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**Study JLS/C4/2005/03**

**Report on the Application  
of Regulation Brussels I  
in the Member States**

presented by

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**Report on the Application of the Regulation Brussels I in the Member States presented by Burkhard Hess, Thomas Pfeiffer and Peter Schlosser<sup>1</sup>**

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## List of Abbreviations

A.C.	Law Reports, Appeal Cases (Third Series)
ADR	Alternative Dispute Resolution
AG	Advocate General
AG	Amtsgericht (German Local Court)
All ER	All England Law Reports
Arb. Int.	Journal of International Arbitration
AVAG	Gesetz zur Ausführung zwischenstaatlicher Verträge und zur Durchführung von Verordnungen der Europäischen Gemeinschaft auf dem Gebiet der Anerkennung und Vollstreckung in Zivil- und Handelssachen (Anerkennungs- und Vollstreckungsausführungsgesetz); (German Act for the Implementation of International Treaties and for the Implementation of European Community Regulations in the Area of Recognition and Enforcement in Civil and Commercial Matters of 19 February 2001)
BAG	Bundesarbeitsgericht (German Federal Labour Court)
BauR	Zeitschrift für das gesamte öffentliche und zivile Baurecht (German legal journal)
BayObLG	Bayrisches Oberstes Landesgericht (former highest civil court in Bavaria, Germany; abolished on 1 July 2006)
BGBI.	Bundesgesetzblatt (Federal Law Gazette)
BGH	Bundesgerichtshof (German Federal Supreme Court)

BGHZ	Entscheidungssammlung des Bundesgerichtshofs in Zivilsachen (German Federal Supreme Court Reporter)
BlgNR	Beilage(n) zu den stenographischen Protokollen des Nationalrats
Bull ASA	Bulletin of the Association suisse d'Arbitrage
Bull. civ.	Bulletin des arrêts de la Cour de Cassation: chambres civiles (publication of decisions of the French court of cassation)
BVerfGE	Entscheidungen des Bundesverfassungsgerichtes (German Federal Constitutional Court Reporter)
C. A.	Court of Appeal
CA	Cour d'Appel
Cass. Soc.	Cassation social (French tribunal for social questions)
CCP	Code of Civil Procedure
cf.	confer
Ch.	Law Reports, Chancery Division (3rd Series)
Chap.	Chapter
civ.	civil
CJJA	Civil Jurisdiction and Judgements Act 1982
CJPr	Code of Judicial Procedure (Sweden)
CLC	Commercial Law Cases
CLIP	(European Max Planck Group for) Conflict of Laws in International Property
C.L.J.	Cambridge Law Journal
CMLR	Common Market Law Reports



CMR	Convention on the Contract for the Carriage of the International Goods by Road
COM	Commission documents (European Commission)
CPC	Codice di Procedura Civile (Italian Code of Civil Procedure)
CPR	Civil Procedure Rules (England)
C.P. Rep.	Civil Procedure Reports
Dir.	Directive
DMF	Droit Maritime Français (French legal journal)
EBR	European Business Register
EC	European Communities
ECHR	European Court of Human Rights
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ed.	edition, editor
eds.	editors
EEC	European Economic Community
E. L. Rev.	England Law Review
e. g.	for example (exempli gratia)
EIPR	European Intellectual Property Review
EO	Executionsordnung (Austrian Enforcement Code)
et al.	et alii (and others)
et seq.	et sequens
EU	European Union

EuGH	Europäischer Gerichtshof (European Court of Justice)
EuGVÜ	Übereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidung in Zivil- und Handelssachen (Convention of September 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters)
EuJL	European Journal of Law Reform
Eur TL	European Transport Law
Euro. C.L.	European Current Law
E.W.C.A. civ	Court of Appeal (Civil Division)
ex.	example
FamRZ	Zeitschrift für das gesamte Familienrecht (German legal journal)
FIFA	Fédération Internationale de Football Association
fn.	footnote
F.S.R.	Fleet Street Reports
GBP	Great Britain Pound
GG	Grundgesetz (German Constitution/Basic Law)
GIE	Groupement d'intérêt économique (economic association)
GmbH	Gesellschaft mit beschränkter Haftung (German private limited company)
GRUR	Gewerblicher Rechtsschutz und Urheberrecht (German legal journal)
GRUR Int	Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil (German legal journal)

GRUR RR	Gewerblicher Rechtsschutz und Urheberrecht Rechtsprechungs-Report (German legal journal)
GVGA	Geschäftsweisung für Gerichtsvollzieher (German directive for bailiffs)
HGB	Handelsgesetzbuch (German Commercial Code)
H. L.	House of Lords
ICLQ	International and comparative law quarterly
id.	idem (the same)
IECL	International Encyclopedia of Comparative Law
IER	Intellectuele Eigendom & Reclamerecht (Dutch legal journal)
IHR	Internationales Handelsrecht (German legal journal)
IIC	International Review of Industrial Property and Copyright Law
IIC	International Review of Intellectual Property and Competition Law
ILA	International Law Association
I.L.Pr.	International Litigation Procedure
ILRM	Irish Law Reports Monthly
InsO	Insolvenzordnung (German Insolvency Act)
int.	international
InstGE	Instanzengerichtliche Entscheidungen zum Recht des geistigen Eigentums (German report for decisions on intellectual property law)
IPrax	Praxis des internationalen Privat- und Verfahrensrechtes (German legal journal)

IPRspr	Rechtsprechung zum internationalen Privatrecht (German report for decisions in private international law)
IR	Industrial Reports
JA	Study number
JAR	Juristische Arbeitsblätter Rechtsprechung (German legal journal)
JB	Juristische Blätter (Austrian legal journal)
JCP	Jurisclasseur periodique (French legal journal)
JC	Judgment Convention (1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters)
JN	Jurisdiktionsnormen (Austrian legal act)
JPrivIntL	Journal of Private International Law
JR	Judgment Regulation (Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters)
JZ	Juristenzeitung (German legal journal)
KB	Law Reports King's Bench Division
k.p.c.	Kodeks postępowania cywilnego (Polish Code of Civil Procedure)
KPP	Kwartalnik Prawa Prywatnego
LC	Lugano Convention
LEC	Ley de Enjuiciamiento Civil (Spanish Code of Civil Procedure)
LG	Landgericht (German Regional Court)
L.G.D.J.	Librairie Générale de Droit et de Jurisprudence

LLMC Convention	Convention on Limitation of Liability for Maritime Claims of 1976
LMCLQ	Lloyds Maritime and Commercial Law Quarterly
NCPC	Nouveau Code de Procedure Civile (French Code of Civil Procedure)
NIPR	Nederlands internationaal privaatrecht (Dutch legal journal)
NJ	Neue Justiz (German legal journal)
NJPR	Nederlandse Jurisprudentie Feitenrechtspraak (Dutch legal journal)
NJW	Neue Juristische Wochenschrift (German legal journal)
NTBR	Nederlands Tijdschrift voor Burgerlijk Recht (Dutch legal journal)
nos.	numbers
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Higher Regional Court)
OJ C	Official Journal of the European Communities containing Information and Notices
OJ L	Official Journal of the European Communities containing Legislation
p.	page
pp.	pages
para	paragraph
PD	Law Reports Probate Division (1875–1890)
PIBD	Propriété Industrielle – Bulletin Documentaire
QB	Law Reports Queen’s Bench Division (1952)

RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht (German legal journal)
R.C.D.I.	Revue International de Droit Comparé (French legal journal)
R.C.J.B.	Revue Critique de Jurisprudence Belge (Belgian legal journal)
RdC	Recueil des Cours de l'Academie de la Haye/Collected Courses of the Hague Academy of International Law
RdW	Recht der Wirtschaft (German legal journal)
Reg.	Regulation
Rev. Arb.	Revue de l'arbitrage (French legal journal)
ev. Crit.	Revue critique de droit international privé (French legal journal)
Riv. dir. int. priv. proc.	Rivista di diritto internazionale privato e processuale (Italian legal journal)
Riv. dir. proc.	Rivista di diritto processuale (Italian legal journal)
Riv. dir. proc. civ.	Rivista di diritto processuale civile (Italian legal journal)
RIW	Recht der Internationalen Wirtschaft (German legal journal)
RSC	Rules of the Superior Court
RZ	Richterzeitung (Legal journal)
SchiedsVZ	Die neue Zeitschrift für Schiedsverfahren (German legal journal)
sec.	section
et seq.	and the following
SES	Schip en Schade (Dutch legal journal)

Slg.	Sammlung der Entscheidungen des EuGH (European Court Reports)
SLT	Scots Law Times
StPO	Strafprozessordnung (German Code of Criminal Procedure)
T.B.H	Revue de droit commercial belge (Belgian legal journal)
TGI	Tribunal de Grande Instance (French Regional Court)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UKHL	House of Lords of the United Kingdom
UWG	Gesetz gegen den unlauteren Wettbewerb (German Unfair Competition Act)
VersR	Versicherungsrecht (German legal journal)
VV-RVG	Vergütungsverzeichnis Rechtsanwaltsvergütungsgesetz (German Act of the remuneration of lawyers)
VzGR	Voorzieningengerecht (Dutch court)
WFO	World-wide freezing order
WL	Westlaw Transcripts
WLR	Weekly Law Reports
WM	Wertpapiermitteilungen (German legal journal)
ZEuP	Zeitschrift für Europäisches Privatrecht (German legal journal)
ZfRV	Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht (Austrian legal journal)

ZfRV-LS	Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht Leitsätze (Austrian legal journal)
ZInsO	Zeitschrift für das gesamte Insolvenzrecht (German legal journal)
ZIP	Zeitschrift für Wirtschaftsrecht (German legal journal)
ZPO	Zivilprozessordnung (German Code of Civil Procedure)
ZSR	Zeitschrift für Schweizerisches Recht
ZZP	Zeitschrift für Zivilprozess (German legal journal)
ZZPInt	Zeitschrift für Zivilprozess International (German legal journal)



## A. Executive Summary

- 1 The following study provides for a comprehensive analysis on the application of the Regulation (EC) No. 44/01 (in the following: Judgment Regulation) in 24 Member States. It is based on interviews, statistics and practical research in the files of national courts. As an empirical study, it addresses the practical application of the Community instrument in the Member States and elaborates proposals for its improvement. In the course of the research, the reporters got a clear answer from an overwhelming majority of persons interviewed on the Judgment Regulation<sup>2</sup>: They clearly expressed the opinion that this Community instrument is performing well; it was even lauded as a masterpiece of Community legislation.<sup>3</sup> Although, some provisions of the Regulation and the case law of the European Court of Justice have been criticised by the interviewed persons, the overwhelming majority appreciated the current state of affairs as being satisfactory.<sup>4</sup> However, the satisfaction of stakeholders dealing with the European instruments is in a certain contradiction to its practical application as the percentage of cases where the Judgment Regulation is applied is relatively low.<sup>5</sup> However, the general impression that the Judgment Regulation is one of the most successful pieces of legislation of the European Community has been confirmed during the conduct of this study.<sup>6</sup>
- 2 The main focus of this report is to provide a comprehensive survey on the practical application of the Judgment Regulation in 24 Mem-

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<sup>2</sup> The general and national reporters contacted more than 1.000 stakeholders involved in the application of the Community instrument.

<sup>3</sup> A presiding judge at the *Landgericht Traunstein* interviewed by *Prof. Dr. Schlosser*, put it as follows: "The Judgment Regulation is the best piece of legislation we've ever got from Brussels".

<sup>4</sup> Nevertheless, the empirical and statistical data of this study demonstrate that the number of decisions circulating cross-border in the European Union is relatively small.

<sup>5</sup> See *infra* C. Statistical Data on the Application of the Judgment Regulation in the Member States, p. 15.

<sup>6</sup> See for detailed information the answers given to the 3<sup>rd</sup> questionnaire, question 2.1.1.1.

ber States. The survey was prepared by means of three questionnaires.<sup>7</sup> These questionnaires were distributed among national reporters who conducted interviews and consulted electronic databases in their respective States. In addition, the general reporters directly addressed stakeholders in other Member States in order to gather as much information as possible.<sup>8</sup> In July 2006, a conference took place in Heidelberg, where the national and general reporters discussed the results of the empirical research and possible improvements of the Regulation.<sup>9</sup> By December 2006, the general reporters had received most of the national reports and started to elaborate this general assessment.

- 3 The following report does not suggest any fundamental amendment of the structure of the Judgment Regulation. However, the report proposes several improvements, especially with regard to the general function of the Judgment Regulation as the residual instrument of European Procedural Law. These improvements concern Articles 1, 2, 5, 15, 22 (4), 23 and 31 JR and the proceedings for recognition and enforcement of foreign judgments (Third Chapter JR) as well as Article 49 JR. It is the general understanding of this report not to advise specific amendments of the Judgment Regulation but mainly to analyse practical problems and to indicate possible ways forward for improvements. Accordingly, the proposals in this report are worded in an open way leaving room for alternatives. In addition, the report also stresses the “best practices” in the Member States related to the application of the Judgment Regulation. Member States may consult this report for an improvement of their national legislation for the implementation of the Judgment Regulation. Equally, this

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<sup>7</sup> The questionnaires were based on the tender of the EU-Commission. Tender JLS/C4/2005/03 – Study to evaluate the practical application of the „Brussels I” (Regulation (EC) No 44/2001).

<sup>8</sup> The questionnaires were also distributed among the members of the European Judicial Network.

<sup>9</sup> This conference was sponsored by the *Thyssen Foundation*, Germany.

report is aimed at providing information for practitioners on how the Judgment Regulation is applied in other Member States.

## B. Introduction

### I. Methodology, Scope and Aim of the Study

- 4 The following study attempts to analyse comprehensively the application of the Judgment Regulation in 24 EU-Member States (Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom (England/Wales and Scotland)).<sup>10</sup> Its purpose is to demonstrate and to evaluate the practical application of Regulation (EC) No. 44/01 in the EU-Member States. The study is based on empirical research carried out on the basis of three questionnaires addressing statistical, empirical and legal questions of the Judgment Regulation.<sup>11</sup> It is aimed at preparing the Commission's report on the application of the Judgment Regulation as provided by its Article 73. The empirical research is based on interviews conducted with stakeholders engaged in European cross-border litigation, especially lawyers, judges and businessmen as well as organisations representing consumers.
- 5 The report is based on a comprehensive, empirical approach, focusing on statistical data and experiences of stakeholders. According to the tender of the EU-Commission, the reporters were asked to collect statistical data. However, the collection of statistical material proved

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<sup>10</sup> The new Member States Romania and Bulgaria were not included in the study, neither was Denmark. However, in the meantime Denmark has ratified a parallel agreement with the European Community extending the provisions of the Judgment Regulation to Denmark by its entry into force on 1<sup>st</sup> July 2007. The text of the agreement can be found here: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005PC0145\(01\):EN:NOT;](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005PC0145(01):EN:NOT;) [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005PC0145\(02\):EN:NOT;](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005PC0145(02):EN:NOT;) the Council decision on the conclusion of the agreements can be found here: [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l\\_120/l\\_12020060505en00220022.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_120/l_12020060505en00220022.pdf). Cf. the website of the European Judicial Network in civil and commercial matters ([http://ec.europa.eu/civiljustice/news/whatsnew\\_en.htm](http://ec.europa.eu/civiljustice/news/whatsnew_en.htm)).

<sup>11</sup> The questionnaires are available in English, French and German at: <http://www.ipr.uni-heidelberg.de/studie2/question.htm>.

difficult. There are only four Member States (Austria, Poland, Slovenia and the United Kingdom) where a comprehensive collection of relevant data exists. However, even in these Member States there is no specific database on the Judgment Regulation. Therefore, it proved impossible to gather the whole set of data described in the tender of the study.<sup>12</sup> In many Member States, there is absolutely no collection of any statistical data on the application of the Judgment Regulation.<sup>13</sup>

- 6 The EU-Commission and the authors of the present report were well aware of the difficulties related to the collection of statistical data. In the course of the research, they adapted their methods to the practical situation in the Member States. Accordingly, this study is mainly based on interviews conducted with stakeholders on the basis of the questionnaires.<sup>14</sup> In the course of the study, the general reporters realised that empirical research and direct contact with practising lawyers and judges were the most efficient way of obtaining reliable information. Accordingly, they directly contacted the courts and accessed their files. Therefore, this study does not provide for a comprehensive collection of the number of cases in the Member States. However, it is possible to conclude some general implications from the information obtained from typical focus point. In addition, the national reports are based on published decisions available in databases. Finally, the legal literature has been included.
- 7 According to the tender, the scope of the study should encompass the practice in the Member States in 2004/2005. However, this time period revealed several disadvantages: On the one hand, the Judgment Regulation only entered into force in the new Member States in

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<sup>12</sup> While it proved almost impossible to assess the number of cases where the Judgment Regulation was applied in adjudication, it has been possible to get figures on the recognition of foreign judgments and other decisions.

<sup>13</sup> This is for instance the case in: Cyprus, Finland, Germany, Greece, Ireland, Luxembourg, Poland (even there are official data on civil cases in general provided for by the Ministry of Justice of the Republic of Poland); Portugal, Scotland.

<sup>14</sup> General and national reporters undertook written and personal interviews with hundreds of persons. The choice of the stakeholders was the task of the national reporters.

May 2004, accordingly, much practice could not be reported (transitional situation). On the other hand, statistical data for 2005 were not fully available in spring 2006, when the empirical research was carried out. In addition: As the Judgment Regulation entered into force in the old Member States on February 1<sup>st</sup>, 2002, much practice on recognition and enforcement could not be ascertained for 2004 and 2005 (especially in relation to appeals and second appeals). Accordingly, the reporters agreed to enlarge their empirical research to 2003 and even to 2006 in order to gather as much information on the practice in the Member States as possible. The study also encompasses the practice in the Member States to the Judgment Convention, as far as the provisions of the Convention correspond to those of the Judgment Regulation.<sup>15</sup>

## **II. Outline of the Study**

### **1. The Different Parts**

- 8 The study follows the structure of the tender (JLS C4/2005/03), which was divided into three sections (statistical data, empirical data, legal analysis). The final report is composed of two main parts: The first part (C) assesses statistical and empirical data obtained from the Member States, the second part contains a legal analysis and evaluation of the Judgment Regulation (D). The third part summarises the proposals of the study for possible improvements (E).

### **2. The Comparative Research**

- 9 For a better understanding of the approach of the study, it seems advisable to briefly describe its unfolding. From December 2005 to February 2006 the general reporters elaborated three questionnaires (on statistical data, on empirical data and for the preparation of the

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<sup>15</sup> Accordingly, the Portuguese report is based on more than 200 (mostly unpublished) decisions on the Judgment Convention from 1992–2007.

legal analysis) which were circulated among the national reporters. Final versions were completed (following discussions with the EU-Commission and amongst the national reporters) in March 2006.

- 10 In March 2006, the questionnaires were sent to the national reporters who collaborated in this research as a network of correspondents. All reporters are specialists of civil procedure in their respective national laws as well as European Civil Procedure Law. The following contributors remained in continuous, close contact with the study's general correspondents and prepared the national reports: *Prof. Dr. Paul Oberhammer* and *Dr. Tanja Domej* (Austria); *Prof. Dr. Patrick Wautelet* (Belgium); *Dr. Chrisoula Michailidou* (Cyprus); *Prof. Dr. Lubos Tichy* (Czech Republic); *Liina Naaber* and *Liina Linsi* (Estonia); *Gustaf Möller* and *Dr. Helena Raulus* (Finland); *Dr. Laurence Sinoqli*, *Philippe Guez*, *Marjolaine Roccati*, *Raoul Marcelo Sotomayor* (France); *Prof. Dr. Burkhard Hess*, *Prof. Dr. Thomas Pfeiffer*, *Prof. Dr. Peter Schlosser*, *Dr. Vollkommer*, *Dr. Matthias Weller* (Germany); *Prof. Dr. Konstantinos Kerameus* and *Prof. Dr. Nikolaos Klamaris* (Greece)<sup>16</sup>; *Prof. Dr. Miklos Kengyel* (Hungary); *Sean Barton* and *Nicola Heskin* (Ireland); *Prof. Dr. Elena Merlin* in cooperation with *Prof. Dr. Claudio Consolo*, *Prof. Dr. Marco de Cristofaro* and *Prof. Dr. Manlio Frigo* (Italy); *Sanda Mitte* (Latvia), *Vigita Vebrate* (Latvia); *Prof. Dr. Vytautas Nekrosius* (Lithuania); *Dr. Thierry Hoscheit* and *Dr. Patrick Kinsch* (Luxembourg); *Dr. Louis Cassar Pullicino* (Malta); *Dr. Mirjam Freudenthal* (The Netherlands); *Dr. Karol Weitz* (Poland); *Dr. Alexander Rathenau* (Portugal); *Prof. Dr. Paul Beaumont* and *Dr. Helena Raulus* (Scotland); *Dr. Natalia Stefankova* (Slovakia); *Dr. Marco Brus* (Slovenia); *Prof. Dr. Juan Pablo Correa Delcasso* and *Natalia Font Gorgorió* (Spain); *Dr. Eva Storskrubb* (Sweden); *British Institute of Comparative Law* (*Martin P. George*, *Dr. Robert Murphy*, *Andrew Dickinson* and *Jacob van de Velden*, England and Wales).

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<sup>16</sup> With the collaboration of: *Dr. Dimitrios Tsikrikas*, *Dr. Nikolaos Katiforis*, *Dr. Ioannis St. Delikostopoulos*, *Dr. Konstantinos A. Giannopoulos*, *Despina Sakka*, *Marilena Tsakiri*, *Vassiliki Kapetanou*, *Georgia Bountouvi*, *Aggeliki Panou*, *Apostolos Koutsoulelos*, *Irini Roussou*, *Kassiani Christodoulou*.

- 11 From March to June 2006 the national reporters started the empirical research. On the basis of the questionnaires, the national reporters addressed stakeholders in their respective countries, conducted interviews with professions involved in the application of the Judgment Regulation, such as (associations of) judges, lawyers, notaries, bailiffs, and the relevant administrations of Member States, as well as interested associations, economic operators and even individual citizens, who had be identified as having faced difficulties in this field.<sup>17</sup> Every national reporter was requested to conduct at least 50 interviews.
- 12 According to the information obtained from the national reporters the following institutions were contacted:
- 13 *Austria*: The national reporters contacted the Federal Ministry of Justice (which disposes of comprehensive statistical data); the Federal Ministry of Justice published extracts of the questionnaires, which are of a special interest for the judicial practice in the intranet of the Austrian Justice. Furthermore, several judges of the Austrian *Oberste Gerichtshof* were interviewed. Many courts from all instances answered to the distributed questionnaires (*Oberlandesgericht Wien, Oberlandesgericht Innsbruck, Landesgericht Graz, Handelsgericht Wien, Landesgericht Salzburg, Landesgericht St. Pölten, Landesgericht Steyr, Bezirksgericht Feldkirch, Bezirksgericht Feldkirch, Bezirksgericht Fürstenfeld, Bezirksgericht Liesing, Bezirksgericht Linz, Bezirksgericht Steyr, Bezirksgericht Wien-Donaustadt, Bezirksgericht Wien-Fünfhaus*). In addition, the national reporter contacted lawyers specialised in commercial litigation.
- 14 *Cyprus*: The national reporter addressed the most known law firms of the country and they answered the questionnaires extensively. Further, databases were searched.

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<sup>17</sup> Any interested person was invited to answer to the questionnaires, which were available online (see *supra*: fn. 11).



- 15 In the *Czech Republic* the national Reporter *Prof. Dr. Tichy* contacted the Supreme Civil Court and practising lawyers. Further, he analysed the available Czech judgments on the Judgment Regulation. *Prof. Dr. Hess* met *Dr. Trebaticky*, judge at Prague Municipal Court at a conference on European procedural law. *Dr. Trebaticky* answered the questionnaires extensively and interviewed additional judges in Prague. Due to his experience as a judge at the Prague Municipal Court – Commercial Division, he was able to provide us with detailed statistical data on the practice at the Prague Municipal Court. In addition, we received information from *Magr. Simon Pavel*, President of Chamber of the District Court of Cheb, who is experienced in cross-border litigation and who deals with many cases concerning the Judgment Regulation. He answered comprehensively to the third questionnaire and interviewed other judges at the District Court of Cheb.
- 16 The *Dutch* reporter contacted the Supreme Court and the Higher Courts of the Netherlands, the Ministry of Justice and lawyers specialised in cross-border proceedings, especially in maritime and patent litigation.
- 17 The *English* reporters accessed the central database of the Judiciary (LAWTEL), they got statistics from the Department for Constitutional Affairs; they interviewed members of the *Queen's Bench Division* of the *High Court*, of the Court Service (Department of Constitutional Affairs) and of the Commercial Court's working group on the Regulation (chaired by *Mr. Justice Tomlinson*). In addition, they contacted several law firms of the London Bar practising international commercial litigation.
- 18 In *Estonia*, the national reporters received information, in addition to a comprehensive research by means of several databases, in particular by cooperation with the Estonian Ministry of Justice.
- 19 In *Finland*, the national reporters conducted inquiries with the help of the Ministry of Justice; they distributed the questionnaires to several courts in the whole country (Supreme Court, Appeal Courts (6) and

District Courts (61)). In addition, they interviewed the two biggest law firms specialised in cross-border litigation and three debt collection agencies, which are used to dealing with international cases.

- 20 The *French* reporters used their experience gained in the context of a study on the practical application of the Judgment Convention in France.<sup>18</sup> With the help of the French Ministry of Justice they got access to the files of the *Tribunal de Grande Instance de Paris*, of the *Tribunal de Grande Instance TGI de Bobigny*, of the *Tribunal de Grande Instance de Versailles*. They conducted a comprehensive research of the files of these courts. They also contacted the *Cour de Cassation* and numerous practitioners (lawyers, bailiffs, debt collection agencies).
- 21 The *German* reporters firstly distributed the questionnaires to the 16 State Ministries and the Federal Ministry of Justice, to the *BGH* and the 24 *Oberlandesgerichte*. These Courts sent the questionnaires to the *Landgerichte* in their districts. The reporters received about 34 comprehensive answers from about 60 % of all Courts, all the *Oberlandesgerichte* and the *Bundesgerichtshof* answered extensively to the questionnaires. On the basis of the answers received, the reporters directly interviewed judges dealing regularly with the Judgment Regulation. *Prof. Dr. Hess* interviewed 3 presiding judges at the *Landgericht Karlsruhe*, 1 presiding judge at the *Landgericht Kleve*, presiding judges of the *Oberlandesgerichte Koblenz* and *Hamm*, presiding judges of the *Oberlandesgerichte Frankfurt, Karlsruhe* and *Stuttgart*. Furthermore, *Prof. Dr. Schlosser* addressed the Bavarian *Arbeitsgerichte*, the *Arbeitsgerichte Köln, Bocholt, Bonn, Emden, Mönchengladbach, Oldenburg, Wesel* and *Aachen* as well as the *Landesarbeitsgerichte Niedersachsen, Cologne* and *Düsseldorf*. *Prof. Dr. Schlosser* and *Dr. Gregor Vollkommer* visited the *Oberlandesgericht München*, the *Landgericht München (I)*, the *Landgerichte*

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<sup>18</sup> L'exequatur des jugements étrangers en France par Marie-Laure Niboyet et Laurence Sinopoli, *Gaz. Pal.* 2004, 1739.

