



JUDGMENT OF THE COURT

17 December 2010*

*(Security for costs before national courts –
Discrimination – Article 4 EEA – Justification)*

In Case E-5/10,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Fürstliches Obergericht (Princely Court of Appeal), Liechtenstein, in a case pending before the Fürstliches Landgericht (Princely Court of Justice) between

Dr Joachim Kottke

and

Präsidial Anstalt and Sweetyle Stiftung

concerning the interpretation of Article 4 of the Agreement on the European Economic Area,

THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson (Judge-Rapporteur) and Henrik Bull, Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

- Dr Joachim Kottke, the Plaintiff in the national proceedings (hereinafter “the Plaintiff”) represented by Dr Harald Bösch, Rechtsanwalt;
- Präsidial Anstalt and Sweetyle Stiftung, the Defendants in the national proceedings (hereinafter “the Defendants”), both represented by Dr

* Language of the Request: German

Helmut Wohlwend, Stefan Ritter, Raphael Näscher and Samuel P. Ritter, Attorneys-at-law;

- the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, EEA Coordination Unit, acting as Agent;
- the EFTA Surveillance Authority (hereinafter “ESA”), represented by Xavier Lewis, Director, Florence Simonetti, Officer, and Jóhanna Katrín Magnúsdóttir, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents;
- the European Commission, represented by Friedrich Erlbacher and Minas Konstantinidis, Members of its Legal Service, acting as Agents.

having regard to the Report for the Hearing,

having heard oral argument of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, ESA, represented by Xavier Lewis, and the European Commission, represented by Friedrich Erlbacher, at the hearing on 18 October 2010,

gives the following

Judgment

I Facts and procedure

- 1 By an order dated 12 May 2010, registered at the Court on 27 May 2010, the Fürstliches Obergericht (hereinafter “the Obergericht”) made a request for an Advisory Opinion in a case pending before the Fürstliches Landgericht (hereinafter “the Landgericht”) between Dr Joachim Kottke and Präsidial Anstalt and Sweetyle Stiftung.
- 2 The Plaintiff is a lawyer in Nuremberg, Germany, who acts as the executor of the will of the late Dr Edith Rieder, formerly resident in Nümbrecht, Germany. In his capacity as the executor of the will, he has filed the case before the Landgericht in order to establish that various instructions issued by the deceased to Präsidial Anstalt, registered in Vaduz, Liechtenstein, to establish Sweetyle Stiftung, also registered in Vaduz, are void, ineffective or must be set aside.
- 3 At the first hearing before the Landgericht on 22 January 2010, the Defendants applied for an order in accordance with Article 57(1) of the Code of Civil Procedure, the Zivilprozessordnung (hereinafter “the ZPO”), requiring the Plaintiff to provide security for the legal costs likely to be incurred by the Defendants in the proceedings to the amount of CHF 125 000. Under this

provision, persons who appear as plaintiffs, but are without residence in Liechtenstein, must on application by the defendant provide security for costs, unless international treaties provide otherwise. The Plaintiff objected to the Defendants' application, arguing that the EEA Agreement precludes the imposition of an obligation to provide security for costs.

- 4 On 3 March 2010, the Landgericht granted the order sought and instructed the Plaintiff to deposit CHF 125 000 within four weeks as security for the legal costs of the Defendants, in cash, or by transferring the amount to an account held by the Landgericht, or in the form a bank guarantee, which is unlimited in time and unconditional, issued by a bank based in an EEA State. In the alternative, the Plaintiff was ordered to request that a hearing be scheduled within the same period for him to affirm by oath his inability to provide the security required, otherwise, following an application by the Defendants, the Plaintiff's action would be deemed withdrawn. Furthermore, the Plaintiff was ordered of the Landgericht's own motion to deposit also CHF 4 000 as security for court fees within four weeks, subject to the same conditions as the security for the legal costs of the Defendants and with the same consequences.
- 5 The Plaintiff appealed to the Obergericht against the order of the Landgericht. He argues that the order should be dismissed as the imposition of an obligation on a foreign plaintiff not residing in Liechtenstein to provide security for costs is incompatible with the EEA Agreement when resident plaintiffs are not under the same obligation.
- 6 The national court considers that as a result of the prohibition on discrimination laid down in Article 4 EEA, the Agreement constitutes a treaty prohibiting the imposition of an obligation to provide security for costs, or at least barring its imposition on plaintiffs who are permanently resident in another EEA State. Furthermore, the national court mentions that judgments and, thus, orders for payment of costs issued by a Liechtenstein court against residents in other EEA States can, by virtue of an enforcement treaty, be enforced only in Austria. All other such plaintiffs not permanently resident in Austria are obliged to provide security for costs under the provisions currently in force.
- 7 The national court has decided to stay the proceedings and refer the following questions to the Court:
 1. *Does the Agreement on the European Economic Area, which entered into force in Liechtenstein on 1 May 1995, constitute a (multilateral) treaty which, as a result of the prohibition on discrimination contained particularly in Article 4 thereof, prohibit an obligation to provide security for costs from being imposed on plaintiffs who reside in another EEA Member State if plaintiffs who reside in Liechtenstein are not obliged to provide such security for costs?*
 2. *In the event that the first question is answered in the negative: is the provision contained in point 1 of Article 57(2) of the Liechtenstein*

