. of the Code of Civil Procedure, to the reimbursement of its costs.

In the present case, in light of the withdrawal of its action, the applicant must be regarded as the unsuccessful party and, as a consequence, it is, in principle, required to reimburse the defendant's costs. Moreover, by motion of 24 September 2012, the defendant, now represented by a firm of Liechtenstein lawyers, made a timely application for an adjudication on costs (document 11), supplemented and/or modified, having regard to the hearing on 6 February 2013 (document 23), by the provision of an updated schedule of costs (document 23a). That schedule of costs also claims fees for the two preparatory sets of pleadings of 13 August 2012 (document 3) and 3 September 2012 (document 7), which were submitted by the defendant itself in its capacity as a firm of lawyers established in Germany.

In this connection, it must be observed as follows:

The Lawyers Act of 9 December 1992 (*Rechtsanwaltsgesetz* or 'RAG'; LGBl 1993 No 41) governs in Article 55 et seq. the exercise of the freedom to provide services.

Pursuant to Article 55(1) of the Lawyers Act (as amended by LGBl 2003 No 21), nationals of a Contracting Party to the Agreement on the European Economic Area entitled to exercise a professional activity as a lawyer in their home State using one of the designations listed in the annex to the Act shall be authorised to exercise their activity as a lawyer in Liechtenstein on a temporary cross-border basis ('European lawyers engaging in the provision of services'). Article 59 of the Lawyers Act (as amended by LGBl 2003 No 21 and LGBl 2008 No 192) is worded as follows:

'(1) A European lawyer engaging in the provision of services shall be supervised by the chamber of lawyers.

(2) Prior to the exercise of an activity in Liechtenstein, a European lawyer engaging in the provision of services shall register his intention to do so with the head of the chamber of lawyers and submit the following evidence:

(a) a certificate evidencing the fact that the service provider lawfully exercises the relevant activity in his home State and that at the date the certificate is submitted that he is not prohibited not even on a temporary basis from the exercise of that activity;

(b) evidence of his nationality; and

(c) that he is covered by professional indemnity insurance within the meaning of Article 25.

(3) The chamber of lawyers shall confirm receipt of the registration without delay. On request, evidence of the registration shall be produced to the courts or administrative authorities.

(3a) Registration shall be renewed once every year if the European lawyer engaging in the provision of services intends in the year in question to provide services in Liechtenstein on a temporary or occasional basis. Furthermore, it shall be renewed immediately, if – with respect to the situation certified – a substantive change has occurred.

(4) It shall be the responsibility of the head of the chamber of lawyers

(a) to advise and instruct a European lawyer engaging in the provision of services on matters concerning the professional obligations of a lawyer;

(b) to supervise the discharge of the obligations to which such persons are subject;

(c) to prohibit the exercise of the provision of services and, where appropriate, notify the courts or administrative authorities of that fact if the requirements set out in paragraph 2 above are not satisfied or cease to be satisfied;

(d) to notify the competent authority of the home State of decisions taken in respect of that person.'

In the present case, the defendant, as a firm of German lawyers, did not effect its registration with the chamber of Liechtenstein lawyers as specified in Article 59 of

the Lawyers Act until 20 February 2013 (see the annex to document 25). In contrast, at the date of its written reply of 13 August 2012 (document 3) and its defence of 3 September 2012 (document 7) it had not yet registered as required under Liechtenstein law. Consequently, it may be questioned whether, notwithstanding those circumstances, in relation to its own procedural steps and activities, the defendant may rely on the Lawyers' Fees Act (LGBl 1998 No 9) and the Lawyers' Fees Regulation (LGBl 1992 No 69). As a matter of national law, this question cannot be conclusively resolved. In this connection, regard must be had to the following matters:

The amendment of the Lawyers Act by the provisions set out in LGBl 2008 No 192 was intended in particular to transpose the following directives:

(a) Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17);

(b) Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77, p. 36); and

(c) Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22).

As a consequence of the primacy accorded to EEA law, when applying the law, the authorities and courts must observe the primary law of the EEA (the main agreement) and EU regulations incorporated into EEA law and, in addition, in principle, also directives. In that connection, national law which is contrary to the EEA Agreement may not be applied (Jürgen Nagel, *Die Auswirkungen der EWR-Mitgliedschaft des Fürstentums Liechtenstein auf den materiell-privatrechtlichen Verbraucherschutz*, SLR 11, GMG Verlag, Schaan 2003, pp. 38-39, with further references). The EFTA Court has jurisdiction, inter alia, to hear requests for advisory opinions on the interpretation of EEA law. In that regard, Liechtenstein has not opted to restrict the authority to make a request to the EFTA Court to courts against whose decisions there is no judicial remedy. In that connection, proceedings before the national court are stayed until the advisory opinion of the EFTA Court has been received (Nagel, cited above, pp. 30-31, with further references, in particular footnote 70).