*Passau* and *Traunstein*. They analysed the pertinent files from the years 2004 and 2005. Against the background of the information obtained, they interviewed the judges about the cases and their personal experiences with the Judgment Regulation. *Prof. Dr. Hess* and the team visited the *German Institute for Youth Human Services and Family Law (DIJuF)*. They interviewed the collaborators of the Institute about their experiences with the cross-border collection of maintenance claims and got access to the relevant files of the Institute. The German reporters also contacted about 40 especially chosen law firms, distributed the questionnaires and interviewed lawyers. Furthermore, the questionnaires were sent to about 60 law firms, which are used to working on international civil litigation and which were recommended by the legal network LEGAL500. These interviews included lawyers of international law firms operating Europe-wide as well as lawyers of smaller firms practicing near the border. The German reporters also addressed numerous other stakeholders, such as banks (e. g. *Deutsche Bank*, *Sparkassen Verband*, *HypoVereinbank*, *Merrill Lynch*), insurance companies (e. g. *Gesamtverband der Deutschen Versicherungswirtschaft e. V.*) and other organisations (e. g. *Deutsche Gesellschaft für Transportrecht*, *Deutsche Schutzvereinigung Auslandsimmobilien e. V.*), trade unions, associations for consumer protection, the Federal Chambers of Lawyers and of Notaries and several other institutions.<sup>19</sup>

- 22 In Greece the national reporters got access to the files of the Court of Appeal Thessaloniki, the Court of First Instance Thessaloniki, (Prof. Dr. Kerameus) and the Athens Court of First Instance (Prof. Klamaris) and interviewed numerous judges in Greece. They also contacted law firms specialised in international commercial litigation.
- 23 In *Hungary* the reporters got access to the Office of the National Judicial Council and the data base of this institution. In addition, the

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<sup>19</sup> For more detailed information on the empirical research see the introduction of the German report, 1<sup>st</sup> questionnaire.

Hungarian reporters directly contacted courts dealing mainly with cross-border proceedings and they contacted lawyers in this specialised field of law.

- 24 In *Ireland*, the published case law has been analysed comprehensively both by reviewing statistics published in annual reports by the Court Service and by searching court databases operated by the Courts Service. Additionally the reporters interviewed several other law firms having dealt with cross-border cases and could refer to their own experience as lawyers working in the field of international litigation.
- 25 The *Italian* reporters accessed the appellate courts of Milan and Bolzano. They interviewed the judges and reviewed the files of the courts. In addition, they also interviewed lawyers of the Milan bar practising in the field of international commercial litigation and they reviewed the published case law in Italy.
- 26 The *Lithuanian* reporter, *Prof. Dr. Nekrosius* contacted *inter alia* the judge at the appellate court who is exclusively competent for the recognition of foreign judgments and therefore a declared expert in international litigation.
- 27 In *Luxembourg*, the national reporters interviewed the President of the District Court Luxembourg, the directors of the *Gerichtskanzlei* Luxembourg and the Attorney General's Office as well as several lawyers and judges. In addition, the national reporters included in the national report also their own professional experience as, respectively, a judge and a lawyer.
- 28 In *Poland*, the national reporter *Dr. Weitz* (who elaborated the most comprehensive treatise on European civil procedure in Poland) got access to the database of the Polish Supreme Court and reviewed all published cases, judges in all instances were interviewed and practising lawyers contacted.
- 29 In *Portugal*, the national reporter informed the general reporters that almost no national practice on the Judgment Regulation was avail-

able. However, the Portuguese Report is based on more than decisions on the application of the Judgment Convention in Portugal between 1992 and 2007. In addition, the Portuguese reporter contacted those persons identified as stakeholders in cross-border proceedings. Accordingly, 3 specialised law firms were contacted as well as those first instance courts which regularly deal with the Judgment Regulation. Furthermore, the Portuguese *EJN* was contacted and it provided comprehensive information.

- 30 In *Scotland*, the national reporters contacted about 75 law firms and the Court of Session. They accessed the database of the Court and interviewed lawyers practising in cross-border settings.
- 31 The *Slovakian* national reporter contacted law firms and distributed questionnaires among courts. Further, judges were interviewed personally.
- 32 The *Slovenian* reporter got access to the central database of the national Ministry of Justice: He contacted all regional courts (11) and reviewed their files. In addition, the national reporter contacted the Slovenian bar and interviewed especially law firms engaged in cross-border cases.
- 33 In *Spain* information on case law with regard to the Judgment Regulation was obtained by means of databases. Further, numerous lawyers were interviewed by the national reporter, in particular from cities with a high number of international cases such as Madrid, Barcelona and Valencia. *Inter alia* the biggest Spanish law firm (with more than 1300 lawyers in Spain). Some of the contacted lawyers answered the questionnaires extensively.
- 34 The *Swedish* reporter conducted an extensive research of databases and law reviews, and analysed the published case law. Further, we contacted the European Judicial Network (*EJN*), which in turn contacted the Swedish National Court Administration. This authority distributed the questionnaires among several courts.

- 35 Furthermore, the general reporters were in contact with *Lex-Mundi-Network* kindly supported by *Dr. Patricia Nacimiento* from the law firm *Nörr Stiefenhofer & Lutz*, which consists of lawyers from all European Member States. The questionnaires were distributed to the partners of this network. Comprehensive reports came from the partners of Cyprus, Estonia, Finland and Slovakia.
- 36 Although the stakeholders were mainly addressed by the national reporters, the general reporters also addressed foreign experts directly.<sup>20</sup> In addition, all available databases in the Member States were searched.<sup>21</sup> The general reporters received the first reports in July 2006, the last in February 2007. From 17<sup>th</sup> to 19<sup>th</sup> July 2006, most of the national reporters met in Heidelberg and discussed the results of the comparative research as well as possible improvements of the Regulation. The final report was prepared and discussed by the general reporters in a meeting in January 2007.
- 37 This general report is based on the answers to the questionnaires as well as on the discussions held at the Heidelberg meeting. However, the general reporters assume exclusive responsibility for all results and proposals of this study. The report has been commonly elaborated by the general reporters. However, the reporters made the following distributions, which correspond to the main responsibility: *Prof. Dr. Hess* elaborated Parts A–C, D.I and D.II (Scope of Application) and Part D.IV (Free Movement of Judgments)<sup>22</sup>; *Prof. Dr. Pfeiffer* elaborated Part D.III (Jurisdiction); *Dr. Matthias Weller* was responsible for Part D.IV (*Lis pendens* and similar proceedings). *Prof. Dr. Schlosser* elaborated Part D.VI (Provisional and Protective Measures). In Part D.III, *Prof. Dr. Schlosser* was responsible for the

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<sup>20</sup> *Prof. Dr. Schlosser* contacted lawyers specialising in the patent litigation; *Prof. Dr. Hess* contacted judges in the Czech Republic dealing with cross-border cases; international law firms from London (Freshfields, Lovells) were directly contacted by the general reporter.

<sup>21</sup> In Germany, the databases of the Courts in all Federal States were searched as well as all commercial databases.

<sup>22</sup> *Prof. Dr. Hess* also prepared A.I.1.a) (on Articles 6 (2), 65 JR).

parts on maritime claims, intellectual property matters (D.III.2.h), Articles 22 (4) JR) and for the assessment of jurisdiction in matters relating to insurance, consumers' contracts and contracts of employment (D.III.2.i)).

## **C. Statistical Data on the Application of the Judgment Regulation in the Member States**

### **I. Availability of Statistical Data**

- 38 As explained above, the collection of statistical data proved difficult. The answers received from the national reporters to the first questionnaire asking about statistical data were full of gaps. Finally, no national reporter was able to react comprehensively to the set of questions. It is a matter of fact that the Member States do not comprehensively collect data on the application of the Judgment Regulation.
- 39 Nevertheless, it was possible to assemble some reliable information. In this respect, different situations must be distinguished: In some Member States (Austria, Hungary, Poland and Slovakia), the national reporters accessed central databases of the Ministries of Justices which provide for detailed information about cases involving foreign defendants. They even obtained specific information about the application of the Judgment Regulation. Further, some national reporters were able to search commercial databases, which comprehensively document the case law of the most important courts (Germany, United Kingdom). Other reporter were able to provide rough estimations on the number of cases concerning the Judgment Regulation.<sup>23</sup> Further, in many Member States the national reporters got access to specific courts and collected information about the case law of these

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<sup>23</sup> Czech Republic (municipal courts in Prague and in Brünn); Cyprus, Estonia, Greece, Germany (several courts) and Poland.

courts.<sup>24</sup> While it is still impossible to deduct general conclusions from these investigations, the results of these researches add up to a general picture, which combines specific data, rough estimations and individual research. Unfortunately, there are also some Member States where it proved impossible to provide any statistical information on the application of the Judgment Regulation.

## **II. Available Information on the Application of the Judgment Regulation**

### **1. The Application of the Jurisdictional Rules of the Judgment Regulation by National Courts**

40 The first questions posed by the EU-Commission addressed the number of cases in which the Judgment Regulation was applied in the Member States in a specific year (2003, 2004 or 2005). The answers received clearly indicate that the number of cases is relatively small, often less than 1 % or even less than 0.1 % of all civil cases in the Member States. The following answers shall demonstrate the current situation:

41 The Austrian report indicates the following figures for the year 2003: In total, there were 12,907 cases in civil and commercial matters (not including social security) involving parties from one of the 13 Member States (not including Austria and Denmark). Of those foreign parties, 11,114 were from Germany, 801 from Italy, 290 from the Netherlands, 156 from France, 148 from Great Britain, 138 from Spain, 103 from Belgium, 49 from Sweden, 36 from Greece, 32 each from Luxemburg and Portugal, five from Finland and three from Ireland. In 5813 cases the defendant was domiciled in one of those states, in 7331 cases it

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<sup>24</sup> This was especially the case in France where the national reporter got access to the files of the *Tribunal de Grande Instance* in Paris and in Versailles. In Germany the national reporters visited the *Oberlandesgericht München*, the *Landgericht München (I)*, and the *Landgerichte Passau* and *Traunstein*. *Dr. Vollkommer* analysed the pertinent files from the years 2004 and 2005. The Greek reporters got access to the files of the *Court of Appeal Thessaloniki*, the *Court of First Instance Thessaloniki* (*Prof. Dr. Kerameus*) and the *Athens Court of First Instance* (*Prof. Dr. Klamaris*). The Italian reporter searched the files of the *Corte d'Appello Milano* and *Bolzano*.



was the claimant. The total number of cases in civil and commercial matters (not including social security) was 828,472. Accordingly, in about 1.5 % of all civil cases a party domiciled in another Member State was involved.

- 42 The English reporters were not able to give a precise numbers of all cases addressing the Judgment Regulation. However, researches carried out in a reputable commercial case database (LAWTEL) suggested that of over 6000 recorded decisions of the English courts in the years 2004–2005 (including preliminary decisions, trial decisions and judgments on appeal), less than 50 related specifically to the Judgment Regulation. However, the reporter stressed the fact that the Judgments Regulation was used as a basis for the jurisdiction of the English courts in a much larger number of cases. Practitioners specialising in cross-border litigation regularly refer to it.
- 43 In Finland, there are no officially recorded statistics. However, according to an inquiry made by the Ministry of Justice there have only been few cases (10–20) where the jurisdiction rules of the Regulation have been applied. Based on the information received from the courts, the Finish report stated that the Regulation was most often applied in relation to recognition of judgements. The reporter estimated approximately 20–30 applications per year.
- 44 In Greece, the approximate number of cases in 2003/2004 where jurisdiction has been based on the Judgment Regulation amounts to 28 to 30 cases. However, since official statistics are not available, this number refers only to published decisions.
- 45 In Ireland, no more than about 20 decisions concerning the Judgment Regulation and/or the Judgment Convention are given in any calendar year. These represent less than 1 % of the total number of cases.
- 46 The German figures collected by Prof. Schlosser and Dr. Vollkommer are similar: According to their research at the *Landgericht Passau*, there were 129 cases (about 9 % of 1,404 decisions in total) in 2005.<sup>25</sup> At the *Landgericht München I* the reporters discovered 518

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<sup>25</sup> In 17 cases, the defendant had his domicile in another Member State, in 33 cases the claimant had his domicile abroad.

cases in 2005 (about 3 % from a total of 16,876 decisions). Obviously, there is only one Court in Germany dealing with a much higher rate of decisions addressing the Judgment Regulation, the *Landgericht Traunstein* (located close to Salzburg). In 2005 there was a total of 3,684 decisions, 609 of them had a connection to Regulation (EC) No. 44/01 (16.5 %). This result is explained by the location of this court close to the Austrian border and the common language in both Member States.<sup>26</sup> Accordingly, many Germans work in Salzburg, Austrian citizens live in Germany. Accordingly, cross-border transactions (mostly small claims) regularly take place. We did not find similar figures in other courts located in border regions: The case law reported from the *Landgericht Kleve* (close to the Belgian and Dutch border) and *Karlsruhe* (close to France) showed that the courts deal with about 25–30 cases a year.

- 47 In the new Member States, the Judgment Regulation entered into force on May 1, 2004. According to the transitorial provision of Article 66 JR, not much case law was available. Accordingly, the Maltese report only mentioned one decision on the basis of the Judgment Regulation. The situation in other small Member States seems similar. In Latvia, the national report estimated about 20 decisions which applied the Judgment regulation from May 2004 until January 2007. Lithuania, from May 1, 2004 until September 2006, only 5 decisions were rendered on the basis of the Judgment Regulation; the Estonia report counted 17 court orders concerning the Judgment Regulation dated from 2006. In Slovenia, the national reporter estimated 20–30 cases between May 2004 and May 2006. In Poland and Hungary, the figures were different because the total number of cases dealt with by the civil courts was significantly higher. The Polish report estimated that the Polish courts handled about 2,500 cases under the Judgment Regulation and the Lugano Convention.<sup>27</sup> The Hungarian report, referring to the summary of the Office of the National Judicial Council,

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<sup>26</sup> The data of Austrian courts demonstrate that almost 90 % of all cases involving foreign parties relate to Germany.

<sup>27</sup> The total of all civil cases in Poland is about 7,300,000. In addition, Polish courts have been applying the Lugano Convention since February 2, 2000.

counted 71 cases altogether, in which Hungarian courts applied the Judgment Regulation during the first year after the EU-accession.<sup>28</sup>

- 48 The reported data on the general application of the Judgment Regulation are too sparse as to allow a comprehensive assessment. However, the figures clearly indicate that for most judges in the European Judicial Area, the application of the Judgment Regulation is not an everyday business.<sup>29</sup> Many judges are confronted with the application of the Judgment Regulation only two or three times a year. Accordingly, they do not dispose of much experience in this field.<sup>30</sup> As a result, it seems advisable to provide for clear and well-defined instruments applicable in cross-border cases and not to create too many parallel instruments for international settings, which are only seldom applied.<sup>31</sup>
- 49 In general, it seems difficult to derive precise information based on these answers. It might well be that the total number of cases related to the jurisdictional grounds of the Judgment Regulation is considerably higher. One reason of this perception is the case law of the *ECJ (Owusu./Jackson)*<sup>32</sup> which interpreted the territorial scope of the Judgment Regulation broadly. According to this judgment, the Judgment Regulation is applicable if the defendant is domiciled in a Member State of the European Community. However, in the published case law of many Member States, several judgments can be found where the applicability of the Regulation has been disregarded by the parties and the courts. In addition, the practical importance of

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<sup>28</sup> Hungarian civil courts render a total of about 200,000 decisions per year.

<sup>29</sup> This factual situation does not correspond to the published case law. In many Member States, judgments addressing jurisdictional issues of the Judgment Regulation are often published, as they address “unusual” legal questions.

<sup>30</sup> Especially the Portuguese reports stressed the fact that judges did not dispose of much information about European procedural law. However, as the report communicates, the situation has improved during the last years.

<sup>31</sup> In this respect, the information provided for by the European Judicial Atlas and the *European Judicial Network in Civil Matters* is very helpful. However, it seems that this source for information is not yet sufficiently known by practitioners.

<sup>32</sup> *ECJ*, 03/01/2005, C-281/02, *Owusu./Jackson*, ECR 2005 I-1383.

the Regulation might be much greater than indicated by the cases: Parties often negotiate based on the Regulation without having recourse to the courts.

## 2. Decisions on the enforceability of foreign judgments

50 More statistical data were available relating to the recognition of foreign judgments under Articles 32 et seq. JR. This result is explained by the specific procedure, which is largely prescribed by Articles 38 et seq. JR. In the Member States, these proceedings have been concentrated in specific courts (or were at least given to specific court officers or judges). Accordingly, there are more statistics on these proceedings available than on the general application of the Judgment Regulation. The following figures have been communicated:

51 England and Wales (*High Court of Justice*): 2004/2005 figures: 92; 2005–2006 figures: 71; France: In 2005, the *Tribunal de Grande Instance de Paris* granted 92 declarations of enforceability, in 2006 (January to July) 30 declarations of enforceability were granted, while the *Tribunal de Grande Instance de Versailles* granted only 5 declarations of enforceability during the same period of time (January to July 2006), the *Tribunal de Grande Instance de Bobigny* did even grant no declaration of enforceability in this period of time<sup>33</sup>; in Germany, it has been impossible to get a comprehensive picture. In border regions, *Landgerichte* granted between 20 and 40 declarations of enforceability (Freiburg, Karlsruhe, Kleve); in commercial centres the figures are higher (40–60 cases in Frankfurt, 173 cases at the *Landgericht München I*), the highest figures were found in the files of the *Landgericht Traunstein*. This court granted 301 declarations of enforceability. In Greece, the 1<sup>st</sup> Instance Court of Athens and Thessalonica granted about 35 declarations of enforceability in 2003/2004. In Hungary, the majority of cases relating to declarations of enforceability (approx. 30 cases) came before the *Central Regional Court of Buda*, the competent court of the capital. The *Local Court of Győr* reported approximately 10 cases since 2004. In Ireland, the reported

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<sup>33</sup> Cf. French report, 1<sup>st</sup> questionnaire, question 1.4.

number of cases assigned a record number (from which the Irish national reporters assumed a declaration of enforceability was made) was 47 in 2003 and 39 in 2004. The Italian reporters visited the *Corte d'Appello Milano* and the *Corte d'Appello Bolzano*. Thus they were able to report on precise figures for these courts. There were 42 declarations of enforceability in Milano in 2003 and 43 in 2004. The *Corte d'Appello Bolzano* (close to the Austrian border) granted: 31 declarations in 2003 and 43 declarations in 2004.<sup>34</sup> The Luxembourg courts granted about 420 declarations of enforceability in 2004, the estimations for Poland are about 450–900 declarations of enforceability from 2003 to 2004. However, the figures obtained from Portugal are much smaller: about 10 declarations of enforceability were granted in 2004.

- 52 According to these figures, the number of applications for a declaration of enforceability is slightly higher than the number of the applications of the jurisdictional provisions. This result can be explained by the fact that the Judgment Regulation equally applies to judgments obtained in domestic litigation. Furthermore, the answers of the national reports clearly show that more than 90 % (often 100 %) of all applications for declaration of enforceability were (finally) successful.<sup>35</sup> However, the national reports equally indicate that the applications are often incomplete and the judicial authorities ask for additional information (especially for translations).<sup>36</sup> When the application is complete, the proceedings for obtaining a declaration of enforceability last on average 7 days<sup>37</sup> to 4 months<sup>38</sup>. When the application is incomplete, the proceedings last much longer. According to infor-

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<sup>34</sup> Cf. Italian report, 3<sup>rd</sup> questionnaire, question 4.1.1.

<sup>35</sup> See answers to the 1<sup>st</sup> questionnaire, question 1.4. The exception is Greece where the national report refers to 65 applications, only 35 decisions of enforceability were granted.

<sup>36</sup> The current situation in the Member States is explained *infra* at D.V.1, paras. 503 et seq.

<sup>37</sup> See the answer of the Luxembourg report to the 1<sup>st</sup> questionnaire, the French report indicated an average of 15 days in the *Tribunal de Grande Instance de Paris*; see generally 1<sup>st</sup> questionnaire, answers 1.7.

<sup>38</sup> See Finish report: 2–3 months; Greek report: 3–5 months, sometimes within 10 days; generally: 1<sup>st</sup> questionnaire, answers 1.7.

mation obtained from lawyers in the Member States, most decisions on the declaration on enforceability are not appealed. The percentage of appeals is between 1 % and 5 % of all decisions.<sup>39</sup>

- 53 Overall, the national reports show a considerable efficiency of the proceedings: Getting a decision on exequatur is a matter of a few weeks, in some Member States, the decision is granted within a few days. In the present state of affairs, the free movement of judgments (without a substantial control of the foreign title in the Member State of enforcement) is at least *de facto* largely implemented in the European Judicial Area.<sup>40</sup>
- 54 In this context, it seems advisable to compare the efficiency of exequatur proceedings with the proceedings for obtaining a European Enforcement Order for Uncontested Claims under Regulation (EC) No. 805/04.<sup>41</sup> In the context of the study, 30 German courts were asked about their experiences with the new regulation.<sup>42</sup> They reported that almost 50 % of the applications were successful. In most of the unsuccessful cases the minimum standards of Articles 12–17 of Regulation (EC) No. 805/04 were not met. However, it seems premature for a final evaluation, as the Regulation (EC) No. 805/04 has only been in force since October 2005 and, accordingly, lawyers and court officers applying the new instrument have not yet gained much experience in this filed.
- 55 The general reporters tried to identify focal points in the Member States where cross-border litigation accumulates and the Judgment Regulation is often applied. In this respect, the national reports indi-

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<sup>39</sup> See the answers of the national reporters to question no. 6 of 2<sup>nd</sup> questionnaire.

<sup>40</sup> The political objective of the free movement of judgments and the reduction of so-called interim measures aimed at the control of the judgment in the Member State of Enforcement was formulated by the Tampere Presidency Conclusions (1999), no. 33 and 34.

<sup>41</sup> This research has been effected by *David Bittmann*, Heidelberg.

<sup>42</sup> 270 applications from October 2005 until December 2006 have been counted. In addition, 95 applications have been lodged in the *Amtsgericht Stuttgart*, which is the only competent authority for granting orders for payment coming from Baden Württemberg.

cated two categories: Courts in economic centres and courts in border regions.

56 In Germany, accumulations of Judgment Regulation cases in economic centres take place for instance Düsseldorf where the *Oberlandesgericht* reported a rate of 3 % of all civil litigations, which is relatively high in comparison to other courts.<sup>43</sup> A court in a border region with a culmination of cross-border litigation is the *Landgericht Karlsruhe*. The commercial chambers of this court reported that a percentage of about 10 % of their caseload related to cross-border litigation and indicated that most of the cases related to France. The *Landgericht Passau*, which reported that 9,2 % of its cases concern Brussels I, indicated that most cases involved an Austrian party, while the *Landgerichte Aachen* and *Kleve* (North Rhine-Westphalia) and the *Oberlandesgericht Köln* pointed out that most titles came from the Benelux.<sup>44</sup>

57 This information confirms the expectation that courts located in a frontier region are more frequently involved in cross-border litigation. However, the information given by the *Landgerichte* in Saxony (located close to Austria, Poland and the Czech Republic) shows that cross-border civil litigation in relation to the new Member States has not yet become a broad phenomenon. This impression corresponds to the information obtained by a broad research of the court records in the *Landgericht Passau*<sup>45</sup>: While Passau is located close to the borders of the Czech Republic and of Austria, the large majority of all cases related to Austria (more than 90 %).

58 The most prominent local focal point seems to be the *Landgericht Traunstein* (Bavaria) which is located near the border to Austria

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<sup>43</sup> The average is about 0.5–1% of all cases, see *supra* German Report, 1<sup>st</sup> questionnaire, question 1.

<sup>44</sup> Information given by W. Jennissen, Presiding Judge of the 16<sup>th</sup> senate of the *Oberlandesgericht Köln* to Prof. Hess.

<sup>45</sup> Prof. Dr. Schlosser and Dr. Vollkommer spent a day in the *Landgericht Passau*. They reviewed the files and the records of several civil chambers and interviewed the president of the court and several judges. The results of this research are annexed (as a protocol) to this questionnaire.

(Salzburg).<sup>46</sup> In 2005, 301 declarations of enforceability were applied for (Article 38 JR) at the *Landgericht Traunstein*, much more than at the *Landgericht München I* (about 180) or the *Landgericht Karlsruhe* (about 25 cases).<sup>47</sup> In total, in 2005 18.4 % of the cases at the *Landgericht Traunstein* had a connection with the Judgment Regulation.<sup>48</sup>

- 59 A clear result of the factual research is that most cross-border litigation in Germany relates to enforceable titles from Austria. Even regional courts located far away from the Austrian border indicated that most of their cases related to Austria, for example the *Landgericht Hamburg*. This result has equally been confirmed by the Austrian reports which demonstrated that about 90 % of all cross-border cases involved litigants from Germany.<sup>49</sup> This result can only be explained by language barriers in cross-border litigation which do not exist between Germany and Austria. However, the French report did not indicate a similar phenomenon in relation to Belgium or Luxembourg. Nevertheless, in the French case law there are many decisions involving parties from Belgium. This result might equally be explained by the language barrier. From a political perspective, this result of the empirical research leads to the conclusion that improvements to cross-border litigation in Europe mainly require the elaboration of standardised procedures where parties can rely on forms available in all languages of the European Union.

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<sup>46</sup> Dr. Vollkommer spent a day in the *Landgericht Traunstein* reviewing the files and the records of several civil chambers and interviewing the president of the court and several judges. The results of this research are annexed (as a protocol) to this questionnaire.

<sup>47</sup> These figures only relate to the commercial chambers (3 of 8 chambers in civil and commercial matters). Due to the organisation of the court, it was not possible to scrutinise the whole case law. Prof. Dr. Hess interviewed three presiding judges of the Commercial Chambers of the *Landgericht Karlsruhe* about their experiences with the Judgment Regulation.

<sup>48</sup> According to information obtained from the 16<sup>th</sup> senate of the *Oberlandesgericht Koeln* (Cologne), the number of appeals under Article 43 JR coming from the *Landgericht Aachen* (located in the border region to Belgium, France and Luxembourg) is equal to the number of appeals coming from the *Landgericht Koeln*, while the district of the latter is three times bigger than the district of the *Landgericht Aachen*.

<sup>49</sup> Austrian report, 1<sup>st</sup> questionnaire, providing for figures obtained in the Austrian Ministry of Justice.



## D. Report on the Application of the Judgment Regulation in the Member States

### I. The Judgment Regulation in the Present European Law

#### 1. The Judgment Regulation in the European Judicial Area

60 The Judgment Regulation is the most successful instrument on judicial cooperation in the European Judicial Area.<sup>50</sup> There is a general consensus among interviewed judges, lawyers and stakeholders that the Judgment Regulation is a well balanced instrument on judicial cooperation which works efficiently.<sup>51</sup> Its aim is to facilitate cross-border litigation in the European Judicial Area by providing a system of comprehensive rules on jurisdiction, *lis pendens* and recognition. According to the case law of the *ECJ*, it ensures the free movement of judgments (and of other enforceable instruments) in Europe. A presiding judge at the *Landgericht Traunstein*, who was interviewed by *Dr. Vollkommer*, put it as follows: “The Judgment Regulation is the best piece of legislation we’ve ever got from Brussels”.<sup>52</sup>

61 Yet, the significance and the functions of the Judgment Regulation in European procedural law have been changed significantly during the last decades, especially since 1997: The Judgment Convention of 1968 was drafted as a traditional instrument of private international law: Like other (mostly bilateral) conventions in this field, it was conceived as a double convention which applied primarily to the recognition of foreign judgments and addressed (mainly from this perspec-

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<sup>50</sup> See *Goode/Kronke/McKendrick/Wool*, *Transnational Commercial Law*, p. 793: “the most successful instrument on international civil procedure of all times”.

<sup>51</sup> See the answers to the 2<sup>nd</sup> and 3<sup>rd</sup> questionnaire.

<sup>52</sup> Interview with a presiding judge at the *Landgericht Traunstein*. The success of the Judgment Regulation has been reinforced by its extension to Member States which are not bound by the 4<sup>th</sup> Chapter of the EC-Treaty (Denmark) and to third States as Iceland, Norway and Switzerland (Lugano-Convention).

tive) jurisdictional issues.<sup>53</sup> From 1973 to 1999, for more than 25 years, the Judgment Convention was the sole instrument on European procedural law and only loosely related to other Community instruments. Due to its comprehensive interpretation by the *ECJ*, it was one of the most successful conventions in private international law.

