



SUPREME COURT OF NORWAY

On 4 November 2022, the Supreme Court's Appeals Selection Committee composed of Justices Bull, Falch and Steinsvik issued, in

HR-2022-2132-U, (case no. 22-097769SIV-HRET), civil case, appeal against order:

A (Counsel Thomas Rieber-Mohn)

v.

IOTA AS (Counsel Line Voldstad)

IOTA Foundation (Counsel Rune Ljostad)

this

O R D E R :

- (1) The case concerns a second-tier appeal against an order to strike out a civil case dealing with copyright in a computer program.
- (2) In 2015, A entered into a cooperation agreement with B on the development of the computer program IOTA, which forms the technical basis for the cryptocurrency of the same name. The company IOTA AS was incorporated the same year, with B as the chairman and general manager. A was employed in the company to develop the software, among other things.
- (3) In October 2017, B incorporated IOTA Foundation in Germany together with a third person. In April 2017, IOTA AS had transferred rights and technology free of charge to the planned foundation. A had a seat on the foundation's board from the summer of 2018 until the summer of 2019.
- (4) On 27 July 2021, A applied for an injunction against IOTA AS and IOTA Foundation demanding the stop of the alleged infringement of his rights to the software IOTA in source code format or any other format. The next day, Buskerud District Court issued an injunction ordering IOTA AS and IOTA Foundation to refrain from exploiting the software. The injunction was issued without an oral hearing and without the defendants being given the opportunity to make a statement.
- (5) On 12 August 2021, A brought an action in Oslo District Court against IOTA AS and IOTA Foundation asking that they be prohibited from any further use of the software IOTA, and that the agreement on the transfer of rights be ruled invalid.

(6) In September 2021, the injunction case was referred to Oslo District Court, and the cases were consolidated into one hearing.

(7) A few days before the oral hearing in Oslo District Court, A brought new claims and a new defendant, B, into the case. The new claims were claims for damages against IOTA AS, IOTA Foundation and B, as well a claim against B in the injunction case.

(8) On 15 October 2021, Oslo District Court ruled as follows:

“In the injunction case (case 21-128591TVI-TOSL/05):

1. The application for an injunction is dismissed with regard to both defendants.
2. In the injunction case, A is to pay costs of NOK 150 000 to IOTA AS and NOK 250 000 to IOTA Foundation. The amounts fall due two weeks from the service of this order.

In the main case (case 21-112732TVI-TOSL/05):

1. The action against IOTA Foundation is dismissed in its entirety.
2. The request that IOTA AS be prohibited from further use of the software IOTA (the first head of the claim) and the request that the agreement from 2017 on the transfer of the rights from IOTA AS to IOTA Foundation be ruled invalid (the second head of the claim) are dismissed.
3. In the main case, A is to pay costs of NOK 150 000 to IOTA AS and NOK 250 000 to IOTA Foundation. The amounts fall due two weeks from the service of this order.”

(9) The District Court did not consider whether the injunction case and the main case should be brought against B or whether the claims for damages in the main case should be brought against IOTA AS. The Court found that it lacked sufficient information to rule on this, as the claims had not yet been served on the defendants.

(10) A appealed against the District Court’s order. IOTA AS and IOTA Foundation appealed against the District Court’s costs ruling.

(11) On 16 May 2022, Borgarting Court of Appeal ruled as follows:

“In the main case:

1. The District Court’s order is set aside as regards the striking out of the claim for damages against IOTA Foundation.
2. Otherwise, the appeal is dismissed.
3. A is to pay costs in the Court of Appeal of NOK 120 000 to IOTA Foundation, within two weeks of the service of this order.
4. A is to pay costs in the Court of Appeal of NOK 63 282 to IOTA AS, within two weeks of the service of this order.

5. A is to pay costs in the District Court of NOK 214 000 to IOTA AS, within two weeks of the service of this order.

In the injunction case:

1. The appeal is dismissed.
2. A is to pay costs in the Court of Appeal A of NOK 90 000 to IOTA Foundation, within two weeks of the service of this order.
3. A is to pay costs in the District Court of NOK 250 000 to IOTA Foundation, within two weeks of the service of this order.
4. A is to pay costs in the Court of Appeal of NOK 20 000 to IOTA AS, within two weeks of the service of this order.
5. A is to pay costs in the District Court of NOK 70 000 to IOTA AS, within two weeks of the service of this order.”

- (12) In other words, the Court of Appeal agreed with the District Court, save for finding that the District Court had no better basis for determining the admissibility of the claim for damages against IOTA Foundation than it had for the claims for damages against IOTA AS and B. The District Court’s ruling was therefore set aside as concerned the striking out of the claim for damages against IOTA Foundation, as set out in the first head of the conclusion in the main case.
- (13) A has appealed against the order to the Supreme Court, except for the first head of the conclusion in the main case. The appeal challenges the application of the law and the findings of fact. A contends:
- (14) The Court of Appeal has interpreted section 78 of the Copyright Act on prohibition against infringements and other violations of the Act incorrectly when finding that this also requires an assessment under section 1-3 of the Dispute Act.
- (15) Within its scope, section 78 of the Copyright Act regulates the issue of legal interest exhaustively as *lex specialis*. Section 1-3 of the Dispute Act is only applicable if a party asks for a declaratory judgment that the acts in question are illegal, as such a request would fall outside the scope of section 78 of the Copyright Act.
- (16) The requirements of a legal interest – i.e. a genuine need to have the claim decided – set out in section 78 of the Copyright Act are met as regards A’s request for a judgment ordering IOTA AS to refrain from any further making available to the public and making copies of the software in any format. Thus, it is also clear that A has a legal interest in asking for such a prohibitory judgment against IOTA Foundation, even with the interpretation of Article 6 (1) of the Lugano Convention that the Court of Appeal has incorrectly applied, and in his application for a temporary injunction against both IOTA AS and IOTA Foundation.
- (17) Furthermore, the Court of Appeal’s striking out of the action is due to errors of fact in finding that there are currently no activities in IOTA AS. Documentary evidence shows that there are still relevant activities in the company.