Zivilprozessordnung (Code of Civil Procedure), whereby a waiver of the obligation on plaintiffs who reside in another State to provide security is made conditional upon the possibility of enforcement in the country of residence, compatible with the EEA Agreement, in particular with the general prohibition on discrimination under Article 4 thereof, insofar as it applies to plaintiffs who reside in an EEA Member State?

II Legal background

EEA law

- 8 Article 4 of the EEA Agreement reads:

Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

- 9 Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice reads:

The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.

Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.

(...)

National law

- 10 The costs of civil litigation in Liechtenstein are governed, in principle, by the Code of Civil Procedure of 10 December 1912 (“the ZPO”). Pursuant to Article 40(1) ZPO, initially, each party must bear its own costs of a civil action. However, a party may be entitled to recover costs from its opponent on the basis of Article 41(1) of the same Act, which stipulates that the unsuccessful party must reimburse its opponent for all necessary litigation costs incurred in bringing the action or pursuing the defence.
- 11 Pursuant to Article 52(1) ZPO, a decision must be made on liability for costs in every judgment or order fully adjudicating the case at that instance. These costs include the court fees and the costs of the legal representatives of the parties, as further specified in the Court Fees Act of 30 May 1974, the Scale of Legal Fees Act of 16 December 1987, and the Scale of Legal Fees Ordinance of 30 June 1992.
- 12 When a decision imposing the obligation on a party to pay its opponent’s costs becomes final, that decision is regarded as an executory order for the purposes of Article 1(a) of the Execution of Judgments Act of 24 November 1971. Execution

may be carried out on any movables or immovables belonging to the debtor, provided that these assets are held in Liechtenstein. Thus, if a plaintiff loses a case, he will be liable to reimburse the defendant's costs. The judgment dismissing the action together with the decision on costs constitutes the execution order. If the plaintiff resides outside of Liechtenstein, the defendant will have to enforce the order for payment of costs abroad.

13 Articles 57 and 57a of the ZPO read as follows:

Security for costs

Article 57

(1) If persons without residence in Liechtenstein appear as plaintiffs or appellants, they shall, on an application by the defendant or respondent, provide the latter with security for costs unless international treaties provide otherwise.

(2) Such an obligation to provide security for costs shall not, however, arise:

- 1. if a court decision ordering the plaintiff or appellant to bear the costs of the defendant or respondent can be enforced in the state of residence of the plaintiff or appellant;*
- 2. if the plaintiff or appellant owns sufficient assets consisting of immovables or receivables registered as secured on such property to cover the costs, and a court decision ordering the plaintiff or appellant to bear the costs can be enforced in the state in which those immovables are situated;*
- 3. in matrimonial disputes during the entire proceedings;*
- 4. in actions of trespass with possession (“Besitzstörungsverfahren”), in actions based on a deed (“Mandatsverfahren”), in actions based on a bill of exchange (“Wechselverfahren”), in counterclaims, as well as in actions brought as the result of a public notice for the entire proceedings.*

(3) If an uncertainty arises concerning the application of a treaty or concerning the enforceability of an order on costs, a statement of the Government on that matter shall be obtained. That statement shall be binding on the court.