- 62 Since the entry into force of the Treaty of Amsterdam (1997), the institutional framework has changed. Based on the new competences of Articles 61 and 65 EC-Treaty, the European Community has implemented several instruments in the field of civil procedure. At the same time, European procedural law has become a part of a new field of European policy, i. e. of the Area of Freedom, Justice and Security being created.<sup>54</sup> This development implies the application of the techniques of integration to European procedural law. This new concept was mainly formulated by the Commission's Communication of 1997.<sup>55</sup> In 1999, it was adopted by the Council in the Tampere Summit<sup>56</sup>. Since the 1990s, the *ECJ* has equally been interpreting the Judgment Convention in the light of general principles of Community law.<sup>57</sup> Today, applying and interpreting the Judgment Regulation have become relevant in a different context. In the present state of affairs, the Judgment Regulation is the basic instrument of European procedural law and its relation to the new parallel instruments has become a crucial issue.<sup>58</sup> Equally, the *ECJ* has changed its attitude in relation to the Judgment Regulation: The Court interprets the new instruments enacted under Articles 61 and 65 EC-Treaty as in-

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<sup>53</sup> Thus, the Convention did more than was requested by the former Article 220 (now 293) EC-Treaty: It addressed not only recognition and enforcement, but also contained uniform grounds for jurisdiction, Jenard Report, OJ EC no. C 59/1 of 3/5/1979, Chapter II C.

<sup>54</sup> Cf. *Storskrubb*, Judicial Cooperation, Chapters II and III.

<sup>55</sup> COM(1997) 609 final, OJ EC no. C 33 of 1/31/1998.

<sup>56</sup> [http://www.europarl.europa.eu/summits/tam\\_en.htm#a](http://www.europarl.europa.eu/summits/tam_en.htm#a).

<sup>57</sup> This development is analysed by *Pontier/Burg*, EU Principles, pp. 5 et seq.; *Hess*, IP-Rax 2006, 348, 351.

<sup>58</sup> See *infra* at paras. 65 et seq.

struments of integration aiming at implementing a comprehensive policy of a European Judicial Area.<sup>59</sup>

## 2. New Instruments in European Procedural Law

63 Since May 2000, the European Community has enacted several instruments on judicial cooperation in civil and commercial matters. At present, two “different generations” of Community instruments must be distinguished: The “first generation” is aimed at the coordination of the autonomous procedural laws of the Member States. Coordination means that the respective Community legislation neither sets up new uniform procedures at Community level nor is aimed at harmonising national procedures.<sup>60</sup> The function of the instruments of the first generation is to guarantee cross-border cooperation in civil matters, which is mainly effected by the civil procedures of the Member States. They cover the fields of jurisdiction and the recognition of judgments in civil<sup>61</sup> and family matters<sup>62</sup>, insolvency<sup>63</sup>, the service of documents,<sup>64</sup> and the taking of evidence abroad<sup>65</sup>. While these instruments implement innovative and efficient concepts of judicial cooperation, their scope is still closely related to traditional instruments in private international law and transnational litigation.

64 However, under the Hague Programme of 2004, the European Community is implementing a second generation of instruments, which adopt a different approach. These instruments are mainly

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<sup>59</sup> *ECJ*, 11/08/2005, C-433/03, *Götz Leffler./Berlin Chemie AG*, ECR 2005 I-9611, paras. 45 et seq. (stressing the guiding principle of full effectiveness of Community law), see *Hess*, *IPRax* 2006, 348, 357–361.

<sup>60</sup> In addition, the Commission sets up informal measures aimed at facilitating judicial cooperation such as the Judicial Network in Civil Matters, the European Judicial Atlas, *Storskrubb*, *Judicial Cooperation*, pp. 217 et seq.

<sup>61</sup> Judgment Regulation.

<sup>62</sup> Regulation (EC) No. 1347/2000 since replaced by Regulation (EC) No. 2201/2003, OJ EC 2003 L 338/1, amended by OJ EU 2004 L 367/1.

<sup>63</sup> Regulation (EC) No. 1346/2000; OJ EC 2000 L 160/1, amended by OJ EU 2003 L 236/33, OJ EU 2005 L 100/1.

<sup>64</sup> Regulation (EC) No. 1348/2000; OJ EC 2000 L 160/37.

<sup>65</sup> Regulation (EC) No. 1206/2001; OJ EC 2001 L 174/1.

based on EC principles such as mutual trust and access to justice. They are aimed at overcoming the old paradigm of exequatur proceedings and provide for a mutual recognition of titles in the European Judicial Area.<sup>66</sup> These instruments do not intend to coordinate the national procedural systems, but contain separate (and comprehensive) procedures in specific fields. Striking examples of these new instruments are the Regulation creating a European order for payment procedure<sup>67</sup> and the Regulation for small claims.<sup>68</sup> These new instruments provide for comprehensive adjudicative procedures in cross-border cases and guarantee the (automatic) recognition of the (new) European titles.

### 3. New Challenges for the Judgment Regulation in the European Judicial Area

65 In the present state of affairs, the role of the Judgment Regulation is changing. On the one hand, its practical importance is reducing, as it is supplemented by specialised instruments, which shall further simplify cross-border proceedings, especially the free movement of titles in Europe.<sup>69</sup> On the other hand, the importance of the Judgment Regulation has been increased: Many of the parallel instruments refer to the Judgment Regulation, which still provides a residual set of rules (“fall back provisions”) which complement the parallel instruments. One example is Article 25 of Regulation (EC) No. 1346/2000. According to this provision, decisions given in the course of insol-

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<sup>66</sup> Cf. Regulation (EC) No. 805/2004 establishing a European Enforcement Order for uncontested claims; OJ EU 2004 L 143/15, amended by OJ EU 2005 L 97/64, OJ EU 2005 L 168/50, OJ EU 2005 L 300/6. Regulation (EC) 1896/2006 establishing a European Payment Order; OJ EU 2006 L 399/1.

<sup>67</sup> Regulation (EC) No. 1896/2006 of 12/12/2006; OJ EU 2006 L 399/1.

<sup>68</sup> Regulation (EC) No 861/2007 establishing a European Small Claims Procedure, OJ EU 2007 L 199/1.

<sup>69</sup> It is expected that the recognition and enforcement of default judgments will mainly be dealt with by the Regulation (EC) No. 805/2004 on uncontested claims. However, information obtained from the courts in the Member States shows that the new instrument is not often used in practice. The *Landgericht Frankfurt (Main)* reported about 25 to 30 applications for a certification of a European Enforcement Order from October 2005 until January 2007.

veny proceedings shall be recognised and enforced in accordance with Articles 38–56 JR.<sup>70</sup> Therefore, the scope of the Judgment Regulation is extended to insolvency proceedings.<sup>71</sup> Equally, under Article 6 Regulation (EC) No. 1896/2006 jurisdiction shall be determined in accordance with the “relevant rules of Community law, in particular Regulation (EC) No 44/2001”.<sup>72</sup> Accordingly, in present European procedural law, the Judgment Regulation operates as a residual instrument, which contains the basic definitions.<sup>73</sup>

66 Furthermore, in the new context, the basic concepts of the Judgment Regulation operate as “terms of reference”. This function shall be demonstrated by several examples: The term of “civil and commercial matters” contains the basic definition for the scope of application of many parallel instruments.<sup>74</sup> The differentiation between “contract” and “tort, delict or quasi-delict” also applies to parallel instruments. The *lis pendens* concept of Articles 27–30 JR also applies to Regulation (EC) No. 2201/2003.<sup>75</sup> The definitions<sup>76</sup> of provisional measures (Article 31 JR), judgments (Article 32 JR), authentic documents (Article 57 JR) and settlements (Article 58 JR) are equally applied in relation to the parallel instruments. Accordingly, the provisions of the Judgment Regulation must be construed in a way allowing a general

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<sup>70</sup> Literally, Article 25 (1) Insolvency Regulation refers to Articles 31–51 JC. This reference must be understood as a reference to the Judgment Regulation, see Article 68 (2) JR.

<sup>71</sup> Article 25 (1) Insolvency Regulation prevails over Article 1 (2) JR which excludes, as a matter of principle, insolvency proceedings from the scope of the Judgment Regulation.

<sup>72</sup> Similarly, the Regulation (EC) No. 861/2007 establishing the European Small Claims Procedure refers to the heads of jurisdiction of the Judgment Regulation. However, this reference operates through the claim form of the Regulation. A claimant filling out the claim form must indicate that the court seised has jurisdiction under the Judgment Regulation, see Annex I (Form A, 4. jurisdiction), OJ EU 2007 L 199/1, 11-12.

<sup>73</sup> As a rule, these definitions are interpreted autonomously by the *ECJ*.

<sup>74</sup> Example: Article 2 (1) Regulation (EC) No. 805/2005 and Article 2 (1) Regulation (EC) No. 1896/2006 refer to the basic definition of civil and commercial matters provided for by Article 1 (1) JR. Specific instruments may also deviate from the basic concept. Accordingly, Regulation (EC) No. 1346/2000 equally applies to public creditors.

<sup>75</sup> Lately, the *ECJ* referred to the general concept of pendency and priority when determining the issue of parallel proceedings under the Insolvency Regulation, *ECJ*, 05/02/2006, C-341/04, *Eurofood IFSC Ltd.*, ECR 2006 I-3813.

<sup>76</sup> As interpreted by the case law of the *ECJ*.

application of the basic definitions in all fields of European procedural law.

- 67 The new function of the Judgment Regulation also entails changes of its substantive content. One example is Article 59 JR. This provision defines the domicile of the parties and refers to the legal systems of the Member States. In the context of the Judgment Regulation, Articles 2 and 59 JR determine the personal scope of application of the instrument.<sup>77</sup> However, in present European procedural law, several new instruments directly refer to Articles 59 and 60 JR when defining cross-border cases.<sup>78</sup> While the (limited) reference of Article 59 JR may operate in the rather limited context of the Judgment Regulation, it does not seem appropriate to operate as a basic reference for the scope of application of all Community instruments in civil and commercial matters. The reference to the different national systems in Article 59 JR does not meet the criteria of an efficient and uniform application of Community law in the Member States (*effet utile*).<sup>79</sup> This example also demonstrates that the transfer of general Community concepts to the Judgment Regulation may entail the change of some of its provisions.
- 68 Another crucial issue relates to the differentiation between the scopes of application of the different Community instruments. Under the Judicial Convention, the interpretation of Article 1 was mainly destined to delimitate the scope of the Convention from the national law of the Member States. At present, the differentiation mainly operates between the different Community instruments. One example is

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<sup>77</sup> ECJ, 03/01/2005, C-281/02, *Owusu./Jackson*, ECR 2005 I-1383

<sup>78</sup> According to Article 3 (1) Regulation (EC) No. 1896/2006 a cross-border case is “one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised.” According to the Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, a cross-border case is “one where the party applying for legal aid in the context of this Directive is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced.”

<sup>79</sup> See *infra* at D.III.2.

the interpretation of Article 1 (2) (b) JR, which excludes bankruptcy, compositions and analogous proceedings from the Judgment Regulation. Under Article 1 (2) (b) JC the *ECJ* held that an action for avoidance was closely related to insolvency proceedings and, accordingly, was not dealt with by the Judgment Convention. Therefore, the *ECJ* held that the national laws of the Member States were applicable.<sup>80</sup> Since the entry into force of the Judgment Regulation and the Insolvency Regulation, the situation has considerably changed: At present, two EC-Instruments address cross-border litigation of single as well as collective proceedings. Therefore, any reference to the procedural laws of the Member States seems excluded and the issue should be referred to the *ECJ* for a change of its jurisprudence. However, the comprehensive application of the Judgment Regulation and the Insolvency Regulation does not mean that all actions for avoidance have to be dealt with by the same instrument. Such a result would not be appropriate because the national systems are too different. Some systems qualify actions for avoidance as insolvency matters while others refer these actions to the ordinary jurisdiction. In this legal situation, the Community instruments must operate in a flexible way. Coordination of the national systems must be understood in a way that the Community provides for flexible solutions, which either designate the Insolvency Regulation (when under the national law the *vis attractiva concursus* prevails in this constellation) or the Judgment Regulation (when the (related) action is qualified as a non-civil matter).<sup>81</sup>

- 69 The differentiation between the different instruments has recently been addressed by the *ECJ* in *St. Paul Dairy*<sup>82</sup>, which concerned the differentiation between the Judgment Regulation and the Evidence

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<sup>80</sup> *ECJ*, 03/26/1992, C-261/90, *Reichert and Kockler*, ECR 1992 I-2149, 2181 paras. 19–20.

<sup>81</sup> Recently, the *Bundesgerichtshof* referred the question to the *ECJ*, 6/21/2007 – IX ZR 39/06, ZIP 2007, 1415 et seq.

<sup>82</sup> *ECJ*, 4/28/2005, C-104/03, ECR 2005 I-3841, paras. 13–16, see *Hess/Zhou*, IPRax 2007, 183 et seq; *Nuyts*, Rev. Crit. 2007, 53 et seq.

Regulation. In this case, the Court held that Regulation (EC) No. 1206/2001 might be circumvented if Article 31 was taken as a basis for dealing with an application for examining a witness for the purpose of providing information on whether the applicant had a claim against someone. As will be explained extensively<sup>83</sup> the rule of reason of this holding cannot be applied to the preservation of evidence. Nonetheless, the holding is likely to be misunderstood because, unfortunately, the *ECJ* did not sufficiently work out the difference between the case then under consideration and the preservation of evidence in the Member States. Most Member States qualify measures for preserving evidence as provisional measures while a few others provide for specific procedures in the pre-litigation stage.<sup>84</sup> Efficiency of justice suggests<sup>85</sup> the application of Articles 31 and 32 JR at least to those measures, which are qualified as provisional measures in the respective Member State (of origin). This solution would reflect the current functions of the European procedural instruments: They are aimed at coordinating the different systems of the Member States in cross-border proceedings. They do not intend a harmonisation<sup>86</sup> or even a standardisation of national procedures (which is neither provided for in the Regulation (EC) No. 1206/2001).<sup>87</sup>

70 Finally, the relations of the European instruments to third States have become a crucial issue.<sup>88</sup> According to the recent case law of the *ECJ*, the Judgment Regulation also applies to litigants domiciled out-

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<sup>83</sup> See herein below the sections on provisional measures (D.VI) and on intellectual property matters (D.VII).

<sup>84</sup> *Szychowska*, I.R.D.I. 2006, 111, 112 et seq.

<sup>85</sup> See in particular regarding intellectual property matter herein below the respective section (D.VII).

<sup>86</sup> The situation may change under Articles 6 and 7 of the Enforcement Directive 2004/48/EC, OJ 2004 L 157/45.

<sup>87</sup> See *infra* at sub D.I.2; generally *Szychowska*, I.R. D.I. 2006, 111, 122 et seq.

<sup>88</sup> „Third States” are either non-Member States of the EU or Member States not participating in the 4<sup>th</sup> chapter of the EC-Treaty (i. e. Denmark); recently *Fentiman*, 43 CMLR 705 (2006).



side of the European Judicial Area.<sup>89</sup> In addition to this, the external competency in the scope of Articles 61 and 65 EC-Treaty largely lies with the Community.<sup>90</sup> Therefore, the Judgment Regulation is also the instrument for coordinating the European instruments with parallel international conventions in special fields.<sup>91</sup> The (expected) accession of the European Community to the Hague Conference on Private International Law demonstrates the institutional change in that respect. Accordingly, issues of the separability of international instruments and prospects of a closer cooperation within a general framework are of utmost importance.

- 71 In the context of the new Community policy, the functions of the Judgment Regulation have been changed. While its primary task is still the coordination of the national procedures, several additional functions can be ascertained: In relation to the various new instruments in the European Judicial Area, its main task is to fulfil the function of a residual instrument, which is applied when the more specialised instruments of the EC are not applicable or incomplete. In this new context, the function of the Judgment Regulation is to provide for a fall back instrument which applies instead of the specific European instruments. Furthermore, the Judgment Regulation contains the basic definitions and concepts of European procedural law and, accordingly, the core of the new policy area of the Community.
- 72 The general reporters of the present study mainly focussed their research on the practical application of the Judgment Regulation in the Member States. Furthermore, they also included the new challenges and functions of the Judgment Regulation in their research. Some of the proposed improvements of the Judgment Regulation directly address the new functions of this instrument which had not been fore-

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<sup>89</sup> *ECJ*, 07/13/2000, C-412/98, *Group Josi*, ECR 2000 I-5925; *ECJ*, 03/01/2005, C-281/02, *Owusu./Jackson*, ECR 2005 I-1383.

<sup>90</sup> *ECJ* (Full Court) Opinion 1/03, 2/7/2006, *Lugano Convention*.

<sup>91</sup> See *infra* at D.III.4.f) on the question whether Article 23 JR should be aligned to the structure of the Hague Choice of Court Convention of 2006.

seen when the Judgment Regulation was enacted. There is no doubt that the success of the new Community policy of judicial cooperation in civil and commercial matters will largely depend on the cohesion of the different instruments and their systematic interpretation. In the new institutional framework, the importance of the Judgment Regulation has been increased during the last decade.

## II. Scope of Article 1 JR

### 1. Civil and Commercial Matters

73 According to Article 1 (1), the JR applies to civil and commercial matters. The *ECJ* interprets Article 1 (1) JR autonomously, in order to define the scope of the Regulation in a uniform way in all Member States.<sup>92</sup> According to the answers received from the national reporters, courts in the Member States generally follow the line of the case law of the *ECJ*. Accordingly, the autonomous interpretation is applied.<sup>93</sup> Yet, the courtpractice in continental Member States shows that there is still a clear trend to draw the distinction between public and private law according to domestic law (as a first step of the interpretation) and to verify the result in the light of the case law of the *ECJ*.<sup>94</sup>

74 While Article 1 (1) JR seems to work efficiently, there are some issues where the public/private law distinction is not self-evident. One example is the use of the Judgment Regulation for asserting claims against private persons by public authorities.<sup>95</sup> In maintenance matters, public authorities use the Regulation for the assertion of civil

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<sup>92</sup> A comprehensive analysis of the *ECJ*'s case law was presented by AG Colomer in his opinion of 11/08/2006, in case C-292/05 *Lechouritou and others./The State of the Federal Republic of Germany*, paras. 20 et seq.

<sup>93</sup> Especially the English courts closely follow the case law of the *ECJ*, English report, 3<sup>rd</sup> questionnaire, question 1.1.

<sup>94</sup> Cf. the answers to the 3<sup>rd</sup> questionnaire, question 1.1.

<sup>95</sup> The issue is addressed in question 1.2. of the 3<sup>rd</sup> questionnaire.

claims (especially private claims assigned to them).<sup>96</sup> However, this practice seems sparse. Most national reporters replied that public authorities did not often use the Regulation to assert claims against private persons. In addition to this, not much case law has been published yet on this issue.

75 Cross-border injunctions in environmental matters are a second example. Formally, these injunctions are based on private law and must be qualified as “civil matters” under Article 1 (1) of the JR.<sup>97</sup> However, the political goal underlying these claims is the implementation of environmental policies, which may not be shared by the neighbouring State. In addition to this, they are meant to replace a comprehensive regime on the recognition and enforcement of public law acts in environmental matters. They are often initiated by non-governmental organisations and supported by political parties or even public authorities. At present, this type of litigation takes place in Austria, where several lawsuits were filed against atomic plants located in the Czech Republic and in Slovenia by public authorities.<sup>98</sup>

76 The *ECJ* recently decided on the application of Articles 1 (1) and 16 (1) JC in a lawsuit for an injunction which was filed in the *Bezirksgericht Linz* by the Province of Upper Austria as the owner of several pieces of land used for agriculture. The plots of land are situated about 60 km from the Czech Temelín nuclear power station. That action sought, principally, an order to ČEZ<sup>99</sup> to put an end to the influences on the Province of Upper Austria’s land caused by ionising radiation emanating from the Temelín power plant, in so far as they ex-

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<sup>96</sup> Example: *ECJ*, 01/15/2004, C-433/01, *Freistaat Bayern./Jan Blijdenstein*, ECR 2004 I-981. Another example concerns claims by public authorities for the recovery of the costs for the clean-up resulting from oil spills, the Directive 2004/35/EC on environmental liability does not address private claims and is, according to its recital 10, without prejudice to the Judgment Regulation.

<sup>97</sup> The first and most prominent case was the judgment of the *ECJ* in the case of 11/30/1976, C-21/76, *Handelskwekerij G. J. Bier BV./Mines de potasse d’Alsace SA*, ECR 1976, 1735.

<sup>98</sup> *OGH*, 1 Ob 221/02k, IPRax 2005, 256; 3 Ob 206/03v, *ecolex* 2004, 404; cf. Austrian report, 3<sup>rd</sup> questionnaire, question 2.2.10.

<sup>99</sup> ČEZ is a Czech energy-supply enterprise in which the Czech State has 70 % ownership, the plant is operated on land that it owns.

ceeded those to be expected from a nuclear power station operating in accordance with current generally recognised technological standards. The underlying problem is that an Austrian referendum had voted against any use of nuclear energy in Austria. In the Czech Republic, nuclear plants are permitted. The *ECJ* did not have to decide on the crucial issue whether an official authorisation by the Czech authorities precluded the claim based on Austrian private law.<sup>100</sup> The Court was only asked whether Article 16 (1) JC (which corresponds to Article 22 (1) JR) was applicable to the claim. The *ECJ* negated that question and held that jurisdiction for cross-border injunctions had to be based on Article 5 (3) JC.<sup>101</sup>

- 77 Another crucial issue closely related to transnational environmental law is private law enforcement: This type of litigation was “invented” in the United States. During the last decade, it has also become popular in Europe. In many Member States, separate public authorities (such as Chambers of Commerce or Chambers of Lawyers) seek injunctions or damages from (foreign) professionals (often based on the assumption that the professional infringed his or her professional duties). Formally, these claims are based on the violation of competition law and therefore civil matters.<sup>102</sup> While the so-called “private law enforcement” (enforcement of claims of private parties for damages and injunctions supported by public interests) is formally within the scope of the Judgment Regulation, the enforcement of professional (or other) duties imposed by public law authorities in civil courts seems problematic, because the legal position of the public authority in the civil lawsuit is directly determined by (public) law. Ac-

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<sup>100</sup> This issue must be decided according to principles of administrative and public international law. From this perspective, it seems doubtful to qualify this type of cross-border injunctions as a pure “civil and commercial matter”, *Bernasconi/Betlem*, Transnational Enforcement of Environmental Law (Second report), ILA Proceedings of the Berlin Conference, 896, 920–926.

<sup>101</sup> In the present case, Article 5 (3) JC was *ratione temporis* not applicable.

<sup>102</sup> Private law enforcement has been largely advocated by the Green Paper of the EC-Commission on Damages actions for breach of EC antitrust rules, COM(2005) 672 final of December 19, 2005. Recently, several actions seeking damage for the breach of competition law have been filed in German courts, example: *OLG Dortmund*, decision of 4/1/2004, IPRax 2005, 542.

ording to the case law of the *ECJ*, the authorisation of a public entity to perform an activity which a private subject is not normally permitted to perform entails the non-commercial nature of a dispute and, accordingly, the non-applicability of the Judgment Regulation.<sup>103</sup> Nevertheless, the practice in the Member States is different.

78 In Germany, the *Oberlandesgericht Köln* recently ordered an injunction against several defendants from Austria and Cyprus who offered internet gambling to German consumers. The plaintiff, a corporation, was 100 % owned by the Federal State of North Rhine-Westphalia and the concessionaire for lotto gambling in that State. The lawsuit was based on competition law, the plaintiff alleged that the defendant violated the concession (and therefore secs. 3 and 8 of the German Act against Unfair Competition (*UWG*)), because they offered cross-border lotto gambling (via active web sites) to customers in North Rhine-Westphalia. The defendants relied on Articles 39 and 49 of the EC-Treaty. They did not address the applicability of the Regulation to a lawsuit, which was in its essence based on the concession of the claimant directly derived from public (administrative) law. The *Oberlandesgericht Köln* did not address the issue either and allowed the injunction. This example shows that the Regulation is sometimes applied in the context of “private law enforcement”. Accordingly, the qualification of this type of litigation as a civil and commercial matter seems doubtful in the light of the case law of the *ECJ* (*Rüffer*<sup>104</sup> and *Sonntag*<sup>105</sup>).

79 At present, it seems too early to derive any conclusions for an amendment of Article 1 (1) JR from these developments. But the recent developments, especially the proposals to implement public interests by private law litigation may impede the free movement of judgments in the European Judicial Area, especially when “public interests” are not mutually shared and protected in all Member States.

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<sup>103</sup> *ECJ*, 04/21/1993, C-172/91, *Sonntag./Waidmann*, ECR 1993 I-1963.

<sup>104</sup> *ECJ*, 12/16/1980, C-814/79, *Netherlands State./Rüffer*, ECR 1980, 3807.

<sup>105</sup> *ECJ*, 04/21/1993, C-172/91, *Sonntag./Waidmann*, ECR 1993 I-1963.

## 2. Excluded Matters, Article 1 (2) JR

80 Generally, the differentiation between the Regulation and other instruments must be effected in a systematic way, and the respective rules must be closely aligned.<sup>106</sup> Before 2001, the delineation between the application of the Regulation (and the Convention) resulted in a demarcation between the domestic law of the Member States and the Judgment Convention. Today, the delineation is (often) made between different EC-instruments.<sup>107</sup> Accordingly, the case law of the *ECJ* on the scope of application of the Judgment Convention must be considered from the perspective of these developments which have taken place in the meantime.

### a) Family and Inheritance Matters

81 Most national reports state that the delineation between both regulations is working satisfactorily. However, much case law has not been reported.<sup>108</sup> Yet, some problematic issues have been revealed:

82 Most of the reported case law related to maintenance claims: In Hungary, problems have arisen if the claim for maintenance is submitted in a custody or paternity action since claims for maintenance are – according to Hungarian law – ancillary to custody or paternity actions. In such cases, it is difficult to determine the criteria for the judge to choose between the two regulations. Similar problems were reported in Germany in relation to default judgments on paternity and maintenance by Polish courts.<sup>109</sup> According to the Austrian national report,

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<sup>106</sup> UK report, 3<sup>rd</sup> questionnaire, question 1.3.1.

<sup>107</sup> See *supra* at D.I.2. Recently, the *ECJ*, case C-104/03, *St. Paul Dairy./Unibel Exser BVBA*, addressed the delineation between Article 31 JR and Article 1 (2) of Regulation (EC) No. 1206/01 and held that measures for preserving means of evidence were covered by the Evidence Regulation and not by Article 31 JR. This delineation does not correspond to the heterogeneous situation in the Member States.

<sup>108</sup> Cf. 3<sup>rd</sup> questionnaire, question 1.3.1. Most of the (sparse) cases relate to the delineation between Regulations (EC) No. 44/2001 and 1347/2000. As the Regulation (EC) No. 2201/2203 is largely identical with Regulation (EC) No. 1347/2000 in matrimonial matters, the reported problems are still of practical relevance.