- (18) Finally, the Court of Appeal interpreted Article 6 (1) of the Lugano Convention incorrectly in finding that it does not give a basis for joining IOTA Foundation into the action in Norway against IOTA AS when the action against IOTA AS is dismissed. According to case law from the Court of Justice of the European Union (CJEU), a joinder of parties under this provision is not dependent on whether the action against the defendant domiciled in the State where the case is brought is dismissed under a national provision, as long as the claims are sufficiently closely related. The connection requirement is met in this case, and so is the requirement laid down in case law of a certain likelihood that A has such a closely related claim against the defendant in Norway, IOTA AS, as he contends.
- (19) It further follows from Norwegian Supreme Court case law and case law from the CJEU that Article 6 (1) may be invoked also by claimants domiciled in non-member countries.
- (20) The derivative appeals from IOTA AS and IOTA Foundation against the Court of Appeal's costs ruling must be dismissed, or the costs ruling should be upheld.
- (21) A asks the Supreme Court to rule as follows:

"In the main case (21-112732-TVI-TOSL/05):

1. Principally:

The action against IOTA AS and the action against IOTA Foundation may proceed as regards the request for a prohibition against any further making available to the public and making copies of the software IOTA.

2. In the alternative:

The second head of the conclusion in the main case in the Court of Appeal's order is set aside.

3. In the second alternative:

The action against IOTA Foundation may proceed as regards the request for a prohibition against any further making available to the public and making copies of the software IOTA.

4. In the third alternative:

The second head of the conclusion in the main case in the Court of Appeal's order is set aside as regards the striking out of the action against IOTA Foundation, requesting a prohibition against any further making available to the public and making copies of the software IOTA.

5. In all events:

A is awarded costs in all instances.

In the injunction case (21-128591TVI-TOSL/05):

1. Principally:

The application against IOTA AS and the application against IOTA Foundation may proceed as regards the request for a prohibition against any further making available to the public and making copies of the software IOTA.

2. In the alternative:

The first head of the conclusion in the injunction case in the Court of Appeal's order is set aside.

3. In the second alternative:

The application against IOTA Foundation may proceed as regards the request for a prohibition against any further making available to the public and making copies of the software IOTA.

4. In the third alternative:

The first head of the conclusion in the injunction case in the Court of Appeal's order is set aside as regards the striking out of the application against IOTA Foundation requesting a prohibition against any further making available to the public and making copies of the software IOTA.

5. In all events:

A is awarded costs in all instances."

- (22) *IOTA AS* contends:
- (23) The case raises neither issues of principle nor any unclear legal issues, and should thus be ruled inadmissible.
- (24) Section 78 of the Copyright Act cannot be interpreted such that it exhaustively regulates the issue of a legal interest in obtaining a prohibitory judgment. Thus, section 1-3 of the Dispute Act is also applicable, both here and in a declaratory judgment that the act is illegal.
- (25) A does not have a legal interest in a prohibitory judgment against IOTA AS, as such a measure would not affect his legal status. There are no indications that IOTA AS will resume the activities that were phased out five years ago, and the relevant rights have been transferred to IOTA Foundation. The new evidence presented does not imply that the Court of Appeal erred in finding that IOTA AS was kept alive exclusively to pursue potential claims against IOTA Foundation.
- (26) Furthermore, a derivative appeal is submitted against the Court of Appeal's costs ruling. IOTA AS has done its utmost to limit its own costs, but A's action has imposed considerable costs on the company for which it should be compensated in full.
- (27) IOTA AS asks the Supreme Court to rule as follows in the main case and in the injunction case:
 - "1. Leave to appeal is not granted.
 - 2. In the alternative: The appeal is dismissed.
 - 3. In both events: IOTA AS is awarded costs."
- (28) *IOTA Foundation's* contentions are mainly similar to those of IOTA AS when it comes to the interpretation and application of section 78 of the Copyright Act and the application of section 1-3 of the Dispute Act.
- (29) In IOTA Foundation's view, the Court of Appeal has interpreted Article 6 (1) of the Lugano Convention correctly. Case law from the CJEU, which concerns other situations, cannot be taken to imply that A has a right to bring IOTA Foundation into an action in Norway that

must be dismissed towards the first defendant, IOTA AS. As an exception from the general rule that a person must be sued in the courts where he or she is domiciled, Article 6 (1) must be interpreted restrictively. The requirement of a close connection between the claims against the first defendant and the foreign defendant is not met, nor is the requirement of a certain likelihood that the first defendant has such a claim.