Article 57a

If a legal entity appears as plaintiff or appellant, the defendant or respondent may demand security for costs if this legal entity is not able to

show evidence of assets in the amount of the anticipated costs subject to enforcement by a judgment imposing a duty to pay costs to the defendant or respondent.

- 14 As regards the exception pursuant to point 1 of Article 57(2) ZPO, Liechtenstein has entered into two bilateral agreements. One is with Switzerland (Agreement of 25 April 1968 between the Principality of Liechtenstein and the Swiss Confederation on the Recognition and Enforcement of Court Orders and Arbitral Verdicts in Civil Matters, LR 0.276.910.1). The other is with Austria (Agreement of 5 July 1973 between the Principality of Liechtenstein and Austria on the Recognition and Enforcement of Court Decisions and Arbitral Verdicts in Civil Matters, LR. 0.276.910.21).
- 15 Liechtenstein has, however, neither acceded to the Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter “the 1988 Lugano Convention”) nor the Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter “the 2007 Lugano Convention”) which replaces the 1988 Lugano Convention.
- 16 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

III Findings of the Court

The content and scope of the questions from the national court

- 17 By its first question, the national court essentially seeks to establish whether Article 4 EEA generally precludes an EEA State from applying a national rule which requires plaintiffs residing in another EEA State to lodge security for legal costs in civil proceedings, when resident plaintiffs are not subject to such a rule. By its second question, the national court in essence seeks to establish whether it is compatible with Article 4 EEA for an EEA State to waive the obligation to provide such security only in those cases where it is possible to enforce the judgment in the EEA State where the plaintiff resides.
- 18 It is settled case-law that legislation of an EEA State which requires plaintiffs in legal proceedings to furnish security for costs falls within the scope of EEA law (see, in general, Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, and for comparison, Case C-43/95 *Data Delecta* [1996] ECR I-4661).
- 19 In general, the prohibition on discrimination in Article 4 EEA applies independently only to situations governed by EEA law for which the EEA Agreement lays down no specific rules prohibiting discrimination (see Case

E-1/00 *Íslandsbanki-FBA* [2000-2001] EFTA Ct. Rep. 8, paragraph 35, and *Piazza*, cited above, paragraph 31).

- 20 Having regard to the fact that the national provision at issue is of a general nature, the present case will be dealt with under Article 4 EEA alone. The two questions referred by the national court are closely related and will be dealt with together. Furthermore, although in terms of its scope the national provision is not limited to security for a defendant's legal costs in connection with court proceedings but covers also security for court fees, the national court's request for an Advisory Opinion is limited to security for a defendant's costs. Consequently, the Court will not examine issues regarding court fees.
- 21 First, the Court will deal with the question whether a provision of national law, such as the one at issue in the case at hand, is caught by Article 4 EEA. If this is answered in the affirmative, it is necessary to assess whether unequal treatment of residents and non-residents nevertheless may be justified.

Discrimination

Observations submitted to the Court

- 22 The Plaintiff argues that the national provision at issue is caught by Article 4 EEA. As Article 57(1) ZPO differentiates between plaintiffs on the basis of residence, by imposing an obligation on those who live abroad which is not imposed on Liechtenstein residents, it primarily disadvantages nationals of other EEA States. In that regard, the Plaintiff points out that a non-resident plaintiff loses legal protection before Liechtenstein courts as a result of a failure to furnish, on time, security for costs in full or in part. Thus, Article 57(1) results in indirect discrimination on grounds of nationality contrary to the general prohibition on discrimination in Article 4 EEA.
- 23 ESA argues that whereas the requirement contained in Article 57 ZPO cannot be considered to entail direct discrimination against non-Liechtenstein nationals, as it is not limited to those nationals, it amounts to treating nationals more favourably than persons from another EEA State and is, therefore, caught by Article 4 EEA.
- 24 The European Commission shares this view, submitting that a national rule that draws a distinction on the basis of residence, in that non-residents are denied certain benefits which, conversely, are granted to persons residing within the national territory, is liable to operate mainly to the detriment of nationals of other EEA States.
- 25 In the view of the Liechtenstein Government, Article 57 ZPO does not constitute discrimination for the purposes of Article 4 EEA, as it is not based on the nationality of the parties involved in civil proceedings. Foreign residence, as such, is not decisive when it comes to the question of whether security for costs must be imposed. What counts is whether or not a court decision is enforceable

in a particular state. In that respect, the Government submits that Article 57(1) ZPO, read together with the exemption contained in point 1 of Article 57(2) ZPO, refers merely to the enforceability of a Liechtenstein court decision within a foreign legal order.