<sup>109</sup> According to information obtained from the German Institute for Youth Human Services and Family Law, the recovery of maintenance claims is mainly effected under the

problems occur with regard to decisions rendered in joined proceedings since then different recognition regimes apply with regard to issues concerning maintenance on the one hand and issues concerning matrimonial law on the other hand. Furthermore, it is pointed out that a distinction between maintenance proceedings and proceedings concerning the matrimonial property regime may be difficult. According to Article 1 (2) (a) the JR is not applicable with regard to claims concerning the matrimonial property regime.<sup>110</sup> The Belgium Report quotes several decisions on maintenance related to divorce proceedings. In this context, Belgian courts applied Article 5 no 2 JR.<sup>111</sup>

83 In Ireland, the question arose whether the term “maintenance creditor” in Article 5 (2) JR (JC) referred only to a person already in possession of a maintenance order or also a person seeking such an order for the first time. This question had been referred to the *ECJ*, which held that “maintenance creditor” should not be interpreted in accordance with the *lex fori*, but that the objective of Article 5 (2) JR had to be taken into consideration. Since its purpose was the protection of the maintenance applicant – who was in general the weaker party – no distinction was drawn between those already recognised and those not yet recognised as entitled to maintenance. However, the Austrian Supreme Civil Court (*OGH*) held that proceedings for advance payments of maintenance between spouses did not fall within the scope of application of the Judgment Regulation. This issue will be clarified by the proposed Regulation on maintenance.<sup>112</sup>

84 Most of the case law was reported from England. According to the general impression, the Judgment Regulation is clear enough with regard to the question which matters are excluded from its scope of application. By virtue of the Matrimonial Causes Act 1973, an English court having jurisdiction on the basis of Regulation (EC) No. 2201/03 will generally also have jurisdiction to rule on maintenance obligations on the basis of Article 5 (2) JR.

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Hague Convention on Maintenance Claims of 1973 and not under the Judgment Regulation, see *infra* at para. D.II.3.

<sup>110</sup> *OGH* 7 Ob 267/03w; 2 Ob 288/99p.

<sup>111</sup> Belgium Report, 3rd Questionnaire, 1.3.1.

<sup>112</sup> *OGH* 1 Ob 199/03a.

- 85 Further, it is referred to two cases which illustrate potential difficulties concerning the relationship between Regulation (EC) No. 44/01 and Regulation (EC) No. 2201/03/EC. Firstly, *Wermuth./Wermuth*<sup>113</sup>, which concerned an application for maintenance pending suit under the provisional and protective measures provision of the Brussels II Regulation (Article 12 Regulation (EC) No. 1347/00). The Court of Appeal held, having regard to the Judgment Convention, that the relief sought was neither a provisional nor protective measure. Therefore, the Court of Appeal had no reason to focus on the issue whether the JR or Regulation 1347/2000 applied. Secondly, in *Prazic./Prazic*<sup>114</sup>, the claimant wife brought proceedings against her husband claiming a beneficial interest in English properties after her husband had initiated proceedings in France, which involved consideration of questions of ancillary relief. The Court of Appeal stayed the English proceedings on the basis of Article 28 JR without raising the question as to whether the French proceedings fell within the scope of the JR rather than the Regulation 2201/2003. The complication of this case is due to the fact that in French divorce proceedings also issues of how to apportion the spouses' assets are involved.
- 86 As a result, it must be stated that even the sparse case law shows several problems regarding the delineation of the instruments in civil and in family matters. However, the problems should be addressed in the (forthcoming) instruments in family matters. Accordingly, the new instrument on maintenance will certainly further disconnect civil and family matters.
- 87 Delineation problems can also be found with respect to inheritance matters. A pending case in Germany clearly demonstrates the issue.<sup>115</sup> In this case, the parties (siblings) had concluded a contract on the distribution of the estate of their parents. However, a dispute arose about the value of the estate, a building located in the city of

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<sup>113</sup> *Wermuth./Wermuth* [2003] 1 W.L.R. 942.

<sup>114</sup> *Prazic./Prazic* [2006] E.W.C.A. Civ. 497, following the decision of the ECJ, 05/15/1994, C-294/92 *Webb./Webb*, ECR 1994 I-1717.

<sup>115</sup> *LG Ulm*, 2/15/2007 – 3 O 293/06. At present, an appeal is pending in the OLG Stuttgart.



Ulm. Finally, the plaintiff sued his sister for the payment of about € 11,000 due as value equalization in money. As the defendant was domiciled in London, she contested the jurisdiction of the Regional Court Ulm. The Court held that the claim was based on a contract and not a succession claim and thus regarded the Judgment Regulation as applicable. Accordingly, the lawsuit was dismissed since the place of performance as well as the place of the defendant's domicile was in London.<sup>116</sup>

### *b) Insolvency Proceedings*

88 There is an ongoing discussion in case law as well as in the legal literature on the delimitation between the Judgments Regulation and the Insolvency Regulation.<sup>117</sup> Law firms and national reporters indicated that the delimitation between the instruments proved to be difficult and led to uncertainties.<sup>118</sup> The main reason is the divergence of the national insolvency laws, especially in the case of avoidance proceedings.<sup>119</sup> While the legal systems of some Member States extend insolvency proceedings to ancillary actions of the administrator against third parties, in other Member States these actions are heard in the ordinary courts.<sup>120</sup> In the present situation, forum shopping in

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<sup>116</sup> This example also demonstrates the need to review the specific heads of jurisdiction (as provided for by Article 5) when the scope of application of the Judgment Regulation is extended by interpretation. In the present case, the insertion of a specific head of jurisdiction in inheritance matters might *de lege ferenda* be advisable. The problem should be addressed in the context of the future Regulation on Inheritance Matters, see questions 14–16 of the Green Paper on Successions and Will (COM(2005) 65 final. addressing heads of jurisdiction). Similar problems arise in the context of the delineation between the Judgment Regulation and the Insolvency Regulation, see *infra* at para. 103.

<sup>117</sup> It must be noted that even the wording of Article 1 (2) (b) JR is not coherent in the different versions of the provisions, see *Layton/Mercer*, European Civil Practice I, para. 12.037.

<sup>118</sup> 3<sup>rd</sup> questionnaire, question 1.3.2.

<sup>119</sup> However, as the UK report correctly states, many problems have been potentially alleviated by the definitions of the scope of application of the Insolvency Regulation contained in its Annex A–C. UK report, 3<sup>rd</sup> questionnaire, question 1.3.2

<sup>120</sup> Additional problems arise out of legal remedies in the context of insolvency proceedings: Thus the administrator may seek an injunction prohibiting the debtor of the estate from disposing of the debt or enjoining a third party from collecting the debt. Such lawsuits may amount to anti-suit injunctions. Only recently the House of Lords referred the

the borderlines between insolvency and litigation has become a broad phenomenon in the European Judicial Area.<sup>121</sup>

- 89 The *ECJ* has not yet decided on the delimitation between the two instruments. Its former case law on Article 1 (2) (b) JC addressed the delimitation between the Judgment Convention and the national insolvency laws. In *Reichert./Dresdner Bank*, the Court held that actions for avoidance could not be based on Article 5 (3) JC, as they were not aimed at the recovery of damages, but at restitution.<sup>122</sup> Further, the Court held that Articles 16 (1) JC (22 (1) JR) and 24 JC (31 JR) were not applicable. In *Gourdain./Nadler*, the Court construed Article 1 (2) (b) JC broadly and held that an order of a French commercial court against a *de facto* manager of a German company could not be enforced under the Judgment Convention by the French liquidator (*syndic*).<sup>123</sup> In this case the *ECJ* elaborated the following test which is to ask "whether the claim relates to a legal provision specifically applicable to insolvency or which is intrinsic to, rather than consequential upon, the insolvency, or is instead a claim arising under the general law albeit that this may be advanced in the context of an insolvency". There are two additional judgments of the *ECJ*, which address insolvency proceedings in the context of the Judgment Regulation. In *Coursier./Fortis Bank* the Court held that the Judgment Convention did not apply to a French judgment which had been extinguished by French insolvency proceedings.<sup>124</sup> The *ECJ* assumed that the recognition of the French judgment was outside the scope of the Judgment Convention and governed by the autonomous

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issue to the *ECJ* whether anti-suit injunctions protecting proceedings not covered by the JR are permitted, see para. 110.

<sup>121</sup> UK report, 3<sup>rd</sup> questionnaire, question 1.3.2 quoting *Look Chan Ho*, 52 I.C.L.Q. (2003), 697.

<sup>122</sup> *ECJ*, 03/26/1992, C-261/90, *Reichert and Kockler./Dresdner Bank*, ECR 1992 I-2149, 2181 paras. 19, 20, *Kropholler*, Article 5 JR, para. 67.

<sup>123</sup> *ECJ*, 2/22/1978, C-133/78, *Gourdain./Nadler*, ECR 1979, 733, para. 6.

<sup>124</sup> Under French insolvency law (Article 169 Law Nos. 85–98), the closing of a winding-up of assets did not bring with it the resumption of the right to bring individual action against the debtor.

law of the Member State of enforcement.<sup>125</sup> Recently, the *ECJ* was asked by the Austrian Supreme Court whether Article 6 (1) JR was applicable in a constellation where bankruptcy proceedings had been opened in relation to the anchor defendant (domiciled in Austria)<sup>126</sup>, while the second defendant was domiciled in Germany. The *ECJ* held that Article 6 (1) JR had to be interpreted autonomously and that the inadmissibility of the civil proceedings against the first defendant due to the previous opening of bankruptcy against the latter's assets was not decisive.<sup>127</sup>

- 90 Since May 2001, the delimitation between judicial and bankruptcy proceedings has changed considerably. There is a close interrelation between the Regulations (EC) No. 1346/00 and the Judgment Regulation. Under Article 25 of the Insolvency Regulation, "related judgments and orders" are recognised and enforced under Articles 32 et seq. JR. However, Article 26 Regulation (EC) No. 1346/00 confines the grounds of non-recognition to violations of public policy. Accordingly, the *ECJ* recently held that any review of Article 3 Regulation (EC) No. 1346/00 by an insolvency court seised second is excluded.<sup>128</sup> Further, the *ECJ* explicitly applied its case law on the interpretation of the Judgment Convention and the Judgment Regulation, to the interpretation of the Insolvency Regulation. Under the present law, the order of the French court in *Gourdain* seems covered by Articles 1 and 3 (1) Insolvency Regulation and must be recognised under Articles 25 and 26 Insolvency Regulation. Due to these developments in the meantime, there is no doubt that the old case law of the *ECJ* must be reviewed. However, the actual situation

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<sup>125</sup> *ECJ*, 9/24/1999, C-267/97, *Éric Coursier./Fortis Bank SA*, ECR 1999 I-2543, para. 33.

<sup>126</sup> According to Article 6 (1) of the Austrian *Konkursordnung* (Insolvency Regulation) "Litigation intended to enforce or secure claims to assets forming part of a bankrupt's estate shall be neither commenced nor pursued after the commencement of bankruptcy proceedings".

<sup>127</sup> *ECJ*, 07/13/2006, C-103/05, *Reisch Montage*, OJ C 224 of 09/16/2006, p. 12 – the *ECJ* did not address Article 1 (2) (d) JR.

<sup>128</sup> *ECJ*, 5/2/2006, C-341/04, *Eurofood IFSC Ltd*, ECR 2006, I-3813, paras. 40 et seq.

in the Member States shall be demonstrated first by the following practice communicated by the national reporters:

- 91 In Austria, most legal writers still follow the *ECJ* case law (*Gourdain./Nadler*) and consequently determine the jurisdiction of an action for avoidance according to national law. The Judgment Regulation is applied with regard to preferential claims and proceedings concerning claims against a bankrupt's estate.<sup>129</sup>
- 92 In Germany, the delimitation is controversial. The *Oberlandesgericht Frankfurt (Main)* recently held that, as a matter of principle, the Judgment Regulation applied to avoidance proceedings.<sup>130</sup> The Court rejected the argument that jurisdiction should be based on Article 3 (1) of Regulation (EC) No. 1346/00 which would entail a *forum actoris* favouring the administrator. The Court also rejected the predominant opinion in the legal literature (based on former case law of the *Bundesgerichtshof*) that the autonomous law of the German Code of Civil Procedure should apply. The Court correctly stated that the avoidance claim of the administrator must be filed in the court competent according to Article 2 JR.<sup>131</sup> Previously, the *Oberlandesgericht Köln* had held that a lawsuit of the creditors of a joint stock company against the founding partners based on the obvious undercapitalisation of this joint stock company could be instituted under the Judgment Regulation. As the claim was not derived from the Insolvency Act, but based on the general law of torts, the court held that Article 5 (3) JR was applicable.<sup>132</sup> At present, German courts are departing from the (restrictive) line of the *ECJ* in *Nadler./Gourdain*. As the decision of the *ECJ* was given before the entry into force of Regulation (EC) No. 1346/00, the current delimitation between the instru-

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<sup>129</sup> Austrian report, 3<sup>rd</sup> questionnaire, question 1.3.2.

<sup>130</sup> *OLG Frankfurt (Main)*, 1/29/2006, ZInsO 2006, 716. The legal situation in Germany is largely described by Bork/*Adolphsen*, Handbuch Insolvenzanfechtung, Chap. 20, paras. 53 et seq.; Rauscher/*Mankowski*, Article 1 JR, paras. 20–22d.

<sup>131</sup> It seems advisable to add a specific head of jurisdiction for avoidance proceedings to Article 5 JR. The courts of the Member State where the insolvency proceedings are pending should have jurisdiction. Such a provision would harmonise the jurisdictional provisions of both Regulations and would reconcile the different solutions in the national procedural and insolvency laws.

<sup>132</sup> *OLG Köln*, 5/14/2004, IHR 2005, 214.

ments does not leave any room for the application of domestic laws of the Member States in these fields. Accordingly, the scope of Article 1 (2) (b) JR must be construed more narrowly. A review (and a revision) of *Gourdain* by the ECJ would be welcome.<sup>133</sup>

- 93 The Italian practice still follows the case law of the ECJ and interprets Article 1 (2) (b) JR broadly: According to the Italian report, avoidance proceedings are within the exclusive competence of the bankruptcy court and accordingly Regulation (EC) No. 1346/00 is applicable. Single actions (especially actions brought by the administrator) concerning or connected to insolvency proceedings are equally not deemed to be dealt with by Article 1 (2) (b) JR. According to the Italian report, these remedies are governed by the domestic rules of the Member State whose judge has jurisdiction under Regulation (EC) No. 1346/2000.<sup>134</sup> As a result, the Italian practice delimits the scope of the European instruments according to the lines of the national delimitation.
- 94 The UK-report indicates that the relevant practice of the English courts supports a narrow construction of Article 1 (2) (b) JR. However, the report clearly demonstrates that the delimitation between the instruments is difficult and that most problems are still unsettled. The report lists several decisions dealing with issues in the border area between the instruments such as company voluntary agreements<sup>135</sup>. The present state of affairs is demonstrated by the following examples:
- 95 In *Re Hayward*<sup>136</sup> the English High Court had to decide whether an action by a trustee in bankruptcy to recover from a third-party property which belonged to the bankrupt defendant fell within the scope of Article 1(2) (b) JC. *Rattee, J* referred to the test of *Nadler./Gourdain*

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<sup>133</sup> The current situation is comprehensively explained by *Thole*, ZIP 2006, 1383. Recently, the *Bundesgerichtshof* referred the question to the ECJ, 6/21/2007 – IX ZR 39/06, ZIP 2007, 1415 et seq.

<sup>134</sup> The Italian report refers to Article 24 of Royal Decree 16 March 1942, no. 267 (*legge fallimentare*). According to this provision, actions implementing preferential property rights fall under the jurisdiction of the ordinary civil courts.

<sup>135</sup> *Oakley v Ultra Vehicle Design Ltd (In Liquidation)* [2005] EWHC 872 (Ch).

<sup>136</sup> *In Re Hayward* [1997] Ch. 45 Rattee J.

and held that the asserted claim was not the principal matter of bankruptcy proceedings. However, the opposite conclusion would presumably be reached if the action were brought by the administrator to recover property transferred by the bankrupt in fraud of his creditors, for such an action is, by its very nature, part and parcel of the law of bankruptcy.<sup>137</sup>

- 96 In addition, the English report refers the case *Mazur Media Ltd v Mazur Media GmbH*<sup>138</sup> as a good example of the "division of function" between Regulation (EC) No. 1346/2000 and Regulation (EC) No. 44/2001. In this case, the claimants, who were domiciled in England, sought a declaration that they were the legal and beneficial owners of master recordings under a share sale agreement. According to this agreement, all the issued shares of the German first defendant were sold to the first claimant by the sole shareholder of the first defendant and the liquidator of the company (the second and third defendants), who were both domiciled in Germany. All copyright for the sound recordings was assigned by the first defendant to its English subsidiary, one of the claimants, but a dispute arose as to who was entitled to the master recordings. The share sale agreement provided that the English courts had exclusive jurisdiction in the event of any dispute arising. However, the defendants contended that the English court had no jurisdiction to hear the claim because insolvency proceedings were pending in Germany, and had therefore applied for a stay of the English proceedings. An alleged English creditor had previously brought a claim against the German company for breach of contract or conversion. *Collins, J.* decided not to stay the English proceedings in favour of the pending insolvency proceedings in Germany. He mainly referred to the jurisdiction clause contained in the share sales agreement. This finding seems to be correct from the perspective of Article 4 (f) Insolvency Regulation which explicitly excludes the effect of the insolvency proceedings on pending lawsuits from the scope of the *lex fori concursus*. In addition, according to

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<sup>137</sup> British report 3<sup>rd</sup> questionnaire, 1.3.2., quoting *Briggs/Rees*, Civil Jurisdiction, para. 2.28. The same conclusion was also reached in *Ashurst v Pollard* [2001] Ch. 595 (a case under the Judgment Convention).

<sup>138</sup> *Mazur Media Ltd v Mazur Media GmbH* [2004] EWHC 1566.

German insolvency law, it is an open question whether and how far the administrator is bound by a jurisdiction clause concluded by the insolvency debtor.<sup>139</sup>

- 97 As the French report states, the French jurisprudence held that a procedure concerning a bankruptcy was “a procedure founded on the disability of the debtor to pay, his insolvency or a convulsion of his credit, which leads to an intervention of the judicial authorities with the aim of a forced collective liquidation of the goods.” However, the French report states several cases where the delimitation has proved difficult. French courts generally follow the case law of the *ECJ* in *Reichert* although the commercial courts (as insolvency courts) are competent to hear these cases. The French *Cour de Cassation* recently applied Article 23 JR (Article 16 JC) to an action of the liquidator for the discontinuation of a pending contract.<sup>140</sup>
- 98 The Polish reporter did not notice any practical problems with delimitation of the scope of application of the Judgment Regulation and the Regulation (EC) No. 1346/2000. The problem of individual actions connected to or resulting from the bankruptcy law (e. g. proceedings by the official receiver against actions of the insolvency debtor, matters relating to the official receiver’s responsibility) was touched by the literature under the Lugano Convention, before the Judgment Regulation and the Regulation (EC) No. 1348/2000 came into force.<sup>141</sup> It was considered that the Lugano Convention should be not applied e. g. in the cases concerning taking legal proceedings by official receiver against the action of bankrupt or relating to the official receiver’s responsibility. This view has also been maintained under the Judgment Regulation and the Regulation (EC) No. 1346/2000. It is necessary to underline that cases concerning the taking of legal proceedings by the administrator for avoidance or relating to the offi-

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<sup>139</sup> The problem is discussed in the context of arbitration agreements, *BGH*, 02/28/1957, *BGHZ* 24, 15, 18. sec. 180 (1) InsO provides for an exclusive jurisdiction of the civil courts in the district of the insolvency court for claims of insolvency creditors; however, in this case it was disputed whether the claim was a privileged debt or not.

<sup>140</sup> French report, 3<sup>rd</sup> questionnaire, question 1.3.2 and Annex: C. Cass. 6/21/2005, no. 04-10868; C.A. Montpellier, 7/28/2004 (recognition of a Belgian default judgment under Article 38 JR).

<sup>141</sup> *Weitz*, KPP 2000, No. 2, 459.

cial receiver's responsibility, are not examined by the bankruptcy court (special court competent for bankruptcy proceedings), but by ordinary civil court.

99 All in all, the reported case law demonstrates considerable difficulties related to the delimitation of the instruments. In the present state of affairs, the delimitation between the Judgment Regulation and the Insolvency Regulation is primarily determined by the scope of application of the latter which is defined by Article 2 and the Annexes I and II to the Insolvency Regulation. However, the annexes largely refer to the (inhomogeneous) national laws on insolvency and do not cover all proceedings provided for in the Member States. In this situation, national courts still follow the line of *Nadler./Gourdain* by asking whether the claim is founded on the law of bankruptcy or winding up. In this constellation, neither the Judgment Regulation nor the Insolvency Regulation, but national law is applied.<sup>142</sup>

100 Accordingly, a comprehensive delimitation between the European instruments should address the following issues:

101 - The delimitation between the two instruments should be clarified to the effect that even collective proceedings and proceedings related to insolvency proceedings which are not explicitly listed in Annex A of the Insolvency Regulation are either dealt with by the Insolvency Regulation or the Judgment Regulation.

102 - The question whether Article 5 JR should be extended by a specific head of jurisdiction allowing the administrator to collect claims belonging to the administered asset (especially actions for avoidance). Such a provision would align the different national insolvency laws, in which actions for avoidance are heard by the insolvency courts, and the Member states where the liquidator must sue in the civil courts under

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<sup>142</sup> The English report (3<sup>rd</sup> questionnaire, question 3.1.2.) in this respect refers to the cases in the matter of *La Mutuelles Du Mans Assurances v In the Matter of Scottish Eagle Insurance Company Ltd* [2005] EWHC 1599 (Ch) and *In the Matter of DAP Holding NV* [2005] EWHC 1602 (Ch) concerning the approval of schemes of arrangement under Companies Act 1985, s. 425 (held to fall outside the scope of the Judgment Regulation by virtue of Article 1 (2) (b) – "judicial arrangements, compositions and analogous proceedings" – and outside Regulation (EC) No. 1346/2000).



the Judgment Regulation. In the present state of affairs, there might be an advantage of those Member States providing for the jurisdiction of the insolvency court.<sup>143</sup> However, an additional head of jurisdiction would put at an advantage the insolvency administrator who would be able to institute the lawsuit for the recovery of assets at the place of the administered estate.

103 - The relationship between Article 28 JR and the effect of the opening of insolvency proceedings in other Member States should be clarified.

104 - The effects of provisional measures in insolvency proceedings on pending lawsuits and enforcement measures in other Member States.<sup>144</sup>

105 In the present state of affairs, it seems premature to propose a comprehensive delimitation between the two instruments. From a systematic point of view, it seems advisable to address the delimitation mainly in the Insolvency Regulation which – as the more specific instrument – should clearly define its scope of application. However, any additional application of national laws in the scope of the Regulations must be excluded.

### *c) Arbitration and Mediation*

#### *aa) The Comprehensive Exclusion of Arbitration, Article 1 (2) (d) JR*

106 Article 1 (2) (d) JR comprehensively excludes arbitration from the scope of European procedural law. Historically, this exclusion is explained by the relationship between the “Brussels regime” and the

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<sup>143</sup> It should be noted that this is not the case in all Member States, as demonstrated in the French report (3<sup>rd</sup> questionnaire, question 1.3.2 – showing that the French practice applies the Judgment Regulation to lawsuits of the liquidator which fall in the competence of the insolvency court).

<sup>144</sup> Typical examples are injunctions enjoining creditors from disposing of or collecting a claim which, according to the administrator, (possibly) belongs to the estate. Sometimes, the injunctions are formulated as motions to cease and desist. However, in the cross border context their effect is similar to “anti-suit injunctions” prohibiting third parties from instituting legal actions in other Member States.

1958 UN New York Arbitration Convention.<sup>145</sup> When the Judgment Convention was negotiated in the 1960s, there was a large consensus that the recognition of arbitral agreements and awards worked efficiently under the 1958 New York Convention and, accordingly, arbitration should not be addressed by the European instrument.<sup>146</sup> In addition to this, the European Council was elaborating a parallel instrument on arbitration at that time which finally proved to be unsuccessful. As a result, Article 1 (2) (d) JR comprehensively excludes not only arbitration proceedings, but also proceedings in State courts relating to arbitration whether it might be supervisory, supportive or enforcement from the scope of the Judgment Regulation. The exclusion of arbitration from European procedural law was reaffirmed in 1978, when the UK and Ireland joined the Judgment Convention.<sup>147</sup>

107 According to the case law of the *ECJ*, Article 1 (2) (d) JR must be interpreted broadly.<sup>148</sup> In *Marc Rich*, the *ECJ* held that proceedings for the appointment of an arbiter in a court of a Member State were excluded from the Convention by (now) Article 1 (2) (d) JR. However, the Court equally concluded that the preliminary issue related to the validity of an arbitration clause did not affect the applicability of the Judgments Convention.<sup>149</sup> Whether proceedings were within the scope of application of the Regulation or within the exclusion was determined according to the nature of the subject-matter of the proceedings. Accordingly, the issue of the validity of the arbitration clause is dealt with by international conventions and national laws. Consequently, parallel civil and arbitral proceedings in different

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<sup>145</sup> However, Article 220 EC-Treaty of 1958 (now Article 293 EC-Treaty) explicitly provides for a Community competence in arbitration.

<sup>146</sup> *Jenard Report*, OJ 1979 C-59, p.1, 13 ; *Van Houtte*, *Arb. Int.* 2005, 509 et seq.

<sup>147</sup> *Dicey/Morris*, paras. 11-023 et seq.; *Schlosser Report*, OJ 1979 C-59, p. 71, 92, paras 61-62.

<sup>148</sup> In the case C-190/89, *Marc Rich*, ECR1991 I-3855, para 18, the *ECJ* held that the Contracting States intended to exclude arbitration "in its entirety, including proceedings brought before national courts" from the scope of application of the Judgment Convention.

<sup>149</sup> *ECJ*, 7/21/1991, C-190/89, *Marc Rich*, ECR 1991 I-3855, para 28; *ECJ*, 11/17/1998, case 391/95, *Van Uden*, ECR 1998 I-7091, para 32.

Member States are possible when the validity of the arbitration clause is affirmed by the arbitral tribunal, but disregarded in another Member State.<sup>150</sup> Furthermore, the *ECJ* in *Van Uden* admitted interim measures of State courts in respect of the subject matter supporting arbitration proceedings under Article 31 JR as this provision refers to the national procedures.<sup>151</sup>

*bb) Information Obtained from the National Reports*

- 108 The case law of the *ECJ* is largely supported by the predominant legal opinion. However, in the legal literature the complete exclusion of arbitration and ancillary proceedings from the scope of the Judgment Regulation has been increasingly disputed during the last years.<sup>152</sup> This was the reason why the general reporters explicitly asked about the relationship between the Judgment Regulation and arbitration and about its extension to ancillary proceedings.<sup>153</sup>
- 109 In the present study, most of the national reporters adopted a critical attitude towards a possible extension of the Judgment Regulation to arbitration and mediation.<sup>154</sup> Similarly, most of the interviewed stakeholders did not see any need for an extension since the 1958 New York Convention was working very well.<sup>155</sup> In particular, the Maltese report stressed that the New York Convention was the “most suc-

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<sup>150</sup> This legal situation has been criticised by *van Houtte*, *Arb. Int.* 2005, 509, 512 et seq.

<sup>151</sup> *ECJ*, 11/17/1998, C-391/95, *van Uden./Deco-Line*, ECR 1998 I-7091, para 25 et seq. where the *ECJ* applied Article 24 JC (now Article 31 JR) to interim measures related to arbitration proceedings.

<sup>152</sup> In the current legal literature, there is an extensive discussion on the relationship between arbitration and European civil litigation, *Audit*, *Mél. Loussouarn* (1994), p. 13 et seq.; *van Houtte*, *Arb. Int.* 2005, 509; *Merrett*, *C.L.J.* 2005, 308; *Nurmela*, *JPrivIntL* 2005, 115; *Veeder*, *BullASA* 2006, 803. The German Association for Arbitration discussed the subject during its spring meeting of 2007; *Schlosser*, *Die Erstreckung von Brüssel I auf die Schiedsgerichtsbarkeit?* (to be published in *SchiedsVZ* 2007).

<sup>153</sup> 3<sup>rd</sup> questionnaire, question 1.5.1.

<sup>154</sup> Only the reports from Cyprus, Estonia, Lithuania, Slovenia and Spain (EJN) – 5 of 25 reports - were of the opinion that an extension of the Judgment Regulation to arbitration might be helpful.