It is unclear to the requesting court whether, in light of the primary law freedom to provide services established in the EEA Agreement and the relevant directive on European lawyers engaged in the provision of services, the abovementioned Article 59 of the Lawyers Act may and, in fact, should be interpreted as meaning that, as a consequence of their omission to register with the head of the chamber of lawyers and hence their failure to furnish the court with evidence of such registration, the European lawyers concerned (here the defendant firm of lawyers Rechtsanwälte Zipper & Collegen with a registered office in Schwetzingen, Germany) may not rely on the Liechtenstein scale of lawyers' fees for the purposes of determining the costs to be reimbursed.

4. From the perspective of EEA law, consideration should be given to the following:

   Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17) provides, to the extent relevant here, in Article 7 as follows:

   '(1) The competent authority of the host Member State may request the person providing the services to establish his qualifications as a lawyer.

   (2) In the event of non-compliance with the obligations referred to in Article 4 and in force in the host Member State, the competent authority of the latter shall determine in accordance with its own rules and procedures the consequences of such non-compliance, and to this end may obtain any appropriate professional information concerning the person providing services. It shall notify the competent authority of the Member State from which the person comes of any decision taken. Such exchanges shall not affect the confidential nature of the information supplied.'

   In relation to the question raised above it would appear that neither the EFTA Court nor the Court of Justice of the European Union (ECJ) has ruled on the issue. However, in Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 245, the EFTA Court held that it infringes both Directive 77/249 and Article 36(1) EEA if in proceedings where representation by a lawyer is not mandatory a lawyer from another EEA Member State is required to act in conjunction with a national lawyer. Moreover, in that case, the EFTA Court clarified that even Contracting Parties which have introduced principles of direct effect and primacy of EEA law in their internal legal order remain under an obligation to correctly transpose directives into national law.

   In Case C-289/02 *AMOK* [2003] ECR I-15059, the ECJ held that Article 49 EC, Article 50 EC and Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services must be interpreted as not precluding a judicial rule of a Member State limiting to the level of the fees which would have resulted from representation by a lawyer established in that State the reimbursement, by an unsuccessful party in a dispute to the successful party, of costs in respect of the services provided by a lawyer established in another Member State. On the other hand, it also held that Article 49 EC and Directive 77/249 must be construed as precluding a judicial rule of a Member State which provides that the successful party to a dispute, in which that party has been represented by a lawyer established in another Member State, cannot recover from the unsuccessful party, in addition to the fees of that lawyer, the fees of a lawyer practising before the court seised of the dispute who, under the national legislation in question, was required to work in conjunction with the first lawyer.

   As Liechtenstein procedural law is derived from Austrian law, as a matter of practice, case-law from Austria must also be considered. In the present case, this applies *a fortiori* as Austria is an EU Member State and the directive at issue has been incorporated into EEA law. In its judgment of 3 November 2003 in case 4 Bkd 2/03, the Austrian Supreme Court (Oberster Gerichtshof) held that the obligation to register provided for in the second sentence of section 3(1) of the Austrian EEA

Lawyers Act 1992 did not constitute an unlawful restriction on the freedom to provide services. It reached that conclusion on the basis that the chamber of lawyers had no possibility to exercise its supervisory duties if it was not even made aware of the involvement of a foreign lawyer. For that reason, the obligation to register was appropriate to ensure that the chamber of lawyers could exercise its supervisory duties in the public interest and, in that regard, a simple duty to register was also the least intrusive means to ensure the supervision – required in the public interest – of the activities of a lawyer. In its judgment of 17 March 2010 in case 15 Os 20/10w, the Austrian Supreme Court clarified that the notification requirement imposed on European lawyers engaged in the provision of services pursuant to section 4(1) of the Austrian European Lawyers Act did not constitute a procedural condition for admissibility. Instead, its purpose related simply to rules of professional conduct with the intention of ensuring that the chamber of lawyers could exercise its supervisory obligations. Consequently, the German lawyer retained in that case was authorised as lawyer for the defendant to object to the indictment.

Although the case law cited above, in particular, the judgments of the EFTA Court and the ECJ, helps shed light on the situation, it does not answer the questions raised here, at least not conclusively. For that reason, the questions set out in paragraph 2 of the operative part must be referred to the EFTA Court for an advisory opinion and, in that connection, the subsidiary legal dispute at issue here concerning reimbursement of costs must be stayed, as set out in paragraph 1 of the operative part.

Fürstliches Landgericht
Vaduz, 9 April 2013
Jürgen Nagel
Fürstlicher Landrichter

The accuracy of this copy is confirmed by
Norma Marte