Reply of the Court

- 26 Ensuring equal treatment for individuals and economic operators and equal conditions of competition throughout the European Economic Area, as well as adequate means of enforcement, including at the judicial level, is an important objective of the EEA Agreement (see the fourth and fifteenth recital in the Preamble to the EEA Agreement and Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraphs 57-58). In this regard, the Court emphasises that access to justice is an essential element of the EEA legal framework, as evidenced by the eighth recital in the Preamble to the EEA Agreement which stresses the value of the judicial defence of rights conferred by the Agreement on individuals and intended for their benefit (see, to that effect, Case E-2/02 *Bellona* [2003] EFTA Ct. Rep. 52, paragraph 36).
- 27 In the absence of EEA rules governing the matter, it is for the domestic legal system of each EEA State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EEA law. Nevertheless, EEA law imposes certain limits on that competence (see, for comparison, *Data Delecta*, cited above, paragraph 12; Case C-323/95 *Hayes* [1997] ECR I-1711, paragraph 13, and Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325, paragraph 19). In particular, legislative provisions on national procedure may not discriminate against persons to whom EEA law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by EEA law (see, for comparison, Case C-186/87 *Cowan* [1989] ECR 195, paragraph 19).
- 28 The national provision at issue does not directly discriminate on grounds of nationality, since the obligation to provide security for legal costs applies irrespective of nationality.
- 29 It is, however, settled case-law that rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result (see Case E-8/04 *ESA v Liechtenstein* [2005] EFTA Ct. Rep. 46, paragraph 16, and the cases cited therein).
- 30 Moreover, the Court held that a national rule in an EEA State which draws a distinction on basis of residence, in that non-residents are denied certain benefits which, conversely, are granted to persons residing within the national territory, is liable to operate mainly to the detriment of nationals of other EEA States, since non-residents are in the majority of cases foreigners, thus constituting indirect discrimination by reason of nationality (see, *inter alia*, Case E-8/04 *ESA v Liechtenstein*, cited above, paragraph 17).

- 31 A provision of national law, such as the one at issue, makes it more difficult for nationals of other EEA States to bring a civil action before the domestic courts than for nationals of the State in question.
- 32 This finding is unaffected by the fact that the national legislation provides for exceptions on the basis of a reciprocal agreement with another EEA State, as in the case of Austria, or on the basis of State comity. Consequently, the Court finds that a rule of domestic civil procedure, such as the one at issue in the national proceedings, entails indirect discrimination within the meaning of Article 4 EEA. Hence, it must be determined whether this discrimination may be justified.

Justification

Observations submitted to the Court

- 33 The Government of Liechtenstein argues that the disputed provision of the ZPO is based on the public policy objective of protecting the good functioning of the judicial system. This policy objective would be jeopardised if a defendant were unable to enforce a decision on costs against an unsuccessful plaintiff. Having regard to the fact that the costs of legal representation can be considerable, such unenforceability would result in an unfair distribution of risk between the parties.
- 34 Moreover, the Liechtenstein Government argues that the provision does not go beyond what is necessary to achieve the objective pursued, since it applies only in cases in which it is indispensable, having regard to the interests of the defending party and thus to the good functioning of the judicial system. In this regard, the Government submits further that judgments from Liechtenstein courts are not recognised in Germany, as that country makes recognition contingent upon the existence of an international convention. As Liechtenstein is not a party to the 1988 Lugano Convention, it has to provide for another system to ensure the legal possibility of enforcement in the interest of the good functioning of the judicial system. The Government also points to the fact that natural persons, whether resident or non-resident, have the possibility to apply for legal aid if they are unable to bear the procedural costs and that where this is granted, it may entail an exemption from the obligation to provide security for such costs.
- 35 The Defendants submit that the provision of security aims at preventing a foreign plaintiff from bringing legal proceedings without running any financial risk in the event of losing the case. In this connection, the Defendants argue that the enforcement of Liechtenstein decisions is impossible in Germany and other EEA States and, as a result, successful defendants would have to institute new legal proceedings to recover their costs if an unsuccessful plaintiff does not pay. The Defendants argue further that the financial disadvantages to a plaintiff are kept to a minimum and are manageable, since provision of security may be effected by way of a bank guarantee.
- 36 The Plaintiff submits that, from a practical point of view, it cannot be assumed that security for the legal costs of a defendant is essential for the proper

administration of civil justice. However, if that presumption is made, other less intrusive measures could be adopted, such as the conclusion of bilateral or multilateral agreements on the enforcement of court decisions.