<sup>155</sup> In this respect, practitioners of the London Bar unanimously expressed the opinion that any extension of the JR to arbitration would be undesirable.

cessful instrument in transnational commercial law". The reactions of many other reports were similar.<sup>156</sup> This predominant opinion shall be demonstrated by the following statements:

110 According to the English report, the unanimous view of those responding to the questionnaire was that an extension concerning arbitration and mediation was undesirable. One main argument was that any extension of the Judgment Regulation would undermine the proper functioning of the 1958 New York Convention. However, the English report quotes several decisions where the interfaces between the Judgment Regulation and the application of the New York Convention were relevant. These decisions relate to anti-suit injunctions for enforcing the integrity of an arbitration agreement;<sup>157</sup> the appointment of arbiters<sup>158</sup> or the recognition and enforcement of arbitral awards.<sup>159</sup> The English report expressly stresses the advantage of the English practice to enforce the integrity of an arbitration agreement by an anti-suit injunction. However, the recognition of these injunctions in other Member states is far from clear, as the Judgment Regulation does not apply.

111 The French report states that practitioners are quite sceptical about such an extension of the Regulation. They are rather satisfied with the New York Convention, which is interpreted broadly by the French *Cour de Cassation* and deemed to work properly. Furthermore, the French report doubts, whether a European instrument would facilitate the recognition and enforcement of an arbitral award. Besides, the enforcement of the arbitration clause was better achieved under the

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<sup>156</sup> The predominant opinion is supported by the national reports of Austria, Belgium, Cyprus, England, Finland, France, Germany, Hungary, Ireland, Malta, Netherlands, Scotland, Spain; cf. answers to question 1.5 of the 3<sup>rd</sup> questionnaire.

<sup>157</sup> *The Ivan Zagubanski* [2002] 1 Lloyd's Rep 106. In *Through Transport Mutual Assurance Association (Eurasia) Ltd, v New India Assurance Co Ltd* [2004] EWCA Civ 1598, the Court of Appeal held that an anti-suit injunction to reinforce the integrity of an arbitration agreement was ancillary to that arbitration agreement, and so fell outside of the scope of the Regulation. The question was referred to the ECJ by House of Lords in *West Tankers Inc. v. RAS Riunione Adriatica di Sicurtà Spa* [2007] UKHL 4.

<sup>158</sup> *The Lake Avery* [1997 Lloyd's Rep. 540.

<sup>159</sup> *ABC v. Banque Franco-Tunesienne* [1996] 1 Lloyd's Rep. 485.

autonomous French law on arbitration than under the regime of Article 23 JR.<sup>160</sup>

- 112 The reactions of most of the German practitioners were similar: They clearly expressed the opinion that the New York Convention should prevail over the Judgment Regulation. However, German courts apply the Judgments Regulation to the recognition of foreign decisions, which merged an arbitral award.<sup>161</sup> Further, German Courts also follow the line of arguments of *Van Uden*. Accordingly, provisional measures related to the merits of arbitration proceedings are available under national law.<sup>162</sup>
- 113 The Italian report states that the mechanisms set forth by the New York Convention provide an efficient system of recognition and enforcement of arbitral awards, which might be impaired by an extension of the scope of application of the Regulation. However, the report states that other connected questions still remain quite uncertain as far as the case law of the Court of justice is concerned; namely the applicability of the Regulation to the recognition of a judgment rendered by a domestic court deciding a case in spite of the existence of an arbitration clause, or to the binding effect of a foreign judgment deciding the validity of an arbitration clause.
- 114 In the Netherlands, the New York Convention is generally considered to be adequate. Problems are mostly related to cases in which the validity of the arbitration agreement is disputed. If the New York convention is judged not to function properly, legal practice is of the opinion that it would be better to adapt that Convention than the Regulation.

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<sup>160</sup> This opinion is shared by the Belgium Report, third questionnaire, 1.5.1.

<sup>161</sup> The *Oberlandesgericht Frankfurt (Main)* 07/13/2005 – 20 W 239/04, construed Article 1 (2) (d) JR narrowly and held that Articles 32 et seq. JR applied to a foreign judgment, which merged an arbitral award; same opinion *BGH*, 27.3.1984, IPRax 1985, 157. English Courts do not apply Article 32 JR to (foreign) judgments which merged an arbitral award, *Arab Business Consortium v. Banque Franco-Tunisienne* [1996] 1 W.L.R. 485 (H.L.)

<sup>162</sup> *OLG Nürnberg*, 11/30/2004, SchiedsVZ 2005, 50, held that pursuant to sec. 1033 ZPO an arbitration clause does not exclude the jurisdiction of State courts for interim protective measures. However, the Court established its jurisdiction by applying the pertinent provisions of the ZPO. In the present case, the *Oberlandesgericht* applied sec. 937 para. 1 ZPO. This provision refers to the general provisions of the ZPO on jurisdiction (secs. 12 et seq. ZPO). Accordingly, the *OLG Nürnberg* relied on secs. 23 and 32 ZPO.

The situation is less clear, if during the arbitral procedure interim measures are applied for to the Dutch judge in interlocutory proceedings (“*kort geding* judge”). In that case the Judgment Regulation is applicable. It should be mentioned that the Dutch judge in interlocutory proceedings may always be resorted to, even if he has no jurisdiction in the procedure on the merits.

*cc) Possible Ways Forward*

115 The answers of the national reports show a principal tendency not to extend the Judgment Regulation to arbitration. At the same time, the practical problems relating to the exclusion of arbitration can no longer be dissimulated.<sup>163</sup>

116 Before addressing specific interfaces between the JR and arbitration, it seems appropriate to stress some guiding principles which should govern any inclusion of arbitral matters in the framework of the Judgment Regulation. Firstly, the New York Convention of 1958 provides a uniform framework for the enforcement of arbitral agreements and for the recognition and enforcement of arbitral awards. The convention is in force worldwide and should not be set aside or weakened by a regional framework. Secondly, the most prominent achievement of the New York Convention consists in its broad scope of application entailing uniformity and legal certainty world-wide, in all contracting States.<sup>164</sup> Therefore, the Judgment Regulation should not address issues dealt with by the New York Convention. However, the prevalence of the New York Convention does not exclude supplemental and supporting provisions, especially provisions addressing the interfaces between the New York Convention and the Regula-

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<sup>163</sup> *Dicey & Morris*, *The Conflict of Laws*, para 11-029 refers to “a number of controversial questions which are not yet finally settled.”

<sup>164</sup> At present (6/17/2007), 142 States (including all 27 Member States of the European Union) have ratified the New York Convention of 1958.

tion.<sup>165</sup> According to the information obtained from the national reports, these interfaces relate to the following issues:

- 117 (1) The enforcement of a (void or valid) arbitration agreement (including declaratory judgments on the validity of the agreement,<sup>166</sup> but also anti-suit injunctions enjoining parties from seeking redress in ordinary courts<sup>167</sup>)
- 118 (2) Ancillary measures such as the appointment of an arbitrator, the granting of supportive provisional relief and the support for the taking of evidence by ordinary courts.<sup>168</sup> The question is whether the JR should contain an additional ground of jurisdiction for supportive measures. The issue includes cost decisions of courts ancillary to arbitration proceedings.<sup>169</sup>
- 119 (3) Recognition and enforcement: The practice in the Member States relating to the recognition of judgments is inconsistent. In some Member States, judgments disregarding the existence of an arbitral agreement are considered as violating public policy and, therefore, are not recognised under Articles 32 and 34 no 1 JR.<sup>170</sup> In other Member States, judgments on the merits are recognised under Article 32 JR regardless of whether an arbitral agreement has been disregarded or not.<sup>171</sup> A conciliatory position has been advocated in constellations where the defendant has not invoked the exception of arbitration (Article II (3) New York Convention) Several legal writers

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<sup>165</sup> A closer judicial cooperation among the EU-Member State in the framework of an international convention is not unprecedented; see Articles 11 and 42 of Regulation (EC) No 2201/03.

<sup>166</sup> C.A. Paris, 6/15/2006, Rev. arb. 2007, 87.

<sup>167</sup> *West Tankers Inc./RAS Riunione Adriatica di Sicurtà Spa* [2007] UKHL 4.

<sup>168</sup> This issue is closely related to the application of the Evidence Regulation.

<sup>169</sup> E. g. Article 63 (4) English Arbitration Act 1996.

<sup>170</sup> *ABC I v. Banque Franco-Tunesienne* [1996] 1 Lloyd's Rep. 485, 488 et seq. (holding that Articles 26 et seq. JC were not applicable).

<sup>171</sup> A decision declaring an arbitral clause as void is usually recognised under the Judgment Regulation, because this issue is usually dealt with as an incidental question of the judgment on the merits, *OLG Düsseldorf*, 5/21/2007, I-3 W 13/07; *Rauscher/Mankowski*, Article 1 JR para. 31a. Different opinion *Bollée*, Revue de l'arbitrage 2007, 89, 91.

qualified this situation as a submission to jurisdiction under Article 24 JR.<sup>172</sup>

- 120 (4) Conflicts between arbitral awards and judgments: At present, it is an open question, whether the prevalence of an arbitral agreement or the pendency of arbitration proceedings bars parallel proceedings in other Member States. As a matter of principle, this issue is addressed by Article II (3) of the New York Convention. Accordingly, Articles 27 - 30 and 34 – 35 JR do not apply. However, in some Member States, judgments endorsing arbitral awards are recognised under Article 32 JR, while other Member States deny the application of the Judgment Regulation by applying Article 1 (2) (d) JR.
- 121 The first line of problems identified relates to the recognition of foreign (declaratory) judgments on the validity of an arbitration clause. According to the pertinent case law, these judgments are not recognised under Articles 32 et seq. JR, due to the exclusion of arbitration in Article 1 (2) (d) JR.<sup>173</sup> Consequently, the arbitration clause may be considered as valid in one Member State and as void in another with the result of parallel proceedings and conflicting judgments.<sup>174</sup> Equally, a judgment declaring an arbitral award void or ineffective is not recognised in the other Member States.<sup>175</sup> As a result, conflicting judgments and arbitral awards (and enforcement measures) may impair the predictability of judicial proceedings in the European Judicial Area. This situation is not satisfactory, although in practice, it occurs very seldom.

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<sup>172</sup> *Muir Watt*, Rev. Critique 2001, 174, 175. However, the application of Article 24 JR depends on the applicability of the JR itself which is determined by Article 1 (2) (d) JR. Consequently, Article 24 JR does not seem to support this line of arguments.

<sup>173</sup> C.A. Paris, 6/15/2006, Rev. arb. 2007, 87 (annotation by *Bollée*).

<sup>174</sup> The situation is more complicated in the case of so-called “hybrid clauses” which alternatively provide for adjudication in a selected court or for arbitration, *Nurmela*, JPrivInt’IL 2005, 115, 127 et seq.

<sup>175</sup> OLG Stuttgart, 12/22/1986, RIW 1988, 480.



122 In this respect, several legal writers<sup>176</sup> proposed to include these decisions in the scope of the Regulation and to delete the exclusion in Article 1 (2) (d) JR.<sup>177</sup> This deletion would entail a close connection between the New York Convention and the Judgment Regulation: The prevalence of the New York Convention applauded almost unanimously by the national reports would remain untouched, because Article 71 JR guarantees its priority as a special convention. Furthermore, arbitration proceedings could still not be qualified as proceedings pending in a “court” of a Member State and arbitral awards would not be “judgments”.<sup>178</sup> In this respect, Article 1 (2) (d) has always had only a declaratory impact. However, court proceedings supporting arbitration in civil and commercial matters would be covered by the scope of the Judgment Regulation and, accordingly, a (declaratory) judgment on the validity of an arbitration agreement could be recognised under Article 32 JR. The danger of conflicting decisions on the effectiveness of arbitration agreements would be diminished.<sup>179</sup> On the other hand, the deletion of Article 1 (2) (d) JR might have an impact on the possibility to issue anti-suit injunctions protecting arbitration agreements. This question will depend on the ruling of the ECJ in the *West Tankers* case.<sup>180</sup> However, even if Article 1 (2) (d) JR was deleted, the position of a party relying on the validity of such a clause would be reinforced, in cases where the decision of a civil court confirmed the validity of the agreement because such a decision would be recognised under Articles 32 et seq. JR in

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<sup>176</sup> See the discussion referred to *supra* at fn. 152.

<sup>177</sup> Cf. the answers of the Italian and Swedish reports to question 1.5 of the 3<sup>rd</sup> questionnaire.

<sup>178</sup> *Schlosser*, in: *Schlosser/Wagner, Die Vollstreckbarkeit von Schiedssprüchen* (Cologne 2007), at fn. 22 et seq.

<sup>179</sup> Accordingly, the current French practice of staying the proceedings in the civil courts until the arbitral tribunal has decided on its competence (so-called negative competence-competence) would not apply in the European Judicial Areas, as a (foreign) judgment on the invalidity of an arbitral agreement would be recognized under Article 32 JR, C.Cass., 6/26/2001, *Revue de l'arbitrage* 2001, 529; 11/16/2004, *Revue de l'arbitrage* 2005, 115; *Bollé*, *Revue de l'arbitrage* 2007, 87.

<sup>180</sup> The issue, was submitted by the House of Lords to the *ECJ (West Tankers Inc. v. RAS Riunione Adriatica di Sicurtà Spa a. o.* [2007] UKHL 4).

all Member State and prevent the courts in other Member States from hearing the case on the merits.<sup>181</sup>

- 123 The proposition, however, presupposes that a device could be developed for the purpose of discouraging obstructing or frustrating litigation. This device should be as effective as an English anti-suit injunction or the French doctrine of the negative effect of the competence-competence. An international arbitration agreement protects both parties from being sued in any ordinary jurisdiction. Proper performance of such an agreement can only be enforced by safeguarding that a party of an arbitration agreement is not in fact compelled to defend a lawsuit in an ordinary court, particularly in a “foreign” one. This aim could be realized by protecting arbitration agreements in a similar way as proposed here in view of jurisdiction agreements.<sup>182</sup> Court proceedings are to be stayed once proceedings for declaratory relief regarding the binding effect of an alleged arbitration agreement are instituted in the country of the place of the arbitration in due time (to be decided by the court seised).
- 124 The deletion of Article 1 (2) (d) JR would equally extend the scope of the Brussels Regime to ancillary measures. Consequently, a decision of a civil court appointing an arbitrator, fixing the seat of arbitration, extending time limits or appointing a court expert for the preservation of evidence destined for arbitration proceedings, would be covered by the Judgment Regulation<sup>183</sup> (and by Article 1 Evidence Regulation as well). In addition to this, provisional measures of national courts supporting arbitration proceedings would not only fall under Article 31

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<sup>181</sup> This practice is not shared in all Member States and could entail *forum shopping* in order to “secure” the competence of the arbitral tribunal by seising state courts. Recently, the Cour d’Appel of Paris held that a judgment of the Genuese Court of Appeal which declared an arbitration agreement void and unenforceable could not be recognized under Article 26 JC/Article 32 JR as it was related to the exclusion of arbitration by Article 1 (2) (d) JC/JR, Cour d’Appel Paris 6/15/2006, *Revue de l’arbitrage* 2007, 87.

<sup>182</sup> See *infra* paras 448-451.

<sup>183</sup> Accordingly, the deletion would entail a departure from the case law of the ECJ in *Marc Rich*, ECJ 7/25/1991, case C-190/89, ECR 1991 I-3855, paras 18 et seq.

JR, but could also be granted by all courts of the Member States under the heads of jurisdiction provided for in Articles 2–26 JR.<sup>184</sup>

125 In addition to this, legal writers proposed to implement additional measures and to address arbitration in the Judgment Regulation “positively”: *Prof. van Houtte* advanced the proposal to enlarge Article 22 JR and to add a separate head of exclusive jurisdiction for ancillary proceedings at the state court of the seat of arbitration.<sup>185</sup> The advantage of this proposal is to exclude the competition between different state courts in relation to the same arbitration proceedings. Accordingly, the sound exercise of judicial power within the European Judicial Area would be reinforced. However, this proposal would also entail problems: Sometimes, the place of the arbitration is not determined in the arbitration agreement and there is no uniform definition of the seat of the arbitral tribunal in all Member States.<sup>186</sup> From this perspective, it seems to be difficult to provide for an exclusive head of jurisdiction. Alternatively, it would be possible to add a specific head of jurisdiction for ancillary proceedings to arbitration in Article 5 JR. However, this proposal would equally face the difficulties related to the lacking consensus about the place of arbitration.<sup>187</sup> In addition, Art. 5 JR does not exclude concurring proceedings under different heads of jurisdiction. Therefore, it seems preferable to provide for an exclusive head of jurisdiction for ancillary proceedings and to set some guideline for a uniform determination of the place of arbitra-

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<sup>184</sup> Alternatively, it seems advisable to clarify that the arbitration exception does not include provisional measures not affected, under the law of the Member State, by an arbitration agreement; see *infra* D.VI.3, at para. 722.

<sup>185</sup> *Van Houtte*, *Arb. Int.* 2005, 509, 518, proposed to frame the wording of this provision similar to sec. 22 (5) JR. See *infra* at para. 132.

<sup>186</sup> The 1958 New York Convention did not harmonise this issue, see Article I (3) NY-Convention. Stein/Jonas/Schlosser, sec. 1025 ZPO (commentary), paras 2 et seq.; Schlosser, *Internationale Schiedsgerichtsbarkeit*, paras 242 et seq. Article 20 of the UNCITRAL Model Law on International Commercial Arbitration refers to the agreement of the parties and to the determination by the arbitral tribunal. See generally, Schwab/Walter, *Schiedsgerichtsbarkeit* (commentary), 7<sup>th</sup> ed. 2005, Chap. 15, paras 38 et seq.

<sup>187</sup> In legal literature, it has been proposed to fix the place of performance of an arbitration clause at the (agreed) place of the arbitral tribunal.

tion.<sup>188</sup> The following guideline may be appropriate: The place of arbitration shall depend on the agreement of the parties or be determined by the arbitral tribunal. Otherwise, the court that would have general jurisdiction<sup>189</sup> over the dispute under the regulation if there was no arbitration agreement shall be competent.<sup>190</sup>

- 126 An advocated proposal in legal literature is to add a “true arbitration exception” clause to the Judgment Regulation drafted in the line of Article 23 (3) JR. According to this proposal, a new Article 23*bis* JR should directly address the formal validity and the legal effects of an arbitration clause.<sup>191</sup> However, there are several flaws related to this proposal: Firstly, such a provision would directly overlap with Article II of the New York Convention, which also addresses the validity of an arbitration clause in a more informal way.<sup>192</sup> Secondly, the clause would not only apply to commercial arbitration, but equally cover arbitration in consumer matters etc.<sup>193</sup> Furthermore, this proposal would also require a concurring restriction (or even amendment) of Article 1

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<sup>188</sup> For the sake of uniformity, the guideline should be aligned to Article 20 of the 1985 UNCITRAL Model Law on International Commercial Arbitration. This provision states that “the parties are free to agree on the place of arbitration. Failing such agreement the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.”

<sup>189</sup> Prof. *van Houtte* proposed to refer to all heads of jurisdiction of the JR. This legal solution corresponds to the Belgian law on arbitration. However, in order to avoid forum shopping it seems preferable to refer only to the heads of general jurisdiction under Articles 2 and 59, 60 JR.

<sup>190</sup> *Van Houtte*, *Arb. Int.* 2005, 509, 518, see *infra* at para. 132.

<sup>191</sup> *Gomes Jene*, *IPRax* 2005, 84, 86 et seq. *Van Houtte* *Arb. Int.* 2005, 509, 520 et seq., proposed inserting the following provision: “When the parties have agreed that an arbitral tribunal with its seat in a Member State has jurisdiction to settle any disputes which have arisen or may arise in connection with a particular legal relationship, such an agreement shall be in writing or evidenced in writing. Where such an agreement is concluded between the parties, the courts of the Member States shall have no jurisdiction over their disputes unless the arbitral tribunal or the court of the seat of arbitration has decided that the arbitral tribunal has no jurisdiction.”

<sup>192</sup> *Stein/Jonas/Schlosser*, Annex to sec. 1061 ZPO, (commentary on Article II 1958 New York Convention) paras. 49 et seq.

<sup>193</sup> It would at least be necessary to complete the “exclusion provisions” in sec. 3–5 of the 2<sup>nd</sup> Chapter of the Judgment Regulation to arbitration.

(2) (d) Rome Convention.<sup>194</sup> Thirdly, the proposed formulation would also entail the so-called competence-competence of the arbitral tribunal (which would be exclusively competent to decide on the validity of an arbitration agreement), a concept which is differently applied in the Member States.<sup>195</sup> Last, but not least, this proposal would entail that arbitration directly became a matter of Community law and replaced the autonomous concepts in the Member States.<sup>196</sup> Accordingly, harmonisation of international arbitration might be considered as a severe intrusion into the procedural culture of the Member States.

127 The third interface between the Judgment Regulation and arbitration relates to recognition. In order to avoid irreconcilable decisions, it has been proposed to assimilate arbitral awards to judgments and to include arbitral proceedings in the grounds for non-recognition of Article 34 (3), (4) JR. In the legal literature, it has been advocated to enlarge the grounds for non-recognition (Article 34 JR) to arbitration: The non-respect of an arbitration agreement or of an arbitral award should be treated as a bar for the recognition of a judgment given by a court of another Member State in the European Judicial Area.<sup>197</sup>

128 At first sight, such a proposal might be criticised as contrary to the principle of free movement of judicial decisions in the European Union. However, in the present state of affairs, the recognition of judg-

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<sup>194</sup> The application of the Rome Convention to arbitration clauses (despite its Article 1 (2)) has recently been advocated by *Zobel*, *Schiedsgerichtsbarkeit und Gemeinschaftsrecht*, pp. 39 et seq.

<sup>195</sup> *Stein/Jonas/Schlosser*, Sec. 1032 ZPO, para. 11; *BGH*, 01/13/2005, *SchiedsVZ* 2005, 95, 97. A comparative overview was recently given by the ILA Committee on International Commercial Arbitration in its Final Report on *lis pendens* and arbitration (Toronto 2006), *ILA-Reports of the 72<sup>nd</sup> Conference*, 145, 167 et seq.

<sup>196</sup> The answers of the national reports demonstrate that there is a strong perception (and interest) to preserve the concurring national concepts at present.

<sup>197</sup> *Prof. van Houtte* proposed adding a fifth ground to refuse the recognition of a judgment from another Member State that might read as follows: "A foreign judgment may not be recognised, ...if it is irreconcilable with an arbitral award rendered in another Member State, that is binding to the parties or has not been set aside or suspended by a court of that Member State involving the same cause of action and the same parties provided that the award fulfils the conditions necessary for its recognition in the Member State addressed."

ments of other Member States, which were given despite an arbitration agreement, is widely accepted in case law and legal doctrine. According to the case law of the French *Cour de Cassation*, such a judgment must be recognised, as this issue is not dealt with by Articles 34 and 35 JR.<sup>198</sup> In the legal literature, some authors proposed recurring to public policy when an arbitration clause was not respected.<sup>199</sup> However, the national reports did not indicate any case law supporting this assertion. Thus, the introduction of an additional ground for non-recognition would change the current situation considerably.<sup>200</sup>

- 129 However, the more principal question is whether an arbitral award can be assimilated to a judgment of a civil court. This question relates to the basic concept of the free movement of judgments in the European Judicial Area which is built on the mutual trust in the court systems of the Member States. The assimilation of arbitral awards to judicial decisions would entail that the same mutual trust existed in relation to arbitration. While there is no doubt that the European Community and all Member States recognise the utility and the judicial quality of arbitration (especially of international commercial arbitration), there is equally no doubt that arbitration proceedings are very heterogeneous and, therefore, a residual judicial control of the procedural fairness of the award (as contemplated by Article V of the New York Convention) is still necessary. However, the proposed fifth ground for non-recognition directly addresses this issue and refers to the judicial control of the arbitral award. However, the judicial control of the arbitral award in the Member State of origin or under the New

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<sup>198</sup> C. Cass. 11/14/2000, Rev. Crit. 2001, 172 (French report, annex 1.5.). In this case, the French party had not invoked the arbitration clause in the German courts. See also *The "Heidelberg"* [1994] 2 Lloyd's Rep. 287, 310 (QBD).

<sup>199</sup> The problem is discussed by *Audit*, Mél- Loussouarn (1994), p. 15, 22 et seq.; *Bälz/Mariefeld*, RIW 2003, 51, 53; *Bollé*, Rev. arb. 2007, 90, 95 et seq.; *Rauscher/Manskowski*, Art. 1 JR, para. 31a; *Schmidt*, Festschrift Sandrock, pp. 205, 211 et seq.; *van Houtte*, Arb. Int.l 2005, 509, 520 et seq.

<sup>200</sup> Nevertheless, in the long run, it might be possible to adopt a specific European instrument on the recognition of arbitral awards. See *infra* at para. 130.

York Convention may also delay the proceedings under Article 43 JR.<sup>201</sup> Therefore; it does not seem advisable to include the recognition of arbitral awards to Articles 32 et seq. JR and to enlarge the grounds of non-recognition in Article 34 JR.<sup>202</sup>

130 Furthermore, it seems advisable to explore alternative ways forward. In the present state of affairs, the free movement of judicial decisions under Article 32 JR seems much more efficient than the recognition and the enforcement of arbitral awards.<sup>203</sup> In the United States, the proceedings for recognising arbitral awards have been simplified and adapted to internal proceedings under the constitutional framework of full faith and credit. However, the grounds for refusing the recognition of an arbitral award are derived from Article V of the New York Convention. A parallel way forward seems advisable for the European Judicial Area: According to this proposal<sup>204</sup>, the recognition and enforcement of arbitral awards should be addressed in a specific instrument. This instrument should harmonise the procedure for the recognition of arbitral awards rendered in a Member State by the civil courts of this Member State. However, the grounds for non-recognition of arbitral awards should be derived from Article V of the New York Convention. The civil courts of the Member States where the arbitral award was given should be exclusively competent for recognising the award. Their decision on the enforceability of the arbitral award should be binding and, thus, be recognised in other Member States without any additional formality – similar to the parallel Community instruments on Uncontested Claims and the Order for Payments. Within the European Union, such an instrument would align the proceedings for the enforcement of arbitral awards with the proceedings concerning other enforceable titles without impeding the

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<sup>201</sup> See *infra* D.IV.

<sup>202</sup> This proposal is not in line with the general policy of the Community aimed at abolishing the grounds for non-recognition contained in Article 34 JR.

<sup>203</sup> *Gomes Jene*, IPRax 2005, 84, 85 et seq.

<sup>204</sup> *Schlosser*, in: *Schlosser/Wagner*, Die Vollstreckbarkeit von Schiedssprüchen (Cologne 2007 – forthcoming).

specific framework of the New York Convention. This proposal offers a promising perspective for a further harmonisation of arbitration in the Internal Market.

131 In the present state of affairs, it seems appropriate not to propose far-reaching amendments of the Judgment Regulation in this field, which is reflected by the clear reactions from the national reports which almost unanimously advised not to change the present situation.<sup>205</sup> Nevertheless, as has been demonstrated, the present situation is not satisfactory and the interfaces between the Judgment Regulation and arbitration should be addressed in a more sophisticated way than by the all embracing exclusion of arbitration in Article 1 (2) (d) JR. In the current discussion, two possible avenues should be advocated. The first is to delete Article 1 (2) (d) JR and to preserve the prevalence of the New York Convention by Article 71 JR. The second way forward is to address the interfaces between arbitration and the Judgment Regulation in a positive, comprehensive way and to include a specific provision on supportive proceedings to arbitration in the Judgment Regulation. Accordingly, the introduction of a new Article 22 (6) in the JR addressing annex proceedings to arbitration seems a possible avenue. This provision could read as follows:

132 *“The following courts shall have exclusive jurisdiction, regardless of domicile, (...)*

*(6) in ancillary proceedings concerned with the support of arbitration the courts of the Member State in which the arbitration takes place.”*

133 In addition, it seems advisable to address the situation of concurring litigation on the validity of the arbitration agreement in different Member States.<sup>206</sup> Since this constellation closely resembles the situation

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<sup>205</sup> See *supra* at para. 115.