- (30) In addition, A may not under any circumstances invoke the Lugano Convention because he is domiciled in a non-member country, Belarus, and therefore, according to Supreme Court case law, has no rights under the Convention.
- (31) IOTA Foundation, too, has submitted a derivative appeal against the Court of Appeal's costs ruling. As a foreign defendant, IOTA Foundation has been compelled to devote significant resources to the case. Although up until now the case has been limited to the issue of admissibility, this issue is so closely connected to the substance of the case that it has been necessary, already now, to carry out a thorough assessment of that aspect as well. IOTA Foundation should therefore have its costs compensated in full.
- (32) IOTA Foundation asks the Supreme Court to rule as follows:

"In the main case:

- 1. Leave to appeal is not granted.
- 2. In the alternative: The appeal is dismissed.
- 3. In both events: A is to compensate IOTA Foundation's costs.

In the injunction case:

- 1. Leave to appeal is not granted.
- 2. In the alternative: The appeal is dismissed.
- 3. In both events: A is to compensate IOTA Foundation's costs."

- (33) *The Supreme Court's Appeals Selection Committee* notes:
- (34) The appeal is a second-tier appeal against an order striking out a case from the District Court because the courts lack jurisdiction. This implies that the Appeals Selection Committee is competent to rule on the factual as well as the legal and procedural aspects of the impugned order, see section 30-6 (a) of the Dispute Act.
- (35) The Appeals Selection Committee takes A's appeal to mean that he is not challenging the District Court's and the Court of Appeal's striking out of the action against IOTA AS and IOTA Foundation as regards the request for a judgment invalidating the agreement of 4 April 2017 on the transfer of rights from IOTA AS to IOTA. No arguments in this regard are made in A's appeal to the Supreme Court, and the contention that the main case and the injunction case must proceed is limited to the request for a prohibition against any further making available to the public and making copies of the software IOTA.

Section 78 of the Copyright Act

- (36) A's primary contention is that the Court of Appeal has interpreted section 78 of the Copyright Act incorrectly in applying section 1-3 of the Dispute Act also to the question whether his action against IOTA AS should proceed.

- (37) This issue must be considered under subsection 1 of section 78 of the Copyright Act:

“Any person who has infringed another person's rights or otherwise violated this Act, may by judgment be prohibited from repeating this action. Any person who has made significant preparations with a view to carrying out an action that would constitute an infringement, or who has in some other manner acted in a way that gives particular grounds for fearing that the person in question will commit an infringement, may be prohibited by judgment from carrying out the action.”

- (38) The following is set forth in the comments to section 78 in Proposition to the Storting 104 L (2016–2017):

“The provision is new. It regulates the possibility to hand down a judgment that prohibits a person to repeat or to commit an infringement, or to repeat an action contributing to an infringement (a prohibitory judgment). The possibility to hand down a prohibitory judgment is not expressly regulated in the Copyright Act. It follows, however, from the provisions on the content of the rights in conjunction with ordinary procedural rules that a prohibition may be issued to stop alleged infringement and, in certain situations, to prevent impending infringements. The provision on prohibitory judgments is included in the Copyright Act to highlight this key statutory sanction. It also clarifies when a prohibition may be issued against a person who has contributed to another person's infringement and to prevent impending infringement. The Ministry's ordinary remarks are found in item 7.2.5.

The section regulates the possibility to hand down an executory judgment [*fullbyrdsesdom*]. The judgment may be enforced in accordance with section 13-16 of the Enforcement Act. A prohibition may also be issued in the form of a declaratory judgment. The possibility to obtain a declaratory judgment in connection with infringement and impending infringement will, as it does today, depend on an interpretation of section 1-3 of the Dispute Act in conjunction with the rules in the Copyright Act on the content of the rights.”

- (39) Hence, the possibility to request a prohibition against infringement of rights under the Copyright Act is not new. This right was previously conferred by the provisions of the former Copyright Act on the content of the rights in conjunction with ordinary procedural rules – particularly the central requirement of a legal interest in section 1-3 of the Dispute Act. The purpose of including that provision in the Act was to “highlight this central sanction”. This suggests that it was not the intention to change the ordinary procedural conditions for bringing such actions. If it had been, it would have been natural to discuss this in more detail in the preparatory works.
- (40) The type of prohibitory judgment regulated by section 78 of the Copyright Act is a form of executory judgment. The right to request a declaratory judgment thus still follows from the ordinary rights provision in the Copyright Act in conjunction with the Dispute Act, as also pointed out in the quote from the preparatory works. It is not natural to interpret this statement antithetically – as an indirect statement that section 1-3 of the Dispute Act is no longer relevant for the type of actions falling under section 78 of the Copyright Act.
- (41) It is true that the requirements laid down in section 78 subsection 1 of the Copyright Act, particularly in the second sentence, set out assessments to be made that mainly coincide with the assessment of legal interest required under section 1-3 of the Dispute Act when this type of action is brought. As this case illustrates, one might however, after having applied the

requirements in section 78, be left with cases where the defendant has no genuine need for a prohibitory judgment. For example, section 78 of the Copyright Act does not take into account the absence – as the District Court and the Court of Appeal have concluded – of relevant activities in the legal person constituting the defendant, nor any impending risk that the defendant will commit the infringements that the claimant is seeking to prohibit. It is difficult to see how a prohibitory judgment may nonetheless be requested when it would otherwise not have been possible, and was not possible before the current Copyright Act was adopted.