- 37 In ESA's view, the financial comfort and situation of a defendant does not constitute a matter of legitimate public policy capable of justifying discrimination. Only the recovery of court fees may justify an obligation falling exclusively on foreigners to lodge security for costs. However, as regards the case at hand, ESA takes the view that the national legislation deals only with security for a defendant's legal costs and not security for court fees.
- 38 ESA recognises that the enforcement of a national court decision may involve costs and complications if the plaintiff does not reside in the same state. However, since the enforcement of civil judgments in other EEA States is possible, ESA questions whether the difference in treatment between resident and non-resident plaintiffs is proportionate. In this regard, ESA submits that what is crucial is not whether the jurisdiction in question formally enforces foreign judgments as such, but whether under the rules of the legal system in which recovery is sought the defendant is able to recover one way or another the costs which have been awarded.
- 39 Similarly, the European Commission argues that although the enforcement of a judgment of a national court in another EEA State may involve certain costs and complications for a defendant that do not necessarily arise when the plaintiff resides in the same state, these costs and complications cannot take precedence over the fundamental interest in preventing obstacles to the free movement of goods and services. The Commission submits that, in any case, the national rule is not limited to what is necessary to attain the objective pursued.

Reply of the Court

- 40 A national rule, such as the one at issue, which discriminates indirectly between EEA nationals may be justified on the basis of public interest objectives. This is the case where the national rule is suitable for attaining the public interest objective pursued, is necessary to achieve that objective and not excessive in its discriminatory effects having regard to the objective sought (see, *inter alia*, Case E-1/09 *ESA v Liechtenstein*, judgment of 6 January 2010, not yet reported, paragraphs 38 and 42 and, for comparison, Case C-29/95 *Pastors* [1997] ECR I-285, paragraphs 24–26).
- 41 Encouragement of cross-border activity is a fundamental objective of the EEA Agreement. When such an activity gives rise to civil litigation, the enforcement of judgments must often be sought within the jurisdiction of another EEA State.
- 42 If such enforcement is possible at all, this may well be more cumbersome than enforcement in the jurisdiction in which the judgment is delivered. Consequently, a rule of national law obliging a plaintiff to provide security for costs in such cases protects the interests of defendants by placing them in a position

comparable to defendants sued by a plaintiff resident within the same jurisdiction. In principle, such protection may constitute a public interest objective (see, in that regard, the Opinion of Advocate General Sharpston of 14 September 2010 in Case C-291/09 *Francesco Guarnieri & Cie*, not yet reported, point 48).

- 43 Although the aim of the national legislation at issue is, in principle, legitimate and the measure chosen is, as such, suitable to achieve the objective pursued, it must be assessed whether the contested measure chosen by the Liechtenstein legislature is necessary to achieve the objective pursued and not disproportionate.
- 44 In assessing the necessity of a national provision requiring a non-resident plaintiff to provide security for costs, the applicable rules on recognition and enforcement of foreign judgments in civil matters in the state in which the plaintiff resides must be taken into account.
- 45 Rules on recognition and enforcement of foreign judgments vary from one jurisdiction to another. Some states recognise and enforce foreign judgments out of comity. Other states, as a matter of principle, do not recognise and enforce judgments from abroad unless bound by treaty to do so.
- 46 As a result, the Court holds that provisions requiring a plaintiff from another EEA State to provide security for costs of court proceedings may be necessary, depending on the circumstances, in order to ensure that these costs are equally enforceable whether or not the plaintiff is resident in the State in which judgment is given.
- 47 It must also be assessed whether such a measure imposes on those concerned a burden that, in light of the objective sought, is excessive in its discriminatory effects. In this regard, the interests at stake must be weighed. On the one hand, overly stringent rules on security for costs of court proceedings may hinder a plaintiff resident abroad in asserting his rights through judicial channels. On the other hand, overly lenient rules on the provision of security or the total absence of such may place a defendant in cross-border proceedings in a less favourable position than a defendant sued by a plaintiff resident in the same jurisdiction.
- 48 Where the State in which the plaintiff is resident allows for the enforcement of a Liechtenstein costs award, whether on the basis of treaty obligations or unilaterally, it would be excessively discriminatory to require the plaintiff to provide security for costs. In these circumstances, the restrictions on a plaintiff's possibility to defend his rights that result from a requirement to provide security for costs cannot be justified by reference to the additional burden of enforcement abroad.
- 49 However, in cases in which the law of the State in which the plaintiff is resident does not provide for the enforcement of a costs award, the national court has to assess whether the problems confronting successful defendants resident in Liechtenstein in the recovery of their costs are sufficient to outweigh the interests