<sup>206</sup> This situation occurs when a party asserts that the arbitration agreement is void and institutes proceedings on the subject matter of the dispute in a civil court, see *supra* at para. 123.



of related actions,<sup>207</sup> it should be addressed in the context of Article 28 JR. However, Article 28 JR only provides for a discretionary stay. The stay of related proceedings in arbitration should be mandatory in order to avoid parallel litigation.<sup>208</sup>

134 Thus, the following provision could be added as a new Article 27 A:

*“A court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to existence and scope of an arbitration agreement if a court of the Member State that is designated as place of arbitration in the arbitration agreement is seised for declaratory relief in respect to the existence, the validity, and/or scope of that arbitration agreement”.*

135 Finally, a new recital should be inserted in the Regulation addressing the issue of the place of arbitration. According to this new recital, the place of arbitration should be determined by the parties or be located in the Member State where the arbitration takes place.<sup>209</sup> The recital could read as follows:

136 *“The place of arbitration shall depend on the agreement of the parties or be determined by the arbitral tribunal. Otherwise, the court of the Capital of the designated Member State shall be competent, lacking such a designation the court shall be competent that would have general jurisdiction over the dispute under the Regulation if there was no arbitration agreement.”*

#### *dd) The Judgments Regulation and Mediation*

137 The relationship between the Judgments Regulation and ADR has not been discussed in the Member States so far, despite the Draft of

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<sup>207</sup> The relatedness refers to the validity (and interpretation) of the arbitration agreement.

<sup>208</sup> See *supra* at para. 123.

<sup>209</sup> The determination of the place of arbitration closely follows the model of Article 20 UNCITRAL-model law on international arbitration of 1985. According to Article 20, the place of arbitration is determined by the parties or by the arbitral tribunal. However, the present proposal departs from the model law as it refers (at last resort) to the general heads of jurisdiction.

an EC-Directive on Mediation proposed by the Commission in 2004.<sup>210</sup> However, this proposal does not explicitly address the relationship between the Judgment Regulation and Mediation. Article 5 of that Draft only imposes a duty on the Member States to ensure the enforcement of settlement agreements (as judgments or settlements). Nevertheless, it seems advisable to link Articles 32 and 58 JR to the European instruments on ADR. Article 32 JR should apply when the settlement is confirmed by a court order (consent judgment), while Article 58 JR should apply when the agreement is notarised. However, it does not seem necessary to include an explicit provision in the Judgment Regulation, but rather to refer to the application of the Judgment Regulation to settlements in a recital of the (draft) EC-Directive on Mediation.<sup>211</sup>

- 138 Most reactions from the legal practice stated that an extension of the Regulation to mediation would be undesirable<sup>212</sup>: The Maltese reporter stressed that mediation and similar processes reflected the socio-legal, ethical and economic realities of the particular communities. Accordingly, what was deemed acceptable and indeed desirable in certain parts of the European Union would not necessarily be regarded in other parts. In addition, mediation was essentially a voluntary process and it ended in a non-binding resolution of the underlying dispute unless settlement was formalised in contract. It should never lose this inherent characteristic by being incorporated into a system designated for court judgments. The same reactions were expressed by German judges: The *Oberlandesgericht Stuttgart* emphasised that German law also did not provide for an exact definition of mediation or provide minimum stan-

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<sup>210</sup> Proposal for a Directive on certain aspects of mediation in civil and commercial matters, Brussels, 10/22/2004, COM(2004) 718 final. A detailed study has been recently published; see *Hutner*, Das internationale Privat- und Verfahrensrecht der Wirtschaftsmediation.

<sup>211</sup> It seems advisable to refer to the Judgment Regulation (and to applicable parallel instruments such as Regulation (EC) No. 804/04) in a recital of the (draft) EC-Directive on Mediation.

<sup>212</sup> See the reactions from Austria, Greece, Hungary, Luxemburg, Malta.

dards. Moreover, there are differences between court annexed mediation proceedings and agreed mediation proceedings by the parties. At present, including mediation proceedings in the Judgments Regulation would be premature.

### 3. Relationship to Special Conventions, Article 71 JR

139 While the Judgment Regulation provides for a uniform system for the coordination and delineation of cross-border proceedings in the European Judicial Area, Article 71 JR expressly stipulates that specialised conventions prevail over the Regulation.<sup>213</sup> This prevalence has been confirmed by the *ECJ*.<sup>214</sup> However, the specialised conventions prevail over the Judgment Regulation only insofar as they provide for specific provisions. When a specific issue is not dealt with by the specialised convention, the provisions of the Judgment Regulation apply. This is especially the case for the rules on pendency (Articles 27–30 JR) which have been applied in this constellation by the courts of the Member States.<sup>215</sup> Nevertheless, the national reports show the practical importance of this provision. The most important conventions shall be demonstrated by the following case law:

140 According to most reports, the Convention on the Contract for the Carriage of International Goods by Road (CMR) is of high importance.<sup>216</sup> The reported case law shows that the jurisdictional provi-

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<sup>213</sup> Bilateral Conventions between the Member States have been superseded by Article 69 JR. This provision is generally applied; see e. g. by the Cypriot report stressing the significance of the Agreement between the Republic of Cyprus and the Republic of Greece on Legal Cooperation in Matters of Civil, Family, Commercial and Criminal Law, signed at Nicosia on 5 March 1984, which has considerably been reduced by the pre-eminence of the Regulation. The same legal situation is reported from Hungary where extensive international relations existed before the accession to the European Union; Hungary participated in numerous multi-lateral and bilateral international conventions, e. g. the Hungarian-Polish/Greek/French/Cyprian/Czech/Slovakian bilateral conventions on legal aid which were superseded by Article 69 JR.

<sup>214</sup> *ECJ*, 12/06/1994, C-406/92, *The Tatry*, ECR 1994 I-5439; *ECJ*; 10/28/2004, C-148/03, *Nürnberg Allgemeine Versicherung*, ECR 2004 I-10327.

<sup>215</sup> See the answers in the national reports to question 1.8 of the 3<sup>rd</sup> questionnaire.

<sup>216</sup> *Royal & Sun Alliance Insurance plc./MK Digital FZE* [2005] 2 Lloyd's Rep. 679, the earlier Court of Appeal decision (dealing with the Judgment Convention) in *Andrea Mer-*

sions of the CMR prevail over the jurisdictional grounds of the Chapter II of the Judgment Regulation. The national courts follow the line of the *ECJ* in *Nürnberger Allgemeine Versicherungs AG*.<sup>217</sup>

141 Further the Hague Maintenance Convention of 1973 is of considerable significance. The German reporters researched the files of the "German Institute for Youth Human Services and Family Law" (*Deutsches Institut für Jugendhilfe und Familienrecht* ("DIJuF")) which is entrusted by the German Youth Welfare Authorities (*Jugendämter*) for the recovery of maintenance claims abroad. The figures obtained clearly demonstrate that the recovery of such claims is mainly effected under the Hague Convention on Maintenance of 1973. With the kind permission of the Institute, the national reporter got access to its records. The following results demonstrate the sparse application of the Judgment Regulation in cross-border maintenance proceedings: In 2003, the Institute dealt with a total of 305 cases, 46 cases related to EC-Member States. The Judgment Regulation was applied in 3 cases, the Judgment Convention in 7 cases. Accordingly, the Hague Convention was applied in 36 cases. In 2004, the Institute dealt with a total of 272 cases, 98 cases related to EC-Member States. The Judgment Regulation was applied in 3 cases, the Judgment Convention in 3 cases. In 2005, the Institute dealt with a total of 286 cases, 104 cases related to EC-Member States. The Judgment Convention was applied in 15 cases, the Judgment Regulation in 13 cases. From January until May 1<sup>st</sup>, 2006, the Institute dealt with a total of 91 cases, 42 cases related to EC-Member States. The Judgment Regulation was applied in 5 cases, the Judgment Convention in 4 cases. This example demonstrates the practical impact of the Hague Convention on maintenance. This problem, however, will be addressed by a separate Community instrument in this field.<sup>218</sup>

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*zario Ltd v Internationale Spedition Leitner Gesellschaft GmbH* [2001] 1 All ER (Comm) 883.

<sup>217</sup> The *Bundesgerichtshof* (11/20/2003, *Transportrecht* 2004, 302) held that Articles 26 and 27 JR also apply to concurrent lawsuits under the CMR and under the Regulation. Cf. also Italian report, 3<sup>rd</sup> questionnaire, question 1.8.

<sup>218</sup> Com(2005) 649 final. Cf. for a critical assessment: *Hess/Mack*, *Der Verordnungsvorschlag der EG-Kommission zum Unterhaltsrecht*, *Das Jugendamt* 2007, 229.

- 142 By contrast, a review of the files of three Bavarian courts revealed that incoming requests (mostly from Austria) were dealt with by applying the Judgment Regulation (or the Judgment Convention). Even where the applicant had based his request on the Hague Convention the courts applied the Judgment Regulation (of the Judgment Convention) arguing that recognition and enforcement according to the latter instrument was simpler.
- 143 The UK report referred to several decisions addressing Article 71 JR in the context of the (former) Warsaw Convention and of the Convention on Arrest in Seaships.<sup>219</sup> Generally, the English courts follow the ruling of the ECJ in *The Tatry*<sup>220</sup>. According to the English report, since the ECJ's decision in *The Tatry*, there has been a relative dearth of cases on Article 71 JR.
- 144 The practical problems of applying Article 71 JR are demonstrated by *Deville./Aeroflot Russian International Airlines*.<sup>221</sup> In this case, an aircraft belonging to Aeroflot crashed killing a number of passengers while on route to Hong Kong. *Deville* were relatives and dependants of the victims of that crash who sought damages against Aeroflot and the manufacturer of the aircraft in actions brought in France and England. Aeroflot contended that the matter should be governed by the Warsaw Convention and that the action should be brought in Russia, England or Hong Kong under the terms of Article 28 of the Warsaw Convention. On that basis Aeroflot challenged the proceedings in the French courts as being contrary to international law and beyond the jurisdiction of those courts, thus seeking an anti-suit injunction. The English proceedings had been commenced in case the French courts were found not to have jurisdiction. *Deville* sought to stay proceedings under the inherent jurisdiction of the court further to the Articles 21 and Article 22 JC. However, Article 57 JC provided that it was

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<sup>219</sup> In *The Bergen (No. 1)* [1997] 1 Lloyd's Rep. 380 a conflict arose between Article 17 JC and Article 7 of the Arrest Convention. The Court held that "by reason of Article 57 of the Brussels Convention (now Article 71 JR), Article 7 of the Convention must prevail." See *infra* at paras. 294 et seq.

<sup>220</sup> See *The Linda* [1988] 1 Lloyd's Rep. 175 where it was held that "The general provisions give way to the particular provisions.

<sup>221</sup> *Deville./Aeroflot Russian International Airlines* [1997] 2 Lloyd's Rep. 67.

not to interfere with the terms of any other convention. The court held, allowing the application, that the court had power to stay proceedings in the interests of justice under its inherent jurisdiction, or to stay proceedings under Articles 21 and 22 JC. The Warsaw Convention fell within the terms of Article 57 JC. The Warsaw Convention applied so as to displace Articles 21 and Article 22 JR. However, the Warsaw Convention was silent on the situation where the manufacturer was also a defendant to litigation. However, on construction of the mandatory provisions of the Warsaw Convention, it was not possible to bring an action against the defendant airline or the manufacturer in France. Although it would have been possible to bring a claim under Articles 2 and 60 JR as well as under Article 5 (3) JR. The English court declined to grant the injunction.

- 145 This example demonstrates the difficulties in applying Article 71 JR. The specialised conventions only partly address the scope of the Judgment Regulation. According to the case law of the *ECJ*, the subsidiary application of the Judgment Regulation remains possible as a matter of principle. However, the borderlines are sometimes difficult to determine. Furthermore, from a European point of view, Article 71 JR seems problematic. As the prevalent conventions are (regularly) not ratified by all Member States, fragmentation of the applicable law(s) is the consequence. However, according to the recent case law of the *ECJ*, the external competences in the material scope of the Judgment Regulation lie with the Community.<sup>222</sup> Seen from these developments, it seems well advisable to look closely at the scope of Article 71 JR and to reduce it as far as possible.<sup>223</sup>

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<sup>222</sup> *ECJ*, 02/07/2006, Opinion C-103, ECR 2006 I-1145.

<sup>223</sup> An alternative would be that the European Community would access to the pertinent international instruments. See *infra* at paras. 308 et seq. on the accession to the Seaship Arrest Convention of 1999.

### III. Jurisdiction

#### 1. General Issues

##### a) Overall Satisfaction

146 The first decision of the *ECJ* concerning the Judgment Convention of 1968 was issued in 1976.<sup>224</sup> In more than 30 years, a detailed and elaborated case law from the *ECJ* as well as from the Member State courts could develop. The results of the national reports are well in line with this experience:

147 The basic trend among the Member States is very positive with regard to an overall evaluation of the jurisdictional provisions of the Regulation. Most national reports affirmed that the Regulation guarantees, according to its overall objectives, predictability of judicial decisions and legal certainty.

148 For instance, the Austrian report emphasises that the Judgment Regulation has even shown more predictability and legal certainty than autonomous Austrian national law.<sup>225</sup> Other national reports, like e. g. Hungary and Ireland, also confirm that the Regulation has resulted in an increase in legal certainty in the context of their respective legal systems.<sup>226</sup> In the Cypriot report, the same effect is attributed to the abolition of exorbitant bases of jurisdiction by Article 3 (2) JR.<sup>227</sup> The English report – which could be seen as a summary of these statements – points out, by referring to the *ECJ* case law, that predictability and legal certainty are among the guiding principles in the *ECJ*'s jurisprudence.<sup>228</sup>

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<sup>224</sup> *ECJ*, 10/06/1976, C-12/76, *Tessili/Dunlop*, ECR 1976, 1473.

<sup>225</sup> Austrian report, 3<sup>rd</sup> questionnaire, question 2.1.1.

<sup>226</sup> Hungarian report, 3<sup>rd</sup> questionnaire, question 1.1; Irish report, 3<sup>rd</sup> questionnaire, question 2.1.1.

<sup>227</sup> Cypriot report (Michailidou), 3<sup>rd</sup> questionnaire, question 2.1.1.

<sup>228</sup> English report, 3<sup>rd</sup> questionnaire, question 2.1.1.

149 Not surprisingly, the guiding principles of the *ECJ* case law are generally accepted in the Member States. As far as the compliance with the supremacy and exclusive applicability of the Regulation is concerned, all national reports confirmed that the jurisdictional provisions of the Judgment Regulation address the relevant jurisdictional questions in a satisfactory manner so that the courts, in general, comply with the Regulation; in particular, the limited catalogue for a ground of jurisdiction outside the defendant's domicile is respected. This respect for the Regulation and its jurisdictional system also includes case law from Member States as the UK and Ireland which traditionally followed a more flexible approach so that it was more difficult for their courts to follow the *ECJ* case law.<sup>229</sup>

150 Asked for their overall evaluation of the Judgment Regulation, problems were stated by the national reporters only as far as limited specific issues are concerned.<sup>230</sup> Some reports (Finland, Germany) addressed the provisions in Article 5 JR. According to the Finnish national report, Article 5 (1) JR is partly regarded as superfluous since Article 2 JR could be used.<sup>231</sup> German courts had sporadically problems with the interpretation of Article 5 (1) b) JR in cases of sales by delivery to a place other than the place of performance and in case of a payment by bank transfer.<sup>232</sup> Further, it is argued in the Finnish report that the scope of application of Article 5 (3) JR was too broad and that its application was cumbersome with regard to the recovery of damages. The Dutch report implies that Article 27 JR could lead to insecurity since it might be abused by the parties.<sup>233</sup> The French report, while confirming that practitioners are quite satisfied with the

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<sup>229</sup> England: *Konkola Copper Mines Plc. v. Coromin* [2005] E.W.H.C. 898 (Comm); Ireland: *Burke v. Unex Sports GmbH* [2005] I. E.H.C. 68.

<sup>230</sup> According to the Maltese report it is difficult to say whether the Regulation guarantees legal certainty since this depended ultimately on its application and interpretation given by national courts. However, this statement must be attributed to a lack of reliable case law in Malta which became an EC Member only in 2004 so that, at the time when the national report has been submitted, there was one final decision of Maltese courts addressing the regulation, Maltese report, Introductory Note.

<sup>231</sup> Finnish report, 3<sup>rd</sup> questionnaire, question 2.1.1.

<sup>232</sup> German report, 3<sup>rd</sup> questionnaire, question 2.1.1.

<sup>233</sup> Dutch report, 3<sup>rd</sup> questionnaire, question 2.1.1.



rules concerning jurisdiction, states that, for a further improvement, more specialized lawyers and magistrates would be desirable.<sup>234</sup>

151 In summarizing these aspects, one may say that the national reports express general satisfaction with the jurisdictional provisions of the Judgment Regulation. According to an overall analysis of the national reports, there is no indication at all that the jurisdictional provisions of the Judgment Regulation need a general revision. Specific questions and issues can be and will be addressed in their specific context in the following text.

*b) Sufficiency of the Fact-Specific Grounds for Jurisdiction*

152 According to the *ECJ* case law, fact specific jurisdiction is an exception to the general principle that the defendant must be sued in the forum of his domicile. This principle, however, is meant only to support the conclusion that the fact-specific grounds for jurisdiction, in particular, Article 5 JR should not be extended *by the courts* beyond the cases actually covered.<sup>235</sup> A more detailed analysis of jurisdictional interests may contribute to this question insofar as fact specific grounds for jurisdiction often have the advantage of being closer to the case and its social and economic environment whereas the domicile of the defendant typically is more convenient for the latter and often closer to assets relevant for an enforcement of the eventual judgment.<sup>236</sup> As a consequence, the reluctance of the *ECJ* as to a judicial extension of the given fact-specific grounds for jurisdiction should not necessarily prevent an extension by the legislature.

153 Whereas most national reporters regard the fact specific grounds of jurisdiction to be sufficient, the German report states that practical cases show a need for a non-exclusive ground of jurisdiction which is

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<sup>234</sup> French report, 3<sup>rd</sup> questionnaire, question 2.1.1.

<sup>235</sup> *ECJ*, 07/03/1997, C-269/95, *Benincasa/ Dentalkit Srl*, ECR 1997 I-3767; *ECJ*, 10/27/1998, C-51/97, *Réunion européenne SA/Spliethoff's Bevrachtungskantoor BV*, ECR 1998, I-6511.

<sup>236</sup> For an analysis see e. g. *Pfeiffer*, *Internationale Zuständigkeit*, pp. 612–619.

based on the situs of movable assets as far as rights in rem or possession are concerned.<sup>237</sup> This viewpoint also found support during the joint conference with the national reporters. In line with this argument, the Maltese national reporter suggests to address actions against ships or other things (actions *in rem*) since Malta has not adhered to the Arrest Convention and it is contentious in Malta whether the Regulation is applicable if an arrest of a ship domiciled in an EU Member State arises.<sup>238</sup> The Luxembourg report states that Article 5 (2) JR can lead to difficulties in practice, since the courts of the place where the creditor of maintenance has his domicile will have difficulties in appreciating the costs of living abroad. Furthermore, the Luxembourg report argues it would be advisable to reflect about a *forum legis* as regards company law, i. e. to envisage the competence of the courts of the registered office beyond Article 22 (2) JR.<sup>239</sup>

- 154 In an overall perspective, the suggestion to add a forum based on the situs of movable assets deserves some merit – provided however the controversy is about these assets. Practical experience shows that the lack of such a forum may result into lawsuits in fora remote from the object of the controversy, from the relevant witnesses and judgments which are more difficult to enforce. The general reporters therefore support the suggestion to add to Article 5 JR the *situs* of a movable asset as a ground for jurisdiction for cases where the controversy is about this asset.

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<sup>237</sup> German report, 3<sup>rd</sup> questionnaire, question 2.1.3. Further, it has been pointed out that problems arise with regard to patent law since – according to the German Federal Supreme Court – claims for compensation cannot be based on the jurisdictional ground of tort. As a consequence of this jurisprudence, the defendant has to sue at different places regarding an injunction relief on the one side and a claim for compensation on the other side. This situation is not regarded as satisfactory, see the separate part in this report addressing patents D.VII.

<sup>238</sup> Maltese report, 3<sup>rd</sup> questionnaire, question 2.1.3.

<sup>239</sup> Luxembourg, 3<sup>rd</sup> questionnaire, question 2.1.3.

*c) Applicability of national law under Article 4 (2) JR**aa) Discrimination of Non-Member State Parties*

155 A discrimination of Non-Member State parties could be caused by Article 4 (2) JR, which allows for additional national grounds for jurisdiction in law suits against a third state domiciliary. However, this question is assessed differently by the Member States. While the reporters from five Member States do not see any risk of discrimination of third State parties, others regard it as more or less obvious that parties of third States are in a less advantageous position.<sup>240</sup>

156 According to the estimation of the Maltese reporter, the Regulation favours EU domiciliaries.<sup>241</sup> In particular, Luxembourg reports that there is discrimination insofar as Article 14 JR of the Civil Code determines jurisdiction on the basis of the Luxembourg nationality of the applicant<sup>242</sup> (which also is the case in France). The Dutch national report sees problems in general, but points out that the Netherlands do not know exorbitant forum rules any longer.<sup>243</sup> Similar arguments can be found in the Polish report since, in Polish national law, Polish citizenship does not constitute an independent ground of jurisdiction.<sup>244</sup> The situation is different in Scotland where exorbitant grounds of jurisdiction still exist in relation to non-EU domiciliaries. Therefore, such domiciliaries can be treated much less favourably than EU domiciliaries.<sup>245</sup> The Austrian report indicates that discrimination towards third State parties may occur due to Austrian national law. Here grounds of jurisdiction exist which can be used only with regard to third State parties.<sup>246</sup> In Germany, different points of view are taken –

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<sup>240</sup> Czech report, 3<sup>rd</sup> questionnaire, question 2.1.4; Greek report (Klamaris), 3<sup>rd</sup> questionnaire, question 2.1.4., Slovenian report, 3<sup>rd</sup> questionnaire, question 2.1.4.

<sup>241</sup> Maltese report, 3<sup>rd</sup> questionnaire, question 2.1.4.

<sup>242</sup> Luxemburg report, 3<sup>rd</sup> questionnaire, question 2.1.4.

<sup>243</sup> Dutch report, 3<sup>rd</sup> questionnaire, question 2.1.4.

<sup>244</sup> Polish report, 3<sup>rd</sup> questionnaire, question 2.1.4.

<sup>245</sup> Scottish report, 3<sup>rd</sup> questionnaire, question 2.1.4.

<sup>246</sup> Austrian report, 3<sup>rd</sup> questionnaire, question 2.1.4.

courts do not see any problems concerning possible discriminations, while some law firms do.<sup>247</sup> The English report points out that the further conditions imposed in the Regulation which Article 4 JR is subject to, make discrimination against third State parties unlikely.<sup>248</sup> Further it refers to the protection, defendants under Article 4 JR have according to Articles 27–30 JR, which has been confirmed by the *ECJ* in *Overseas Union Insurance Ltd./New Hampshire Insurance Co.*<sup>249</sup>

157 Seen against this background, a clear summary is difficult to state. To leave no doubt, it is obvious that third State domiciliaries are put in a less advantageous position by exorbitant fora not established but admitted by Article 4 (2) JR, also because judgments rendered in these cases have to be recognised in all Member States. On the other hand, such exorbitant fora exist in third states too, and EC domiciliaries are subject to these fora. Consequently, the best way to cope with this situation would be an international convention with these third states which could guarantee both: proper jurisdictional rules (in the EC and in third States) as well as effective cross-border recognition and enforcement.

*bb) Effect on EU claimants*

158 Art. 4 (2) could also be seen from the viewpoint of EU claimants. Although this issue has not expressly been raised by national reporters, it is clear that this provision results into a different position of EU citizens in the Member States. Firstly, there is of course the general aspect national jurisdictional systems are not uniform so that claimants have to adapt to different national systems. As a consequence, parties have to bear additional information costs.

159 Secondly and more importantly, Art. 4 (2) results into significant differences if parties want to make use of national exorbitant fora. Every EU claimant may make use of jurisdiction over third party defendants

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<sup>247</sup> German report, 3<sup>rd</sup> questionnaire, question 2.1.4.

<sup>248</sup> English report, 3<sup>rd</sup> questionnaire, question 2.1.4.

<sup>249</sup> *ECJ*, 06/27/1001, C-351/89, ECR 1991 I-3317.

based on the service of process in the UK or on the presence of assets in Germany (provided there is sufficient connection to Germany<sup>250</sup>) whereas, under Art. 4 (2), exorbitant fora referring to the nationality of the claimant are open to claimants from another Member State only if this claimant has a domicile in the forum State. As a consequence, the jurisdictional provisions in some Member States are open for all EU claimants whereas some jurisdictional provisions in other Member States are not.

- 160 This situation is hardly according with the principle of establishing an area of freedom, justice and security as described by Art. 61 EC-Treaty. A comparison with the situation in the U.S. may illustrate this: Whereas it is possible for a New York Company to sue a European defendant in California under the American transient rule, it is impossible for an English company to sue an American company in France under Art. 14 French Code Civil even if the latter company has considerable assets in France so that France is a convenient forum for the enforcement of such a judgment.
- 161 Theoretically, there are different ways to answer this situation. Firstly, Art. 4 (2) could be abolished and all jurisdictional provisions in the JR could be extended to defendants from third states. This would, however, considerably limit access to justice. Furthermore, the fora open outside the defendants domicile are rather limited under the JR, and they can be limited within the cooperative framework of the regulation because reciprocal recognition of judgements is guaranteed. It would therefore be not advisable to simply extend the jurisdictional system of the JR to cases with third party defendants.
- 162 Secondly, the jurisdictional system of the JR could be extended in connection with an addition of further fora in Art. 5 – which then could be limited to cases without EU-defendant. This would certainly be the way of addressing the problems of Art. 4 (2) JR which would fit best into the concept of an area of freedom, security and justice. On the

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<sup>250</sup> BGH, 16 July 1991, BGHZ 116, 90.

other hand, as of now, there is no intensive discussion about how such additional fora for third party defendant cases should be conceived. If this idea should be pursued, it would be advisable to initiate such a discussion.

- 163 Thirdly, the differences between the member states could be mitigated if the special jurisdictional provisions in Art. 5 and 6 JR were applied regardless of a seat of the defendant in a member state. A similar solution is already favored under Art. 22.<sup>251</sup> The applicability of national provisions could then be limited to a residual provision like framed after Art. 7 (1) Brussels Ia Regulation 2201/2003. Under such a system, access to justice would in no case be more limited. And although the present differences would not be abolished completely, it would still constitute a more harmonized system of access to justice.
- 164 Fourthly, the differences between the Member State laws could be mitigated by changing the requirement that Member State Claimants must have their seat in the forum state in order to invoke national jurisdictional provisions against third state defendants so that a seat in any Member State would suffice. As a result, jurisdiction based on nationality under the French Art. 14 Code Civil would then be available for all EU nationals. Whereas this hypothesis would improve jurisdictional equality among citizens of different Member States, it would also extend exorbitant fora with their problematic effect on third state defendants.
- 165 Given the political implications of these possible avenues, the general reporters refrain from giving a comprehensive recommendation. It might however be advisable, in a first step, to extend Art. 5 and 6 to cases involving third state defendants and to allow a reference to national law only on the basis of a residual provision.