- (42) The quote from the comments to section 78 references item 7.2.5 of the Proposition. The discussion therein of the wording in subsection 1 second sentence primarily describes the extent to which a prohibitory judgment may be obtained even if the person at whom the judgment is aimed has still not overstepped the limit for criminal attempt. The Ministry did not want such a condition to be laid down. On page 272 of the Proposition, it argues that “[w]hen there is an impending risk that a person might commit an infringement, it should be possible to issue a prohibition regardless of whether that person knows or ought to have known that the act he or she is about to carry out will constitute an infringement.” The quoted wording in the comments to section 78, expressing that the provision, in addition to highlighting the sanction, “clarifies when a prohibition may be issued”, must be read in the light of this. The application of section 1-3 of the Dispute Act is not discussed in item 7.2.5.
- (43) Against this background, the Appeals Selection Committee finds that the Court of Appeal has interpreted section 78 of the Copyright Act correctly when also applying the limitation in section 1-3 of the Dispute Act, which implies that a prohibitory judgment must have a relevant impact on the parties.
- (44) A also contends that the Court of Appeal has erred in its findings of fact. According to A, it is not correct that there are no relevant activities in IOTA AS, which means that there is no impending risk that the actions against which a prohibition is sought will be carried out. The Court of Appeal writes:

“IOTA AS is registered in the Register of Business Enterprises, but it is stated that there have been no activities in the company since 2017. The only activities today are related to these proceedings. A has not contended that IOTA AS has used the IOTA technology after 2017, but he claims to have a legal interest in obtaining a prohibitory judgment to prevent it from happening in the future.”

...

Among the two defendants under this contention, it is currently only IOTA Foundation that uses the IOTA technology. As the Court of Appeal perceives it, A has not disputed the current absence of activities in IOTA AS. Nor has he pointed out individual circumstances suggesting a likelihood that IOTA AS will resume its activities and start using the IOTA technology again. This demonstrates that he has no legal interest in obtaining a judgment for the first part of the claim.”

- (45) In the appeal to the Supreme Court, A disputes the allegation that there currently are no activities in IOTA AS. To demonstrate the opposite, he has presented IOTA AS’s annual accounts for 2020 showing that there are assets in the company. In the Appeals Selection Committee’s view, however, the accounts do not imply that the Court of Appeal has erred in finding that the company’s only current activity is the participation in these ongoing proceedings. According to the profit and loss accounts for 2020, the company had neither income nor expenses.

- (46) In addition, A has presented a blog post from B from 29 April 2021, in which he, as A perceives it, presupposes that IOTA AS will function as a custodian of assets generated from the original “crowd sale” of IOTA currency, to distribute such assets to investors that might make claims for payment in the future. In that regard, the blog post also describes possible future legal steps by IOTA AS against IOTA Foundation.
- (47) In turn, IOTA AS holds that it already in the District Court argued that the possibility to pursue potential claims through the company is in fact why IOTA AS has not been liquidated.
- (48) The Appeals Selection Committee notes that A’s legal interest in obtaining a prohibitory judgment against IOTA AS is not established by the possibility that the company in the future may resume some form of activities, but by the possibility that the company may use the computer program IOTA in the period to come. The blog post shows that there is an ongoing conflict between IOTA AS and IOTA Foundation related to the IOTA currency, but A has not explained why this suggests that IOTA AS might use the disputed software.
- (49) The Appeals Selection Committee finds the same with regard to A’s allegation that IOTA AS still possesses copies of the source code and the accompanying software.
- (50) Against this background, the Appeals Selection Committee agrees with the Court of Appeal that the requirement of legal interest in section 78 of the Copyright Act, cf. section 1-3 of the Dispute Act, is not met. The appeal must therefore be dismissed as far as it concerns the striking out of the action against IOTA AS in the main case. Consequently, A also has no legal interest in the injunction case against IOTA AS, which means that the appeal must be dismissed also on this point.

Article 6 (1) of the Lugano Convention

- (51) A has further challenged the Court of Appeal’s interpretation of Article 6 (1) of the Lugano Convention, which reads:
- “A person domiciled in a State bound by this Convention may also be sued:
- where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;”
- (52) Actions against IOTA AS are normally to be brought in Buskerud District Court, but since the case concerns copyright infringement, Oslo District Court is mandatory venue under section 85 of the Copyright Act. Article 6 (1) of the Lugano Convention requires that that the case against the first defendant be brought where it “is domiciled”. However, the Convention gives no guidelines as to the extent of the national judicial districts, nor any prohibition against centralising certain types of cases to individual courts. Hence, the Appeals Selection Committee finds that the condition that the case against the first defendant, IOTA AS, must be brought where it “is domiciled” is met in this case.
- (53) The key question is thus whether the claims against IOTA AS and IOTA Foundation are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The Court of Appeal has dismissed the action against IOTA Foundation with this argument:

“This provision is not applicable because A’s claim against IOTA AS requesting a prohibition against any use of the software is inadmissible. Then, a joint hearing of the claims against IOTA AS and the foundation is in any case not going to take place.”