of plaintiffs from other EEA States in being able to commence legal proceedings in Liechtenstein.

- 50 In this assessment, various factors must be taken into consideration. For example, it is relevant whether or not non-resident plaintiffs unable to bear the costs of litigation are entitled to legal aid and, if so, under what conditions. Furthermore, factors such as the nature of the security, its amount, the time-limit for its posting and the situation giving rise to its imposition may have to be taken into account. Requiring security for an amount which is out of proportion to the costs likely to be incurred by the defendant or unreasonably high or which must be posted within a very short period of time would constitute a disproportionate impediment.
- 51 If it is considered desirable that the imposition of security for costs should not depend on such case-by-case assessment, accession to a multinational instrument such as the 2007 Lugano Convention would constitute a possible remedy, as previously held by the Court (see Case E-2/01 *Pucher* [2002] EFTA Ct. Rep. 44, paragraph 39).
- 52 In light of the foregoing, the answer to the Obergericht must be that a provision of national law pursuant to which non-resident plaintiffs in civil litigation must provide security for costs of court proceedings, while resident plaintiffs are not obliged to provide such security, entails indirect discrimination within the meaning of Article 4 EEA. In order for such a discrimination to be justified on the basis of public interest objectives, the provision of national law must be necessary and not excessive in attaining them. The latter condition is not met in cases where the State in which the plaintiff is resident allows for the enforcement of a costs award, whether on the basis of treaty obligations or unilaterally. In other cases, too, provision of security may not be required in a manner disproportionately affecting the interests of a non-resident plaintiff in being able to commence legal proceedings. This means in particular that security may not be required for an amount which is out of proportion to the costs likely to be incurred by the defendant or unreasonably high, or which must be posted within a very short period of time. The form of security required, the situation giving rise to its imposition and whether or not the plaintiff is entitled to legal aid also constitutes important factors. It is for the national court to determine in a particular case whether the conditions for justification are satisfied.

V Costs

- 53 The costs incurred by the Principality of Liechtenstein, ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings before the Obergericht, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Fürstliches Obergericht hereby gives the following Advisory Opinion:

1. **A provision of national law pursuant to which non-resident plaintiffs in civil litigation must provide security for costs of court proceedings, while resident plaintiffs are not obliged to provide such security, entails indirect discrimination within the meaning of Article 4 EEA.**
2. **In order for such a discrimination to be justified on the basis of public interest objectives, the provision of national law must be necessary and not excessive in attaining them.**
3. **The latter condition is not met in cases where the State in which the plaintiff is resident allows for the enforcement of a costs award, whether on the basis of treaty obligations or unilaterally.**
4. **In other cases, too, provision of security may not be required in a manner disproportionately affecting the interests of a non-resident plaintiff in being able to commence legal proceedings. This means in particular that security may not be required for an amount which is out of proportion to the costs likely to be incurred by the defendant or unreasonably high or which must be posted within a very short period of time. The form of security required, the situation giving rise to its imposition and whether or not the plaintiff is entitled to legal aid also constitute important factors.**
5. **It is for the national court to determine in a particular case whether the conditions for justification are satisfied.**

Carl Baudenbacher

Thorgeir Örlygsson

Henrik Bull

Delivered in open court in Luxembourg on 17 December 2010.

Gjermund Mathisen
Acting Registrar

Carl Baudenbacher
President