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<sup>251</sup> Jenard, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels, 27 september 1968, Comments to Art. 16 Brussels Convention: applicability in cases of defendant's domicile in a third state.

d) *Examination ex officio*

aa) *General Aspects*

166 Whilst Article 25 JR requires the national courts to examine their jurisdiction *ex officio*, this provision does not interfere with national procedural rules concerning the examination of facts. As the Schlosser Report has pointed out, one has to distinguish between an examination of the legal question of jurisdiction on one hand and of the examination of the underlying facts on the other. Whereas Article 25 JR requires an examination of the legal issue *ex officio*, national procedural may leave it to the parties to submit the relevant facts.<sup>252</sup> This situation is reflected by the national reports; in general it can be stated, that the national reports revealed differences among the Member States in particular concerning the examination of choice of forum agreements. In this respect, some national courts require evidence for the basis of jurisdiction whereas others examine only documents presented by the parties.<sup>253</sup> In the latter case, it may indeed happen that a choice of forum agreement does not come to the court's attention. However, the national reports do not suggest that this situation has caused serious inconveniences.

bb) *Relation between Article 26 JR and Article 19 of the Service of Documents Regulation 1348/2000*

167 In this respect, the basis in the Member State case law for an evaluation of this problem is rather narrow.<sup>254</sup> Having said this, it seems that in some Member States the mechanism of Article 26 (3) JR with

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<sup>252</sup> Schlosser Report (Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, signed at Luxembourg, 9 October 1978, OJ C 59, 5 March 1979) no. 22.

<sup>253</sup> See national reports, respective 3<sup>rd</sup> questionnaires, question 2.1.5.

<sup>254</sup> See, also for the following aspects, national reports, respective 3<sup>rd</sup> questionnaires, question 2.2.26.

Article 19 Regulation (EC) No. 1348/2000 (stay of proceedings) is given precedence over rendering a judgement whereas practice in others is not yet clear:<sup>255</sup>

168 In Greece, courts are examining the requirements set forth by the Service of Process Regulation, when dealing with actions involving defendants residing abroad; they do not hesitate to stay proceedings, as they did according to Article 15 of the Hague Convention, when evidence of actual service of process is missing.

169 The same holds true for Germany.<sup>256</sup>

170 In Spain, the Court will stay the proceedings if it is not shown that the defendant was able to receive the documents and had time to enable him to arrange for his defence. This principle will not be applied if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to Article 19 Regulation (EC) No. 1348/2000. If valid service has been effective, Article 26 JR is applied.

171 According to the English report, Article 26 (2) JR will, in the near future, be completely superseded by Article 19 of Regulation (EC) No. 1348/2000. The provisions of both are relatively uncontroversial, and the changes made by Article 19 (i. e. where the document has to be served within the territory of a Member State) are dealt with by paras. A1 and 3 of Practice Direction (Service Out of the Jurisdiction) of the Civil Procedure Rules, PD6B.

172 The Irish rules of court create a special procedure for cases where there is no appearance by a person who has been served with Irish proceedings under the Judgment Regulation. Ordinarily, where an Irish defendant does not enter an appearance, the plaintiff can obtain

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<sup>255</sup> A question not addressed here concerns differences in the Member State law as far relating to declarations according to Article 19 (2) of the Service of Process Regulation; for this purpose see the consolidated version of the Member State communications, updated 29 Dec. 2006, [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/pdf/vers\\_consolide\\_en\\_1348.pdf](http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/vers_consolide_en_1348.pdf), 14 Feb 2007.

<sup>256</sup> See *BGH*, 09/24/1986, VIII ZR 320/86, for Article 15 of the Hague Services Convention; it is recognised that the same applies in the case of Article 19 Services Regulation (EC) No. 1348/2000, *Kropholler*, Article 26 JR, para. 11.



a judgment by lodging the appropriate papers but without having to appear again in open court, provided that the claim is for a specific amount. However, where the defendant is served by reason of a jurisdiction arising under the Judgment Regulation, the plaintiff is required under Order 13A, RSC, to bring a further application before the court, grounded upon a sworn affidavit, before judgment can be obtained. This procedure enables the court to undertake the assessment of jurisdiction required by Article 26 JR.

173 One report addresses the question whether Article 26 (2) JR is still needed.<sup>257</sup> According to the general reporters, this is the case. Article 26 (2) JR applies, e. g., to cases where the defendant is domiciled in a Member State but is served with process in a third State which is neither a Member State nor a party to the Hague Service convention.<sup>258</sup>

174 The overall impression of the general reporters is that the complex mechanism in Article 26 JR (paragraph 3 takes preference over paragraph 2 and 4 whereas paragraph 4 takes preference over paragraph but over paragraph 3) is very difficult to understand for practitioners which are not, at the same time, experts for private international law. A more simple structure could be advisable.

#### *e) Infrastructural and organisational questions*

##### *aa) Time and Money*

175 With regard to the question whether the examination of jurisdiction is time-consuming and expensive, Member States take a different point of view. While in some Member States the examination is expensive and time-consuming (in Cyprus, Sweden, England), this is not the case in other Member States (Estonia, Greece, Hungary, Lithuania, Slovenia). In the Netherlands defences as to jurisdiction are heard as

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<sup>257</sup> German report, 3<sup>rd</sup> questionnaire, question 2.2.26, referring to a court statement.

<sup>258</sup> Rauscher/*Mankowski*, Article 26, para. 14; it may, for instance, also apply in a case under the Judgment Regulation, service is effected in the forum state itself.

procedural issues. And since this can be expensive and time-consuming, the law on civil procedure has been changed in 2001, allowing now one statement of defence, including procedural and substantive defences at the same time. The following survey demonstrates the broad variety in this respect:<sup>259</sup>

176 In Poland, the examination of jurisdiction can be time-consuming; however this does not lead to additional costs. Fees are paid at the beginning of the proceedings, and there are no special fees with regard to the examination of jurisdiction. In Spain, it depends on several factors whether court fees have to be paid. In Austria the costs with regard to objections to jurisdiction are the same as regarding the main proceedings. In Germany, no special fees exist with regard to the determination of jurisdiction. According to information obtained from law firms, the examination of jurisdiction takes about two to 14 months. In England the costs may exceed 10,000 or even 100,000 Pounds (it should, however, be noted that these figures include the costs of legal advice). Following the Maltese report, costs are – if the court decided that it has jurisdiction and continues to hear the case – very often borne by the defendant. In such a case, costs are minimal since the case will continue to be heard on the merits and ultimately costs on the final judgment are assessed on the basis of the value of the claim. However, if the court decides that it has no jurisdiction, the court registrar assesses the costs in a final manner. In these cases the costs may be considerably higher. With regard to the time it takes to obtain a final decision on jurisdiction, most Member States could not give precise figures since this depends on several factors. According to the Lithuanian report it takes up to two months, according to the Polish report, three to six months (may take up to two or three years), according to the Slovenian report it is mostly unpredictable, in Spain it takes about two to three months. The Austrian report indicates that the decision may last up to several months in complex cases. In Malta a decision on jurisdiction takes between six months and two years (depending on the judge). According to the French re-

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<sup>259</sup> For the following survey of the national reports see the 3<sup>rd</sup> questionnaires, 2.1.6.

port such a procedure of contesting the competence of a court can take a long time and cost as much as a judgment on the merits.

*bb) Procedural Framework – Separate and Preliminary Determination of Jurisdiction*

177 In this respect, national practice is rather different again<sup>260</sup>:

178 With regard to the relation between jurisdiction and the main proceedings the Greek report points out that – if they are decided in connection with each other – an examination of the subject matter is not necessary anymore in case of a lack of jurisdiction. Also in Hungary, there is no separate decision on jurisdiction as well as in Poland. However, if jurisdiction is challenged, the court will decide separately on this issue. In Germany, jurisdictional issues are decided usually in the final judgment. However, the court, on its discretion, may order a preliminary hearing on the admissibility of the proceedings and give an interim judgment on the admissibility of the lawsuit. The situation is different in Ireland where jurisdiction can be dealt with as a discrete matter. This is reported as a help to reduce costs. On the other hand, a separate application on jurisdiction potentially delays the decision in the main proceedings but only if the jurisdictional application fails. In Austria, the plea as to jurisdiction can be decided upon either separately or in conjunction with the main proceedings. It lies within the discretion of the court to decide which way to choose. The situation is similar in Malta. Here, the Court can decide to deal with the issue of jurisdiction either by delivering a separate and preliminary judgment or alternatively together with the main judgment on the merits. According to the Maltese national reporter the tendency is to go for the first option. The English report states that between issues of jurisdiction and the main proceedings, a decision on jurisdiction is necessary before the Court can decide to proceed on the merits, although jurisdiction applications are sometimes coupled with an application for summary judgment by the claimant or the defendant – in this regard, the Court will generally postpone lodgement of evidence and hearing

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<sup>260</sup> See in the national reports the 3<sup>rd</sup> questionnaires, 2.1.6.

of the summary judgment application until after the jurisdiction application has been decided, unless it takes the view that the jurisdiction application is an unreasonable attempt to delay determination of an apparently unanswerable claim. Luxembourg reports that in practice that jurisdiction often is questioned in the first instance and decided by separate judgments. The procedure in question is not particularly expensive, but it will obviously delay the judgment. On the other hand, if the jurisdiction of the court of first instance is confirmed by the separate judgment, there is no possibility of an immediate remedy, but only at the same time as regarding the judgment on the merits (Article 580 of the new Code of Civil Procedure). As the French report states, the question of the competence of a court can be raised *ex officio* or by the parties according to Article 92 *NCPC*. The question has to be raised in *limine litis* according to Article 74 *NCPC* before the debtor raises a defence on the merits. The party, who raises objections against the competence must prove its statement and declare which jurisdiction was the competent one.

- 179 Based on this survey, a separate preliminary decision of the jurisdictional issues may be helpful for a speedy and inexpensive determination of this question; in some other legal systems, an application for a preliminary ruling can be used as an instrument to delay a final judgment. With regard to the good experiences with the no delay provisions in Article 41, it may be advisable to add to Section 8 a clause stating that preliminary rulings on jurisdiction should be made without delay. Seen in a broader context, a delay in determining jurisdiction is particularly problematic in the situation of Article 27 JR and Article 28 JR. This problem will be addressed in that context.<sup>261</sup>

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<sup>261</sup> *Lis pendens* (D.IV).

## 2. Specific Issues

### *a) Domicile – Determination Pursuant to Articles 2, 59 JR*

#### *aa) General Evaluation*

180 Most reports (but not all) replied that there are no special problems with regard to the application of Article 2 JR and Article 59 JR. However, a look at the various definitions shows a broad variety of solutions.<sup>262</sup> Whilst some national laws know explicit definitions of this term, others do not:

181 According to the definition in the Estonian Civil Code Act (Articles 14 and 15), “domicile” can be defined as a legal residence (the place where a person primarily lives). In Greece, “domicile” is defined in the Civil Code and means the place where a person is permanently established. In Luxembourg, the term domicile is defined by means of Article 102 Civil Code. According to this rule, domicile is the place of the “main establishment” of a person. In Lithuania, domicile is defined in the Civil Procedure Code and is the place where a natural person mainly lives. The Dutch Civil Code defines domicile as the place where a person is habitually living according to social norms. It does not mean the actual place of residence. According to the Polish Civil Code, domicile is understood as a specific locality where an individual intends to stay. In Spain, there are definitions concerning the domicile of natural persons (which is the place where a person has his/her normal place of residence) as well as concerning the commercial domicile of legal entities. Also in Austria, civil procedure law contains a definition of “domicile”. According to this definition, domicile is this place where a person has settled down with the intention to establish a permanent residence there. This place has to be the centre of the economic, professional and social life of the respective person. According to Austrian law, it is possible to have more than one domicile. German law contains a definition in the Civil Code, according to which a person has his/her domicile where he/she is residing with the inten-

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<sup>262</sup> See the respective reports 3<sup>rd</sup> questionnaire, question 2.2.1

tion to stay permanently. Among the Member States which do not know an explicit definition of “domicile” is Finland. Here, domicile is generally more or less understood in the same way as the concept of habitual residence. In Slovenia, obviously some problems exist since there is a definition in the Law on Registration of Residence and it seems to be controversial whether it can be relied on this definition. It is claimed by some commentators that “domicile” which is used – but not defined - in the Civil Procedure Act, should be defined by reference to the generally accepted opinion according to which domicile is the place where a person resides if he has the intention to reside there permanently – and not with regard to the explicit definition contained in the Law on Registration of Residence. French courts only rather seldom define the term “domicile” but often only determine where it is. If a definition is given, the term domicile” is construed as “usual residence” or “place of permanent settlement, with the purpose to create a permanent centre of interest”. According to a French practitioner an autonomous interpretation would be desirable.

182 With regard to the problem of a plurality of domiciles, it can be pointed out that - according to the national reports – Greece and Cyprus are the only countries which explicitly stated that it is not possible to have more than one.

183 Based to this survey, the situation in continental Europe is already rather complex. An additional source of complications arises from the circumstance, that the common law concept of domicile is different from a traditional continental European understanding so that these jurisdictions had to establish a special concept of “domicile” for the purposes of the Regulation:<sup>263</sup>

184 In the UK, this definition of the notion of “domicile” is contained in the Civil Jurisdiction and Judgments Order 2001. Here two conditions are stated: The individual must reside there and the nature and circumstance of his residence must indicate he has a substantial connection with the UK. Further, the English report could refer to case law. In

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<sup>263</sup> Schlosser Report, no. 73.

*Bank of Dubai Limited./Fouad Haji Abbas*<sup>264</sup> the Court of Appeal held that "...it seems to me that a person is resident... in a particular part of the United Kingdom if that part is for him a settled or usual place of abode." Further it was pointed out that a certain degree of permanence or continuity was necessary. Also in the UK it is admitted that a person may have a factual connection with two or more Member States at the same time, and that therefore a case of multiple domicile can arise. In Ireland, according to the High Court, domicile has to be interpreted in Irish law as referring to the place where a defendant is "ordinarily resident".<sup>265</sup> In Cyprus, domicile is understood as a person's permanent home. This is regarded to be the place where he/she intends to reside permanently – no matter whether he/she is resident there at the moment. In Scotland, and for the purposes of the Regulation, a natural person is domiciled in Scotland if he/she is resident in Scotland and the nature and circumstances of his/her residence indicate that he/she has a substantial connection with Scotland.<sup>266</sup>

185 A special situation exists in Malta due to the fact that the Code of Organisation was originally promulgated in Italian (and the term used was "domicilio" which in Italian means "residence") while some courts applied the British notion of domicile, i. e. residence coupled with an intention to reside. When later the Code was translated into English and Maltese, the term domicile was used and confusion arose due to the adaptation of the term to the English notion of domicile.

186 In order to evaluate this situation, three aspects need to be distinguished:

- As far as the determination of the forum at the domicile of the defendant is concerned, the courts seem to have no difficulties in applying their national definition of domicile.
- Indirectly, with the term domicile in Article 59 JR defines the scope of application of the jurisdictional provisions in Arts. 2, 5

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<sup>264</sup> [1997] I.L. Pr. 308.

<sup>265</sup> *Deutsche Bank./Murtagh* [1995] 2 IR 122.

<sup>266</sup> *Selco./Mercier*, 1996 SLT 1247.

and 23 JR. The broad variety of solutions in the national legal systems results into a heterogeneous scope of application of the jurisdictional system of the Regulation in the Member States. Insofar, the proposal to provide for a harmonised concept of domicile or residence may deserve further consideration. In this respect, a definition based on objective criteria such as e. g. a habitual residence for a certain period of time would be preferable<sup>267</sup>.

- Article 59 (2) JR is relevant if a party does not have its domicile in the forum state so that the applicability of the Regulation may depend (e. g. in the context of Article 23 JR) on a domicile in another Member State. In this case, the courts have to determine the question of domicile according to the laws of one or other Member States where a party may have a domicile, e. g. if they have to judge on the validity of a choice of forum clause. If e.g. a German and an American agree on the jurisdiction of the English courts, an English court may be required to determine whether the German party has a domicile in Germany under German law in order to determine whether Art. 23 JR is applicable to the choice-of-forum clause. This rather complex situation could be amended if an autonomous concept of domicile or residence could be established.<sup>268</sup> Also for this reason, the proposal to provide for a harmonised concept of domicile or residence may deserve further consideration.

#### *bb) Domicile of Companies*

187 Member States regard the alternative connecting factors of Article 60 JR in general to be feasible. Several reports, in particular Austria,

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<sup>267</sup> See Sched. 1 Sec. 41 (6) Civil Jurisdiction and Judgments Order 2001.

<sup>268</sup> See e. g. *Kropholler*, Article 59 JR, para 3.



commented very positively on this provision since it had led to a simplification.<sup>269</sup>

188 However, two issues under Article 60 JR are worth mentioning since they raise questions as to the necessity of further clarifications:

- Firstly, some reports raise doubts as to the necessity and clarity of three different connecting factors.<sup>270</sup>
- Secondly, the effects of an increasing number of companies which have their statutory seat abroad under the *Centros* and *Inspire Art* case law of the *ECJ* on the adequacy of Article 60 (1) a) JR are not yet clear.<sup>271</sup>

189 Consequently, it has to be said that the ramifications of Article 60 JR are not yet clear enough to render a final evaluation. The general reporters recommend observing closely the further development under Article 60 JR.

*b) Contractual Obligations. In particular: the Delineation from Matters relating to Torts and Quasi-Delicts*

190 The basic principles in the *ECJ* case law as to this question are that

- Contractual matters in the sense of Article 5 (1) JR have to be defined autonomously and exclude all claims based on obligations not voluntarily accepted by the debtor
- Article 5 (3) JR applies to all claims for damages falling outside the scope of Article 5 (1) JR.<sup>272</sup>

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<sup>269</sup> Austrian report, 3<sup>rd</sup> questionnaire, question 2.2.2; see also e. g. the respective sections in the reports from Estonia, Slovenia.

<sup>270</sup> See reports from England, Hungary, Slovenia, Greece, and Cyprus, 3<sup>rd</sup> questionnaires, 2.2.2.

<sup>271</sup> German report, 3<sup>rd</sup> questionnaire, question 2.2.2.

<sup>272</sup> *ECJ*, 03/22/1983, C-34/82, *Peters Zuid Nederlandse*, ECR 1983, 987; *ECJ*, 07/11/2002, C-96/00, *Gabriel*, ECR 2002 I-6367; *ECJ*, 09/17/2002, C-334/00, *Taccozzi/Wagner*, ECR 2002 I-7357; *ECJ*, 01/20/2005, C-27/02 *Engler/Janus Versand*, ECR 2005 I-481.

- 191 In some Member state, these principles have caused controversial discussions insofar as matters of pre-contractual liability are deemed to be a case of non-contractual liability (Article 5 (3) JR).<sup>273</sup> However, no report alleges that this has caused unacceptable results or contradicting judgments by national courts. Based on the *ECJ* case law (*Tacconi* and *Gabriel* cases), the courts seem to be well able to draw a line.<sup>274</sup>
- 192 Problems in national case law are to some extent caused by the fact that courts do not make sufficiently clear whether Article 5 (1) or (3) JR is applied.<sup>275</sup> In other jurisdictions, questions arise if there is a contractual relation between the parties and if, according to national law, this contractual relationship does not bar claims in tort. In this respect, there is some critique that connected tort claims (if available under the applicable law) cannot be brought under Article 5 (1) JR forum and connected contractual claims cannot be brought under Article 5 (3) JR.<sup>276</sup> Court practice, however, follows the principle that Article 5 (1) JR only applies as far as the pending claim actually has its legal basis in the contract itself (or in contract law) so that for claims based on other doctrines, Article 5 (1) JR does not apply.<sup>277</sup>

*c) In particular: The Place of Performance*

*aa) General Aspects*

- 193 The most significant general aspects concerning Article 5 (1) JR in the case law of the *ECJ* are:

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<sup>273</sup> See e. g. the Austrian report, 3<sup>rd</sup> questionnaire, question 2.2.8.

<sup>274</sup> See national reports, 3<sup>rd</sup> questionnaire, question 2.2.9.

<sup>275</sup> This seems to be a particular problem in France, see French report, 3<sup>rd</sup> questionnaire, question 2.2.8.

<sup>276</sup> See e. g. Irish report, 3<sup>rd</sup> questionnaire, question 2.2.9.

<sup>277</sup> Dutch and Irish report, 3<sup>rd</sup> questionnaire, question 2.2.8.; see also for Germany *BGH*, 12/16/2003 – XI ZR 474/02.

- In general, the place of performance has to be determined for the each obligation separately so that the courts have to refer to the specific obligation forming the subject of the controversy.<sup>278</sup>
- If a certain claim is based on different obligations (or causes of action) arising from the contract, the main obligation decides.<sup>279</sup>
- Only exceptionally, in particular for disputes concerning employment contracts, the obligation most characteristic determines the place of performance for all disputes arising from a contract.<sup>280</sup>
- The place of performance has to be determined according to the private law referred to by the choice of law rules of the forum (*Tessili-Rule*)<sup>281</sup>, unless Article 5 (1) (b) JR applies.

194 A survey of the national reports demonstrates that these general aspects of *ECJ* are well accepted in the practical application of the Judgment Regulation in the Member States.<sup>282</sup> Moreover, it seems clear in the Member states that lit. b) of Article 5 (1) JR takes preference over lit c) so that the courts have to determine first whether the former provision applies.<sup>283</sup> Disputes under Article 5 (1) JR focus on the following aspects:

*bb) Place of Performance under Article 5 (1) (b) – indent 1 JR*

195 Seen against the background of the Judgment Convention, Article 5 (1) JR has been changed significantly by the Judgment Regulation.

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<sup>278</sup> *ECJ*, 10/06/1976, C-14/76, *de Bloos/Bouyer*, ECR 1976, 1497.

<sup>279</sup> *ECJ*, 01/15/1987, C-266/85, *Shenavai/Kreischer*, ECR 1987, 239.

<sup>280</sup> *ECJ*, 05/26/1982, C-133/81, *Ivenel/Schwab*, ECR 1982, 1891; *ECJ*, 01/15/1987, C-266/85, *Shenavai/Kreischer*, ECR 1987, 239.

<sup>281</sup> *ECJ*, 10/06/1976, C-12/76, *Tessili/Dunlop*, ECR 1976, 1473; *ECJ*, 09/28/1999, C-440/97, *GIE Groupe Concorde/Captain of the ship "Suhadiwano Panjan"*, ECR 1999, I-6307.

<sup>282</sup> See 3<sup>rd</sup> questionnaires, 2.2.5., of the national reports

<sup>283</sup> See 3<sup>rd</sup> questionnaires, 2.2.7., of the national reports

Whereas under the “old” Article 5 (1) JC, the *Tessili* rule<sup>284</sup> applied to all cases, Article 5 (1) (b), indent 1 JR, now gives an autonomous definition of the “place of performance”. It should be remembered that this change was initiated in order to improve the legal situation with regard to three aspects of Article 5 (1):

- Firstly, the application of *Tessili* to a contract involving different obligations could result into a split of competence.
- Secondly, pursuant to the *Tessili* rule, the place of performance had to be determined according to the private law referred to by the choice of law rules of the forum. Thus, it was – and still is under Article 5 (1) (c) JR – necessary to answer the choice of law question and to determine the place of performance, according to the applicable law (own or foreign), only to decide about the jurisdictional question. This was (and still is to some extent) a rather complicated system.
- Thirdly, the *Tessili* rule resulted into a forum of the plaintiff if applied with Article 57 (1) a) CISG<sup>285</sup> which sometimes was criticised.

196 It is clear and not doubted that the new version of Article 5 (1) JR gave an answer to the first and the third question;<sup>286</sup> it is one of the purposes of this provision to establish a forum closer to the parties. However, there are still complaints about a lack of clarity. Some reports emphasise that the provision is rather complicated.<sup>287</sup> Several reports also address the problem of the relationship between the contractual agreements on one hand and the autonomous definition of the place of performance on the other.

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<sup>284</sup> ECJ, 10/06/1976, C-12/76, *Tessili/Dunlop*, ECR 1976, 1473.

<sup>285</sup> ECJ, 06/29/1994, C-288/92, *Custom Made Commercial/Stawa Metallbau*, ECR 1994 I-2913.

<sup>286</sup> Opinion of General Advocate Yves Bot of 02/15/2007, C-386/05, *Color Drack GmbH/LEXX International Vertriebs GmbH*.

<sup>287</sup> Austrian, Dutch and German reports, respective 3<sup>rd</sup> questionnaires, question 2.2.3.

- 197 As to the latter question, there seems to be consent that, firstly, an agreement between the parties prevails over a *de facto* determination of the place of delivery according to letter b) and that, secondly, a *de facto* determination according to letter b) takes preference over a determination according to the provisions of the applicable law.<sup>288</sup> The delineation of these two rules, however, may be problematic but only in certain cases. By far the most important issue for practice is the following: If the parties agree that purchased goods are to be handed over to the carrier, who, in turn, ships them to the final place of destination, legal doctrine is split regarding the point whether “under the contract” the goods were to be delivered to the final destination or to the place where the carrier has taken them. The following two examples further illustrate the problem:
- 198 A seller from Heidelberg, Germany, sells a printing machine to a buyer in Lisbon, Portugal. According to the contract, the machine has to be delivered FOB Rotterdam. There seems to be consent that, in this case, Rotterdam is the place of performance. However, the lines of argument behind this result are everything but uniform: The English report tends to say that, in such a case, it is inherent in the contract that the parties have agreed on Rotterdam as a place of performance, whereas the Austrian report declares that, in the case of the use Incoterms, the place of performance is where the goods have actually been handed over to the buyer.<sup>289</sup> In the case at hand, this again is Rotterdam so that the result is identical. One may criticise though that Rotterdam is an adequate forum only for cases where the goods can still be inspected there.

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<sup>288</sup> See in the national reports, the respective 3<sup>rd</sup> questionnaires, question 2.2.3. Both aspects have recently been confirmed by the Opinion of *General Advocate Yves Bot*, of 02/15/2007, C-386/05, *Color Drack GmbH/LEXX International Vertriebs GmbH*.

<sup>289</sup> According to the Austrian report, 3<sup>rd</sup> questionnaire, question 2.2.3., it is the actual place where the goods are handed over which counts. However, Austria also reports case law according to which it is “not unacceptable” to construe an Incoterm as an agreement on the place of performance. Similar discussions can, e. g., be found in Germany, see e. g. *Kropholler*, Article 5 JR, paras. 45–51.

- 199 The second example is more difficult: Instead of a FOB clause, the parties have agreed that the seller will ship the goods at the expense of the buyer but without any further clarification. In such a case, it is disputed whether the actual delivery at the seat of the buyer decides or whether the courts to some extent have to refer to national background law in order fill gaps in the contract.<sup>290</sup>
- 200 Despite these uncertainties and open questions, the general reporters refrain from submitting any suggestions in this respect. The *ECJ* has not had a chance yet to develop a reliable and balanced case law in order to solve these open questions. Furthermore, the majority of the national reports does not support any specific amendments of Article 5 (1) JR.<sup>291</sup> Moreover, it is well known that the actual version of Article 5 (1) JR was a compromise between a contractual and a more procedural approach to the problem of determining the place of performance, both of which have their merits. A more procedural understanding gives more weight to a fair balancing of procedural and jurisdictional interests of the parties (like the proximity between forum and case)<sup>292</sup> whereas the other gives more weight to the contractual agreements. At least, this compromise deserves further testing. Consequently, any suggestion to change the rule for sales contracts in Article 5 (1) (b) JR would be premature.

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<sup>290</sup> *Kropholler*, Article 5 JR, para. 49.

<sup>291</sup> Except for the French report, 3<sup>rd</sup> questionnaire, question 2.2.3., which suggests an abolishment of the provision since the parties could agree on choice of law clauses. However, the general report does not follow this proposal because experience shows that the parties cannot always reach an agreement in this respect; and nevertheless there is a need for a contractual forum in cases the goods are delivered at a place remote from the defendant's seat.

<sup>292</sup> Opinion of *General Advocate Yves Bot* of 02/15/2007, C- 386/05, *Color Drack GmbH./LEXX International Vertriebs GmbH*.