- (54) It is correct that when the action against IOTA AS is inadmissible, there is also no risk of irreconcilable judgments resulting from proceedings against IOTA Foundation in another Convention State. In the light of the CJEU constantly stressing that the rules on special jurisdiction in Title II Section 2 of the Lugano Convention must be strictly interpreted because they are exceptions from the general rule on proceedings in the defendant’s domicile – see for example case C-103/05 *Reisch Montage* paragraph 23 – it is natural to assume that Article 6 (1) is not applicable.
- (55) However, in the same *Reisch Montage*, the CJEU interpreted the provision differently. The case concerned an action brought in Austria by a company domiciled in Liechtenstein (Reisch Montage) against a person domiciled in Austria and another person domiciled in Germany. It involved payment of debt owed to Reisch Montage by the person in Austria, for which the person in Germany had guaranteed. Austrian courts’ jurisdiction in the case against the person in Germany was based on Article 6 (1) of Council Regulation (EC) 44/2001, corresponding to Article 6 (1) of the Lugano Convention. The person in Austria had already been declared bankrupt by a final ruling when the case was brought, and the action against him was thus inadmissible under Austrian civil procedure law. The question was whether this implied that Article 6 (1) not could be applied towards the defendant from Germany. It appears from the judgment’s paragraph 17 that the German Government in its observations submitted to the CJEU argued roughly in the same manner as the Court of Appeal in the case at hand, and so did the CJEU’s Advocate General in his Opinion.
- (56) The CJEU answered the question as follows with regard to the Council Regulation which, at the time, corresponded to the Lugano Convention:
- “Article 6(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 must be interpreted as meaning that, in a situation such as that in the main proceedings, that provision may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant.”
- (57) In other words, the fact that the action against the first defendant was inadmissible under a national provision did not prevent joinder of parties under Article 6 (1). To support this, the CJEU states in paragraphs 27 and 30 that Article 6 (1) itself does not include any requirement that an action brought must be admissible by the time it is brought, or, for example as opposed to the provision corresponding to Article 59 of the Lugano Convention, any reference to rules of domestic law.
- (58) As set out in the Supreme Court rulings Rt-2004-981 and HR-2020-1328-A paragraph 43 *et seq*, CJEU case law is an important source when Norwegian courts deal with the interpretation of the Lugano Convention. In the Appeals Selection Committee’s opinion, the CJEU’s view in *Reisch Montage* should therefore form the basis for the interpretation of Article 6 (1) of the Lugano Convention. Although it is not obvious that Article 6 (1) must be thus interpreted, the CJEU’s view is based on arguments that are also relevant within the scope of the Lugano Convention. A uniform interpretation of treaty provisions on the courts’ international jurisdiction is in itself important for the provisions to fulfil their purpose.

- (59) However, IOTA Foundation argues that in *Reisch Montage* paragraph 32, the CJEU also noted that “Article 6(1) of Regulation No 44/2001 cannot be interpreted in such a way as to allow a plaintiff to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled”.
- (60) As the Appeals Selection Committee reads the CJEU case law, the principle of strict interpretation of Article 6 (1) and the view that the provision must not be abused as described in *Reisch Montage* paragraph 32, means that the requirement of a close connection between the claims must be firmly applied. In Case C-98/06 *Freeport*, the CJEU states in paragraph 54 that Article 6 (1) applies “where claims brought against different defendants are connected when the proceedings are instituted, that is to say, where it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled.” In HR-2019-2206-A *Posten* paragraphs 60–61, also the Supreme Court establishes that an abuse doctrine is redundant once the connection requirement is met.
- (61) In Case C-539/03 *Roche Nederland* paragraph 26, the CJEU maintains that the connection requirement entails that the risk of irreconcilable judgments must “arise in the context of the same situation of law and fact.” The Supreme Court states in HR-2019-2206-A paragraph 76 that “the implication of Article 6 (1) is that it must be assessed whether there is a likelihood that the claim against the anchor defendant, legally and factually, is as connected to the other claims as the claimant maintains”.
- (62) About the connection requirement, the CJEU sets out in Case C-145/10 *Painer* paragraphs 80 and 81 that is not a requirement that the legal bases for the actions brought are identical, such that a difference in legal basis does not, in itself, preclude the application of Article 6 (1). However, the defendant must be able to foresee that they might be sued in the state where one of them is domiciled. The case concerned copyright infringement in the form of publication a photograph without the photographer’s consent. The same is expressed in Case C-352/13 *Cartel Damage Claims* paragraph 23, which concerned a claim for damages against several chemical undertakings due to cartel activity.
- (63) These judgments also demonstrate that it is not a requirement that the legal effects of rulings that otherwise would have been given in the courts of various countries, are mutually irreconcilable. At the outset, it is sufficient that there is a risk that such rulings may be based on premises involving the same legal and factual situation, and that are mutually irreconcilable.
- (64) The CJEU’s judgment in Case C-366/13 *Profit Investment*, invoked by IOTA Foundation, does not suggest otherwise. There, an Italian company had brought an action in an Italian court partially against an issuer of securities and a financial intermediary, neither of which was domiciled in Italy, seeking annulment of the contract, partially towards its own parent company seeking damages for mismanagement by having allowed the company to participate in a trade that resulted in compulsory administrative liquidation. The CJEU stated that it does not suffice that the result of one of the procedures may have an effect on the result of the other.

- (65) The Appeals Selection Committee notes that the requests for a prohibitory judgment against IOTA AS and IOTA Foundation both arise from a contention that A holds the copyright in the software, and that the two companies are infringing this right. Even if both Norwegian and German copyright should turn out to be applicable, both countries' legislation is adjusted to Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. Based on the Directive, the CJEU has also developed a general doctrine of originality, which is relevant in both Norway and Germany, see the Supreme Court judgment HR-2017-2165-A paragraph 68. A further contends that both IOTA Foundation and IOTA AS have acted as principals and each other's contributors to the infringement, although, admittedly, IOTA Foundation have mostly appeared as the principal. A's contentions regarding IOTA AS's contribution mostly relate to the agreement between IOTA AS and IOTA Foundation from 2017. Furthermore, there is such a close connection between IOTA AS and IOTA Foundation with regard to both personnel and product, that the two undertakings were able to foresee that the claims against each of them might be joined. In the Appeals Selection Committee's view, this meets the requirements set out in Article 6 (1) of a close connection.
- (66) As for the requirement of "a certain likelihood" that A has a closely connected claim against the first defendant, the relevant factor, also here, is the request for a prohibitory judgment, not whether A has a claim for damages against IOTA AS or IOTA Foundation. The Appeals Selection Committee assumes that this requirement has been laid down to prevent that allegations against the first defendant are created primarily to establish jurisdiction under Article 6 (1) against the other defendants, see HR-2019-2206-A paragraph 71. Apart from this, the general rule is that the defendant's contentions on the substance of the case are relied on.
- (67) In this case, the action against the first defendant is inadmissible. This implies, for that reason alone, that there is no possibility for the request for a prohibitory judgment against the first defendant to succeed. As mentioned, it must be assumed from the CJEU judgment *Reisch Montage* that a striking out of the action against the first defendant does not, in itself, prevent the action against the other defendants from proceeding under Article 6 (1).
- (68) In the light of the Supreme Court judgment HR-2019-2206-A, one may nonetheless ask whether a requirement must be laid down not only of a certain likelihood that the action may succeed if it proceeds, but also of a certain likelihood that the action may proceed at all. An action against the first defendant that is clearly inadmissible may represent just as much of an abuse of Article 6 (1) as an action against the first defendant without prospects of succeeding. The *Reisch Montage* judgment, in which it was clear that the action was inadmissible, speaks against such a dual requirement although the issue was not expressly discussed. However, it is not necessary to consider this issue now. As the Appeals Selection Committee sees it, the issue related to the application of section 78 of the Copyright Act versus section 1-3 of the Dispute Act is in any case not so clear that there was not even a certain likelihood that A could succeed with his view.
- (69) The following is stated in section 78 of the Copyright Act:
- "Any person who has infringed another person's rights or otherwise violated this Act, may by judgment be prohibited from repeating this action."
- (70) A primarily contends that IOTA AS is still infringing his rights to the software IOTA. However, this has not been further elaborated. Secondly, he contends that the entry into the agreement of 4 April 2017 on the transfer of rights from IOTA AS and IOTA Foundation

contributed to IOTA Foundation's subsequent infringement of his rights to the computer program. This is disputed by IOTA AS and IOTA Foundation. However, they are not disputing the existence of agreement or the fact that IOTA Foundation is still conducting business based on the computer program developed by A, although they claim that the program has been further developed and in principle is no longer subject to copyright protection. As the case has been presented, the Appeals Selection Committee finds that there would have been a "certain likelihood" that the agreement from 2017 might be considered to constitute a contributory act if the action against IOTA AS had proceeded, which means that A could have succeeded in his request for a prohibitory judgment against IOTA AS.

- (71) IOTA Foundation further contends that A, who is domiciled in Belarus and thus not in a Convention State, may not invoke the rules of the Lugano Convention. In this respect, IOTA Foundation mentions Rt-2012-1951, in which the Supreme Court found that a Singapore-based claimant could not invoke the Lugano Convention and thus avoid further assessment under section 4-3 of the Dispute Act as to whether the action has a sufficiently strong connection to Norway. The action had no other link to Norway than the fact that the defendant was domiciled here. The Supreme Court's found this questionable and saw no reason that Norwegian courts should "go first" as long as the CJEU had not taken a clear stand.
- (72) According to legal literature, the CJEU clarified this issue in Case C-175/15 *Taser International*, arriving at a different conclusion than the majority in Rt-2012-1951. However, it is not necessary for the Appeals Selection Committee to consider that issue on a general basis. This case involves more than one Convention State since the issue is whether the action against IOTA Foundation may be brought in Norway instead of in Germany. Under any circumstances, it follows from the CJEU judgment in Case C-412/98 *Group Josi Reinsurance* paragraph 61 that the provisions in Title II section 2 of the Lugano Convention 2, which include Article 6, also apply to the advantage of claimants domiciled in a non-member country. Finally, the Committee notes that same follows from *Reisch Montage*, where the claimant was domiciled Liechtenstein, which is not a Convention State.
- (73) Against this background, the Committee finds that A's appeal must succeed as regards the action in the main case against IOTA Foundation. Also, the case is sufficiently clarified for the Committee to rule, based on its own assessment of the facts, that the claim against IOTA Foundation may proceed to a hearing.
- (74) The next question is which consequences this has for the jurisdiction of Norwegian courts in the injunction case against IOTA Foundation.
- (75) IOTA Foundation contended in the District Court that Norwegian courts did not have jurisdiction in the injunction case even if they might have it in the main case. It follows, however, from the CJEU judgment in Case C-391/95 *Van Uden* paragraph 19 that "it is accepted that a court having jurisdiction as to the substance of a case in accordance with Articles 2 and 5 to 18 of the Convention also has jurisdiction to order any provisional or protective measures which may prove necessary." The case concerned the Brussels Convention, on which the Lugano Convention is based, and joinder of parties is regulated in Article 6 (1) of both Conventions, i.e. among the provisions referenced by the CJEU. In paragraph 22, the CJEU specifies that this applies without the jurisdiction being subject to any further condition that the injunction be enforceable in that State. Admittedly, paragraph 40 lays down a requirement under Article 24 of the Brussels Convention, corresponding to Article 31 of the Lugano Convention, of a real connecting link between the subject-matter of

the measures sought and the territorial jurisdiction of the court. However, it follows from the context, see paragraphs 28 and 29, that this applies to situations where the national court does not have jurisdiction under the rules of the Convention and therefore bases its jurisdiction exclusively on national rules, as permitted by Article 24 of the Brussels Convention and Article 31 of the Lugano Convention. In our case, however, the jurisdiction in the case against IOTA Foundation is based on Article 6 (1) of the Lugano Convention.

- (76) The injunction case against IOTA Foundation must thus also proceed to a hearing.

Costs

- (77) As for the derivative appeals from IOTA Foundation and IOTA AS against the Court of Appeal's costs ruling, the Appeals Selection Committee notes that when an appeal is brought against a ruling on the procedure, the Committee must in any case determine the costs in all instances, see section 20-8 subsection 2 second sentence of the Dispute Act.
- (78) According to the Dispute Act section 20-9 subsection 2, the appellate instance must base its determination of claims for costs in lower courts on its own ruling in the case. When, like in the case at hand, there are multiple parties on the same side, it follows from section 20-6 subsection 1 that the costs issue must be assessed separately for each such party.

IOTA AS

- (79) IOTA AS is successful also in the Supreme Court in its contention that the main case and the injunction case against the company are inadmissible. According to section 20-2 subsection 1 of the Dispute Act, the company should then be entitled to full compensation for its costs. The Court of Appeal assumed that IOTA AS's costs were evenly divided between the main case and the injunction case, both of which raise largely the same legal and factual issues. This is not challenged in IOTA AS's appeal against the costs ruling from the Court of Appeal.
- (80) In the main case, the Court of Appeal accepted IOTA AS's claim for costs in the Court of Appeal and the District Court in accordance with the statements, but divided between the main case and the injunction case. This constitutes NOK 63 282 in the Court of Appeal and NOK 214 000 in the District Court, including VAT. There was a dissent with regard to the claim for costs in the Court of Appeal. The claim for costs in the District Court was accepted with some doubt.
- (81) As regards the half of the claims for costs submitted by IOTA AS related to the injunction case, a united Court of Appeal found that they exceeded what was necessary, see section 20-5 of the Dispute Act. The majority found that necessary costs in the Court of Appeal amounted to NOK 20 000, while the minority set a somewhat lower amount. A united Court of Appeal reduced the claim for costs in the District Court from NOK 214 000 to NOK 70 000. These amounts also are inclusive of VAT.
- (82) As mentioned, IOTA AS has challenged the Court of Appeal's determination of costs. The Supreme Court's Appeals Selection Committee agrees with the Court of Appeal that the injunction case involves mainly the same issues as the main case, which means that there is a good reason to reduce the claims in the injunction case to the amount determined by the Court of Appeal for the proceedings in the Court of Appeal and in the District Court. IOTA AS's costs in the District Court and the Court of Appeal are therefore set at the same amount as that

determined by the Court of Appeal.

- (83) In the Supreme Court, IOTA AS has claimed NOK 61 718.75 including VAT for 14 hours' work. This covers both the main case and injunction case. The Appeals Selection Committee finds that the amount does not exceed what must be considered necessary. The amount is awarded rounded up to the nearest krone.

IOTA Foundation

- (84) A has succeeded in the Supreme Court on the issues appealed. The main case proceeds as regards the request for a prohibitory judgment against IOTA Foundation. The injunction case also proceeds.
- (85) It is true that Norwegian courts' jurisdiction in the case against IOTA Foundation under Article 6 (1) of the Lugano Convention is conditional on a simultaneous action brought by IOTA AS, and this action has been dismissed. However, a winning party is generally also entitled to compensation for costs for contentions that do not succeed, see Rt-1997-1245.
- (86) A party who is successful in the whole or in the main is entitled to full compensation for his/her costs from the opposite party, see section 20-2 subsections 1 and 2 of the Dispute Act. In assessing this, regard must be had to the striking out of A's action in the Court of Appeal as regarded the request for a declaratory judgment invalidating the agreement of 4 April 2017 on transfer of rights to the software IOTA AS to IOTA Foundation. The same request was made in the action against IOTA Foundation, and, as mentioned, the issue has not been further appealed to the Supreme Court. A can thus not be deemed to have won the case in the whole or in the main. This is not changed by the fact that A succeeded in the Court of Appeal in having the District Court's striking out of the action against IOTA Foundation set aside. Here, A succeeded on a formal basis without the issue giving rise to doubt.
- (87) A party who has succeeded to a significant degree without winning the case, may be awarded costs from the opposite party under section 20-3 of the Dispute Act in whole or in part if there are compelling grounds for doing so. The Appeals Selection Committee cannot see that such compelling grounds exist.
- (88) The injunction case relates only to the request for a prohibitory judgment in the main case. Here, has A won the case and is entitled to compensation for costs in all instances, see section 20-2 subsection 1, cf. section 20-8 subsection 2 of the Dispute Act. There are no compelling grounds under section 20-2 subsection 3 for exempting the defendants from liability, neither in whole nor in part.
- (89) In the response and pleading to the Supreme Court of 1 July 2022, the aggregate costs in the main cases and the injunction cases against both IOTA AS and IOTA Foundation in the District Court and Court of Appeal are stated to be NOK 652 831.18 divided on 214.75 hours. This gives an hourly rate of around NOK 3 000. According to a pleading of 3 January 2022, A submitted a claim of EUR 12 019.53 related to the District Court's hearing of the application for an injunction. The amount includes VAT. In a pleading of 19 April 2022, A has claimed total costs of EUR 28 200 in the Court of Appeal, for both the main case and the injunction case, without the amount being divided on the cases. The Appeals Selection Committee assumes that half of it – EUR 14,100 – relates to the injunction case, and that this amount, too, is inclusive of VAT.

- (90) Converted to NOK based on Norges Bank's average rate for October 2022 of NOK 10.3919, this makes NOK 124 906 in the District Court and NOK 146 526 in the Court of Appeal. The claims are accepted.
- (91) Whether A must be compensated for the court fee for the District Court's hearing of the injunction case is contingent upon the outcome of the case, see section 20-8 subsection 3 of the Dispute Act. The court fee in the District Court is not limited to the jurisdiction issue, which the courts have been dealing with so far. However, A is entitled to compensation for the court fee in the Court of Appeal of NOK 7 194, see section 15 subsection 2 and section 8 subsection 7 of the Court Fees Act, based on the 2021 rate. This brings the total costs in the Court of Appeal to NOK 153 720.
- (92) In its appeal to the Supreme Court, A has claimed NOK 118 800 plus VAT for 22 hours' work. This amount is not divided between the cases against IOTA Foundation and IOTA AS. In the District Court and the Court of Appeal, A's claim for costs against IOTA Foundation has been about five times the claim against IOTA AS, and the Appeals Selection Committee splits the amount of NOK 118 800 according to the same distribution key, such that NOK 99 000 is allocated to the case against IOTA Foundation. This amount must in turn be split between the main case and the injunction case. In previous instances, the claim for costs against IOTA Foundation has been split between both cases in approximately the same proportion. The Appeals Selection Committee will use the same approach here, so that NOK 49 500 will be allocated to the injunction case. Since A, according to information provided, does not have a right to deduct VAT, VAT of NOK 12 375 must be added to this amount, which makes a total amount NOK 61 875.
- (93) In a subsequent response (to the appeals against the costs) and pleading, another EUR 1 200 is claimed in the case against IOTA Foundation. Once more, the Appeals Selection Committee will allocate half of it, EUR 600, to the injunction case. With a currency rate of NOK 10.3919, this makes NOK 6 235. With the addition of VAT of NOK 1 558.75, this rounds up to NOK 7 794.
- (94) In total, this amounts to NOK 69 669, including VAT. The claim is accepted.
- (95) In addition, a court fee of NOK 7 338 accrues in the Supreme Court, see section 8 subsection 2 of the Court Fees Act.
- (96) A's costs in the Supreme Court in the injunction case are compensated by a total of NOK 77 007.

Conclusion

- (97) A's appeals in the main case and the injunction case against IOTA AS are dismissed. IOTA AS is awarded costs in the District Court and the Court of Appeal in the amounts determined by the Court of Appeal, and in the Supreme Court in accordance with the submitted claim.
- (98) A's appeal against IOTA Foundation has succeeded, such that the request for a prohibitory judgment in the main case and the injunction case may proceed to a hearing. As regards the main case, the parties carry their own costs. As for the injunction case, A is awarded costs in the District Court, the Court of Appeal and in the Supreme Court.

(99) The order is unanimous.

C O N C L U S I O N

In the case between A and IOTA AS:

1. A's appeal is dismissed.
2. A will pay costs of NOK 284 000 in the District Court to IOTA AS within two weeks of the service of this order.
3. A will pay costs of NOK 83 282 in the Court of Appeal to IOTA AS within two weeks of the service of this order.
4. A will pay costs of NOK 61 719 in the Supreme Court to IOTA AS within two weeks of the service of this order.

In the case between A and IOTA Foundation:

1. The action against IOTA Foundation proceeds to a hearing as regards the request for a prohibition against any further making available to the public and making copies of the software IOTA.
2. Costs related to the hearing of the request for a prohibition against any further making available to the public and making copies of the software IOTA are not awarded in any instance.
3. The injunction case between A and IOTA Foundation proceed to a hearing.
4. IOTA Foundation will pay costs in District Court of NOK 124 906 related to the injunction case to A within two weeks of the service of this order.
5. IOTA Foundation will pay costs of NOK 153 720 in the Court of Appeal related to injunction case to A within two weeks of the service of this order.
6. IOTA Foundation will pay costs of NOK 77 007 in the Supreme Court related to injunction case to A within two weeks of the service of this order.

Ingvald Falch
(sign.)

Henrik Bull
(sign.)

Kine Steinsvik
(sign.)