*cc) Place of Performance under Article 5 (1) (b) – indent 2 JR*

- 201 The situation is – to some extent – similar as far as the place of performance for services is concerned insofar as the answers given by the Member States have been diverging:<sup>293</sup>
- 202 Whilst the statements from Greece, Lithuania, the Netherlands – and in its general tendency also Austria – do not report any problems in determining the place where a service was provided or should have been provided, and some Member States do not have any experience in this matter (Czech Republic, Hungary, Ireland, Luxembourg, Scotland, Slovenia, Spain), other national reports noted difficulties relating to the localisation of non-physical services or services provided on the internet.<sup>294</sup> In line with this, difficulties are seen if a service is provided in a plurality of states.<sup>295</sup>
- 203 Given this rather diverging picture, an urgent need for specific measures cannot be recognised. Experiences with the Judgment Convention confirm that the kind of questions reported here will and can be solved satisfactorily by case law. Although, in a developing society of knowledge and electronic communication, it is certainly useful to observe the future development of jurisdiction for services contracts carefully, any suggestion in this respect would again be premature.

*d) Matters relating to Torts and Quasi-Delicts**aa) General Aspects*

- 204 Whereas the definition of torts covers a broad variety of cases<sup>296</sup> which, for itself, seems to raise no further problems<sup>297</sup>, much atten-

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<sup>293</sup> See 3<sup>rd</sup> questionnaires, 2.2.4 of the national reports.

<sup>294</sup> Reports from Estonia and Poland, respective 3<sup>rd</sup> questionnaires, question 2.2.4.

<sup>295</sup> *Kropholler*, Article 5 JR, para. 44. The Swedish report, 3<sup>rd</sup> questionnaire, question 2.2.4., reports case law according to which the main obligation decides and states that a further clarification could be helpful.

<sup>296</sup> See the respective 3<sup>rd</sup> questionnaires, question 2.2.10. of the national reports.

tion is paid to the questions of localising torts. In the case of torts and *quasi-delicts*, legal practice can rely on the following well-established principles recognised by the *ECJ* in its case law to Article 5 (3) JR:

- The wording “place where the harmful event occurred or may occur” in Article 5 (3) JR requires an autonomous interpretation.
- This interpretation is based on the principle of ubiquity, according to which the claimant has a choice between the courts for the place where the damage occurred and the courts for the place of the event giving rise to this damage.
- The term “damages” refers to the place where the tortuous act directly produced its harmful effects upon the person who is the immediate victim of that event as opposed to mere indirect consequences.

205 The national reports do not indicate any fundamental criticism to these principles. There are some references to aspects where national courts have to look for a further concretisation of these principles. A survey of these aspects gives a fair impression of how national courts can and actually do work on the above mentioned principles developed in the case law of the *ECJ*:

206 According to the French report, the determination of the damaging fact is done in a rather pragmatic way by the localisation of the acts in relation to the damage. The Austrian report mentions similar questions and discussions and shows how they could be and have been resolved in the case law of the Austrian *Oberste Gerichtshof* and the *ECJ*.<sup>298</sup> The German report describes the case law of the *ECJ* as a well balanced compromise between the interests of the victim on one hand and the interests of the possible wrongdoer on the other.<sup>299</sup> Various national reports show that the above mentioned principles

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<sup>297</sup> For the problem of delineating Article 5 (1), (3) see para. 190 *supra*.

<sup>298</sup> Austrian report, 3<sup>rd</sup> questionnaires, question 2.2.11.

<sup>299</sup> On part of this balance is that, according to German procedural law, it is sufficient that the claimant alleges sufficient facts for a tortuous act in Germany and that it is excluded that such an act actually was committed, see *BGH*, 10/13/2004 – I ZR 163/02.



can be applied to different kinds of actions, including injunctive or declaratory relief.<sup>300</sup>

207 Furthermore, the Irish report notes the recent Irish Supreme Court judgment of *Leo Laboratories Limited./Crompton BV*<sup>301</sup>: The Court appeared to accept as settled law the jurisprudence of the *ECJ* in *Bier./Mines de Potasse d'Alsace* with reference to multiple jurisdictions in situations where the origin of the damage is situated in a state other than the one in which the place where the damage occurred. However, the court also referenced the later case of *Marinari./Lloyds Bank plc* (Case C-364/1993)<sup>302</sup> which limited the scope of *Bier* stating that the place where the harmful event occurred "cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere".

208 The Greek report mentions that in claims concerning defamation by the press or the media on a national level, there is a certain tendency to prefer the venue of the defendant in order to avoid jurisdictional complications.<sup>303</sup> It does, however, not indicate any cases where the Judgment Regulation is applicable and where the Greek courts would not follow the *ECJ*.

209 As to the distinction between direct and indirect consequences, the English report draws the attention to the case *Henderson./Jaouen*<sup>304</sup>, where the defendant had already been awarded damages by a French court and then proceeded for further damages before English courts because his condition deteriorated. The French court had expressly allowed further proceedings in case of deterioration. However, the English court held that Article 5 (3) JR was not applicable because the deterioration did not constitute a "fresh wrong" which was now caused in England, but an indirect damage that still connects to the original wrong in France. Article 5 (3) JR therefore leads to the

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<sup>300</sup> UK report, 3<sup>rd</sup> questionnaire, question 2.2.11.

<sup>301</sup> [2005] IESC 31.

<sup>302</sup> [1995] ECR I-271.

<sup>303</sup> Greek report (*Kerameus*), 3<sup>rd</sup> questionnaire, question 2.2.11.

<sup>304</sup> [2002] EWCA Civ 75.

French courts – the provision is deemed to require a damage directly done to the immediate victim of the tort.

210 Based on this survey, it seems fair to state that the principles for an interpretation of Article 5 (3) JR as developed in the *ECJ* case law may, of course, need some further concretisation if applied in national practice. However, there is no indication that such concretisation raises insurmountable problems or that the results reached do not adequately serve the needs of legal practice. Especially in internet cases, the courts seem to be on their way to develop reliable criteria for a localisation of torts, e. g. by asking to which country a certain website is directed.<sup>305</sup>

*bb) Multi-State Cases and the Shevill-Jurisdiction*

211 Whereas the above mentioned general aspects do not raise any fundamental problems, the situation is, to some extent, more complicated as far as multi-state cases are concerned. The starting point for these discussions is the decision of the *ECJ* in *Shevill./Press Alliance SA*.<sup>306</sup> According to *Shevill*, based on the phrase 'place where the harmful event occurred' in Article 5 (3) JR, the victim of a libel by a newspaper article distributed in several States may sue for damages against the publisher either before the courts of the State of the place where the publisher of the defamatory publication is "established" (sharply to be distinguished from the defendant's domicile), which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Member State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the forum State (so-called *mosaic theory*).

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<sup>305</sup> See e. g. the Scottish report, 3<sup>rd</sup> questionnaire, question 2.2.9, or from France *Cour d'Appel Paris*, 4<sup>ème</sup> ch., sect. A, 26 April 2006.

<sup>306</sup> [1995] ECR I-415.

- 212 As, e. g., the Austrian report points out quite correctly, the mosaic theory is applicable not only to press defamation cases but may also apply to other torts causing immediate effects in a multitude of states. Whereas this is relatively clear for internet cases<sup>307</sup>, this report notices some uncertainty concerning the application to other multi-state torts.<sup>308</sup> The English report also raises the question whether damages should be determined on the basis of the samples sold there (this was the result reached by English courts in the *Shevill* case after the *ECJ* judgment). The report moreover asks how the place of the event giving rise to the damages will be defined on the basis of an autonomous interpretation, in particular whether the *ECJ* will follow a “center of gravity approach”.
- 213 Beyond these questions of interpretation, which will probably find an answer in the course of future legal development, it is a well known fact that *Shevill* raises more fundamental questions. The statements received during the preparation of this report have been in line with this general discussion. Polish professionals underline that practical application of rules resulting from the *Shevill*-case are difficult, especially the rule that jurisdiction of Member State is limited to the value of this part of damage which were injured by the publication only in the territory of this member state. Although no practical case is reported from Poland, there is fear that this guideline may be not efficient in practice. Moreover, it should be noted that it may be advisable to better coordinate Article 5 (3) JR with the jurisdictional provisions of the Community Trade Mark Regulation (EC) No. 94/40 and the Design Regulation (EC) No. 6/2002<sup>309</sup> By contrast, the English report considers the *Shevill*-doctrine to be workable. According to the Dutch report, some Dutch lawyers even go as far as to argue that the *Shevill*-decision has to its effect that Article 6 (1) JR can be deleted.

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<sup>307</sup> In this respect, see also e. g. the French report, 3<sup>rd</sup> questionnaire, question 2.2.11.

<sup>308</sup> Austrian report, 3<sup>rd</sup> questionnaire, question 2.2.11.

<sup>309</sup> Reference to the section on industrial property (D.VII).

- 214 Based on an overall survey of the national reports and on general experience with Article 5 (3) JR, there are two possible objections against *Shevill* – both have to do with the circumstance that the alleged wrongdoer has to face responsibility under a multitude of legal systems which encompass the law of all states where a certain conduct causes effects. Firstly, the multitude of jurisdictions (which will lead to a multitude of applicable laws) results into a lack of predictability and legal uncertainty so that transnational activities may become an incalculable risk. Secondly, it is sometimes submitted that, due to the multitude of legal systems, one has to comply with the standards of all legal systems so that eventually the most restrictive legal system decides about the admissibility of a certain conduct. Especially for media cases, it is argued that this framework may unduly liberties such as freedom of trade or transnational free speech.<sup>310</sup>
- 215 However, although this line of argument is well known, no national report suggests that Article 5 (3) JR should be amended in order to overrule the *ECJ's Shevill*-doctrine. In the opinion of the general reporters, this has to do with the following aspects: Firstly, a free press is guaranteed by constitutional principles and by Article 10 EHRC in all Member States. Secondly, the *Shevill*-doctrine tries to balance the interests of the media on one hand and the interest of the victim on the other. As far as injunctive relief is concerned, the *Shevill*-doctrine has to its effect that the courts of a state of distribution could issue an injunction only within the limits of their own jurisdiction. Moreover, *Shevill* only gives a very limited jurisdiction for the payment of damages to courts the state of distribution. Seen from the perspective of the victim, there is the following choice under *Shevill*: A claimant either has to go to the courts of the state where the publisher is established in order to recover all damages suffered (which is more convenient for the alleged wrongdoer) or the victim has to collect the dif-

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<sup>310</sup> This has been discussed during the meeting with the national reporters. For statements raising this well-known issue see e.g. *Kadner Graziano* *Europäisches Deliktsrecht*, p. 86 et seq; see also *Schack*, *Internationales Zivilverfahrensrecht*, para 306, stating that *Shevill* is unconscionable for both claimant and defendant.

ferent parts of his damages in different courts, which again is burdensome. *Shevill* gives a strong incentive to either follow the forum of the defendant or to concentrate on jurisdictions where a considerable effect (which should be foreseeable for the defendant) was caused.<sup>311</sup> Moreover, the courts can be trusted to apply the *Shevill* doctrine reasonably so that, e. g., no unfair cumulating of damages will take place. As long as this is the situation, the reporters see no sufficient basis for recommending any amendments of Article 5 (3) JR.

e) *Jurisdiction in adhesion to criminal proceedings*

216 The role of civil jurisdiction for annex proceedings to criminal cases (Article 5 (4) JR) is very different in the Member States. Whereas, e. g., in France, such proceedings play an important role, their function in other legal systems, like e. g. Germany, is rather limited. This difference is owed to a diversity of legal traditions on one hand and to differences as to the legal effectiveness of such annex or adhesion proceedings on the other.<sup>312</sup> Article 5 (4) JR reflects this situation insofar as this provision refers to national Member State law in order to determine the question of jurisdiction. This situation causes several difficulties.

217 A first problem is that Article 5 (4) JR results into differences as to the jurisdiction of the Member States as far as the jurisdictional rules in criminal procedure are different<sup>313</sup> but also as far as their criminal law is different since Article 5 (4) JR only applies if a certain conduct, resulting into private law liability, also constitutes a criminal offence. It should also be noted that there are far reaching jurisdictional provi-

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<sup>311</sup> A good example for the requirement of considerable effects is given by the Scottish report, 3<sup>rd</sup> questionnaire, question 2.2.9.

<sup>312</sup> See e. g. for a comparative analysis of the French and German law in this respect *von Sachsen Gessaphe*, 112 ZZP (1999), 3–35.

<sup>313</sup> If e. g. the national transformation rules of the doorstep-selling Directive are violated, there are Member States providing for criminal sanctions (see *ECJ*, 03/14/1991, C-361/89, *Criminal proceedings against Di Pinto*, ECR 1991 I-1189) whereas others do not.

sions in the law of criminal procedure in the Member States. This report has not done intensive research as to the Member State law of criminal procedure. It is, however, a typical rule that the courts at the place where the arrest took place have jurisdiction<sup>314</sup>, a rule which sometimes is extended to other crimes unconnected to the arrest and also to accuseds.<sup>315</sup> Moreover there is a controversy whether national procedural law may allow a further extension to defendants other than the accused.

218 In this context, it should be also noted that Article 3 (2) with Annex I JR expressly prohibits jurisdiction (in the UK) based on mere presence of the defendant which, historically, is nothing but a moderate variation of jurisdiction based on the place of arrest.<sup>316</sup> The general reporters refrain from going as far as to allege that there is a contradiction between Article 3 (2) JR and Article 5 (4) JR; it makes a difference if someone has to defend in a civil matter before a court where he has to stand as a criminal defendant anyway. However, possibly in connection with issues of cooperation in criminal matters, this issue should be observed further.

219 Another problem has arisen in an unpublished German-Spanish case.<sup>317</sup> As of what point in time is a civil liability case pending in a Spanish court? A formal rule for empowering the Spanish court to deal with damages for the benefit of the victim does not exist so that any formal notion of pendency, as required by Article 30 JR, is difficult to apply here. Consequently, it has to be stated that Article 30 JR is not drafted in a way to conform with practice of criminal courts committed to order compensation to be paid to the victim.

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<sup>314</sup> E. g. German *StPO*, sec. 9.

<sup>315</sup> See e. g. French Code of Criminal Procedure, secs. 52, 85.

<sup>316</sup> See e. g. *Pfeiffer*, *Internationale Zuständigkeit*, p. 311, with further references.

<sup>317</sup> This issue has been brought to the attention of the author of this part of the report by general reporter Peter Schlosser who has been asked to give an expert opinion in this case twelve years ago but turned down this offer. The case is unpublished.

f) *Co-defendants under Article 6 (1) JR*

aa) *Article 6 (1) JR too broad?*

220 With respect to this provision, discussions address the problem whether Article 6 (1) is too broad as well as whether it too narrow. As far as the former question is concerned, there seems to be general consent that its scope of application is not too broad and that, in particular, it does not violate the right the parties to a fair hearing under Article 6 (1) ECHR if the courts apply this provision carefully. Much of the Member State case law deals with the question of how to delineate the provision's scope adequately:

221 As to the functioning of Article 6 JR, the English report gives a good example for these efforts and lists the following key points: (1) There must be a "real claim" against the anchor defendant in the court of his domicile.<sup>318</sup> There is, however, no need to show a good arguable case on the merits against the anchor defendant.<sup>319</sup> (2) The date for testing the domicile of the anchor defendant is that of the institution of proceedings against him, which will mean the date of issue of the claim form which names him as defendant.<sup>320</sup> (3) There must be a proper basis for making a claim against the co-defendant.<sup>321</sup> (4) If there is an agreement on choice of court between claimant and co-defendant, it will not be possible to rely on Article 6 (1) JR unless the co-defendant waives his right to reply on the jurisdiction agreement by appearing and submitting in the proceedings. (5) Formerly, it has been argued that, if there is a potential risk of conflict between decisions on an important issue of fact (instead of conclusions of law), Article 6 (1) JR could be relied upon to invoke special jurisdiction over

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<sup>318</sup> *The Rewia* [1991] 2 Lloyds' Rep 325. Similar case law is reported from Ireland, see *Gannon/.B&I Irish Steam Packet Company Limited and Others*, [1993] 2IR 359.

<sup>319</sup> *Et Plus SA v Welter* [2005] EWHC 2115; *Masri v Consolidated Contractors International (UK) Ltd* [2005] EWHC 944; *Casio Computer Co Ltd v Sayo (No.3)* [2001] EWCA Civ 661.

<sup>320</sup> *Canada Trust Co v Stolzenberg (No.2)* [2002] 1 AC 1.

<sup>321</sup> *Messier Dowty Ltd v Sabena SA* [2000] 1 WLR 2040. In France, this was unclear for a long time. Meanwhile this issue has been clarified by *Cour de Cassation*, 1ère chambre civile, 06/20/2006, no. 03-14553.

the co-defendant<sup>322</sup>; however, recent case law of the *ECJ* contradicts to this position.<sup>323</sup>

222 E. g. in France, similar aspects are discussed in the context of the doctrine of fraud<sup>324</sup>; a general doctrine of non abuse is also discussed in Germany.<sup>325</sup>

223 Although a lack of predictability under Article 6 (1) JR is still a problem, the overall conclusion is not a negative one. Based on this survey, it seems fair to say that the courts have been able to narrow down Article 6 (1) JR as far as necessary in order to safeguard potential defendants against inadequate fora.

*bb) Article 6 (1) JR too narrow?*

224 This is a more controversial question. In particular in industrial property rights cases, the recent development of *ECJ* jurisprudence under Article 6 (1) JR has been harshly criticised by practitioners of several Member States.<sup>326</sup>

225 As far as the application of Article 6 (1) JR raises questions as to its uniform application in the Member States, it should be noted that this, to some extent, is a consequence of differences in national laws, particularly relating to the problem of coordination between different sources of liability, namely in contract and in tort. Whereas French law applies the doctrine of non-cumul, according to which contractual claims bar a liability in tort, the English legal system, e. g., offers a choice to the claimant to express his claim either as one in contract

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<sup>322</sup> *Gascoine v Pyrah* [1994] I.L.Pr. 82.

<sup>323</sup> *ECJ*, 10/27/1998, C-51/97, *Reunion Europeenne SA./Spliethoff's Bevrachtungskantoor BV*, ECR 1998 I-6511; *ECJ*, 07/13/2006, C-539/03, *Roche Nederland BV./Primus*. In England consultees were strongly critical of the line taken in *Reunion Europeenne* though and have recommended a more generous approach be taken to facilitate the efficient administration of justice, English report, 3<sup>rd</sup> questionnaire, question 2.2.12. Austrian practice is in line with the *ECJ* case law, see national report 3<sup>rd</sup> questionnaire, question 2.2.12.

<sup>324</sup> French report, 3<sup>rd</sup> questionnaire, question 2.2.12.

<sup>325</sup> *Kropholler*, Article 6 JR, para. 16.

<sup>326</sup> For a detailed analysis see the section on industrial property and patent cases (D.VII).



or in tort, and German law is based on the principle of concurring claims: According to this principle, claims are not added. Instead, it is up to the court to apply the source of law which, based on the facts submitted by the parties, can be applied more easily or can serve as basis for the complete claim.<sup>327</sup> The national reports, however, do not give support to the conclusion that such differences are unacceptable.

226 Another issue is whether it is adequate to limit Article 6 (1) JR to cases where jurisdiction over the anchor defendant is based on domicile (Article 2 JR). As the English report argues, it may be in the interest of justice, as stated by a great number of practitioners, to base jurisdiction on a form agreement rather than the domicile, in order to avoid fragmented litigation.<sup>328</sup>

227 In the opinion of the general reporters, this suggestion deserves some merit: For instance, if there is a great number of wrongdoers and all but one have committed the alleged tortuous act in Member State A, it is still impossible to file a suit there, unless one of them (by mere coincidence) has his or her domicile there. Furthermore, according to practitioners as well as based on the experience of the general reporters, both the domicile and other bases of jurisdiction have their specific merits in such cases.<sup>329</sup> As a consequence, one could e. g. envisage a provision according to which other bases of jurisdiction are sufficient for Article 6 (1) JR provided that the court has jurisdiction over a certain quorum of defendants. That could help to guarantee that an extension of Article 6 (1) JR would be limited to courts having a real and substantial connection to the forum. The general reporters recommend further consideration of this issue<sup>330</sup>.

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<sup>327</sup> For a comparative survey see e. g. Jahr, in: Festschrift Lücke, pp. 297–322.

<sup>328</sup> English report, 3<sup>rd</sup> questionnaire, question 2.1.3.

<sup>329</sup> See para. 152 *supra*.

<sup>330</sup> See also paras. 279 et seq.

*g) Inapplicability of Article 6 (2) and Article 11 JR in Austria, Germany and Hungary (Article 65 JR)*

*aa) The Different Systems in the Member States*

228 In all European legal systems not only the claimant<sup>331</sup>, but also the defendant may add a third party to a pending litigation and extend the effects of the judgment to that party. The most common examples are actions on a warranty or guarantee; or cases where relief is sought from a third party by way of indemnity or by way of contribution to the judgment in the main proceedings. In the European Judicial Area, two different types of third party proceedings are known to the Member States:<sup>332</sup>

*(1) Third Party Proceedings under Article 6 (2) JR*

229 The first solution has been adopted by a large majority of the Member States and is reflected by Articles 6 (2) and 11 JR. According to this system, a third party may be included into pending proceedings if the defendant of these proceedings asserts a warranty or a guarantee against the third party. The typical case is found in Articles 331–333 and Articles 334–338 *NCPC*. Under these provisions, a third party may be sued at the court competent to decide the main proceedings. Accordingly, Article 333 *NCPC* provides for a head of jurisdiction which even prevails over a jurisdiction clause (binding the third party and the defendant in the main proceedings).<sup>333</sup> In the main proceedings, the second action is joined to the pending one

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<sup>331</sup> The claimant can always sue several persons in one proceeding, this situation is addressed by Article 6 (1) JR.

<sup>332</sup> For a comparative analysis see *Spellenberg*, ZZP 106 (1993), 283; *Stürmer*, in: Festschrift Geimer, p. 1307; *Kraft*, Grenzüberschreitende Streitverkündung und Third Party Notice (1997); *Otte*, Umfassende Streitentscheidung durch Beachtung von Sachzusammenhängen (1998), p. 718 et seq.

<sup>333</sup> This provision reads as follows: “Le tiers mis en cause est tenu de procéder devant la juridiction saisie de la demande originaire, sans qu’il puisse décliner la compétence territoriale de cette juridiction même en invoquant une clause attributive de compétence.”

and the third party is treated as a full party. He or she acts independently from the parties in the parallel litigation. Finally, the court pronounces a judgment in favour of or against the (third) party which is subject to enforcement under Articles 32 and 38 JR. The position of English law is even more generous. Under CPR 19, the court may add or substitute parties and consolidate the proceedings.<sup>334</sup> These provisions are based on considerations of procedural efficiency. Articles 6 (2) and 11 (2) JR directly reflect this legal concept. They provide for a (distinct) head of jurisdiction for the lawsuit against the third party which is derived from all heads of jurisdiction of the JR.<sup>335</sup>

## (2) Third Party Notice

230 The second system (of a notice of pending suit to third parties) is mainly found in Austria, Germany, Hungary, but also in Estonia, Latvia, Poland and Slovenia.<sup>336</sup> These legal systems clearly separate the main proceedings from the intervention of the third party.<sup>337</sup> In the main proceedings, no judgment against or in favour of the third party is given and the third party is only in the position of an intervenor.<sup>338</sup> Nevertheless, the third party is indirectly bound by the judgment in the main proceedings. The legal technique is as follows<sup>339</sup>: The defendant in the main proceedings may serve a notice of pending suit on the third party.<sup>340</sup> The third party is invited to join the pending proceedings, not as a party, but as an auxiliary intervenor

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<sup>334</sup> *Zuckerman*, Civil Procedure, paras. 12.1 et seq. ; *Kraft*, Grenzüberschreitende Streitverkündung, p. 180 et seq.

<sup>335</sup> On the question of whether Article 4 (2) JR also applies to the main proceedings see *infra* at para

<sup>336</sup> Spain has also recently introduced the third party notice.

<sup>337</sup> These procedural laws strongly adhere to the model of “two parties proceedings” and of a limited effect of *res judicata*.

<sup>338</sup> According to this position, the third party may assist the party of the main proceedings in the litigation, but is not in the legal position to act against the will of the parties of the main proceedings,

<sup>339</sup> The procedure is described by *Murray/Stürmer*, German Civil Justice, pp. 208–209 and pp. 517–518.

<sup>340</sup> In the European Judicial Area, cross-border service of the notice is effected under the Regulation (EC) No. 1348/2001.

and to assist the main party.<sup>341</sup> Such interventions do not require any basis for (international) jurisdiction.<sup>342</sup> If the party notified does not appear in the hearing, the main proceedings are continued regardless of this fact. If the suit is lost, the third party is bound by the findings of the judgment. Consequently, the third party will be precluded from questioning the factual or legal basis of the court's decision in a second lawsuit between the defendant in the main proceedings and the third party.<sup>343</sup> Several safeguards protect the position of the third party. Firstly, the notice on the third party about the pending proceedings must be served properly.<sup>344</sup> Secondly, the preclusive effect of the judgment of the main proceedings only occurs after the moment of the service of the notice.<sup>345</sup> Thirdly, the intervenor may oppose the procedural conduct of the assisted party. In the main proceedings, the intervenor cannot "block" the procedural conduct of the assisted party. However, in this constellation, the third party is not bound by the judgment in the main proceedings.<sup>346</sup>

231 The preclusive effects of the third party notice operate in the proceedings between the defendant of the main proceedings and the third party. If the defendant loses the main proceedings he may file a lawsuit against the third party. In these proceedings, the legal and factual findings of the judgment in the main proceedings are directly binding for the court (secs. 74 and 68 ZPO).<sup>347</sup> Accordingly, the court

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<sup>341</sup> See sec. 74 et seq. ZPO. The third party may also assist the claimant in the pending proceedings.

<sup>342</sup> Accordingly, Article 6 (2) JR is not applicable, Article 65 (1) JR.

<sup>343</sup> Accordingly, this preclusive effect of the judgment goes beyond the effect of *res judicata*, because it also includes the factual findings of the court.

<sup>344</sup> Accordingly, cross-border on the third party service is effected under Reg. EC 1346/00.

<sup>345</sup> Any interim judgment given before the filing of the notice does not bind the third party.

<sup>346</sup> This limitation is clearly expressed by sections 68 and 74 ZPO.

<sup>347</sup> Sections 68 and 74 ZPO read as follows:

Sec. 68 ZPO Effect of auxiliary third-party intervention.

"The third party in an auxiliary intervention shall not be heard, in relation to the main party, with the assertion that the legal dispute, as presented to the judge, has been decided incorrectly; the intervening third party shall be heard with the assertion that the

of the second proceedings verifies whether the conditions of secs. 74 and 68 ZPO are complied with – the court of the main proceedings does not decide on the issue whether the third party notice was effective or not. The judgment of the main proceedings only mentions the fact that the third party was served by the defendant and the (non-) appearance of the third party.<sup>348</sup>

232 Germany recently extended the application of secs. 68 and 74 ZPO (as well as Article 65 JR) to collective civil litigation: According to Articles 14 and 16 Master Proceedings Act of Nov, 1<sup>st</sup>, 2005<sup>349</sup>, which provides for collective proceedings in capital market cases, parallel actions are stayed and the common questions are decided by the *Oberlandesgericht*. Finally, the *Oberlandesgericht* renders a master decision binding for all plaintiffs of the disputes during the master proceedings.<sup>350</sup> The binding effect of a German master decision on parallel proceedings is not derived from *res judicata* (sec. 322 ZPO),

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main party conducted the lawsuit in a defective manner only insofar as the third party was prevented, by the state of the lawsuit as it was at the time of its joinder or by declarations and acts of the main party, to assert means of attack or defense, or insofar as means of attack or defense which were unknown to the intervening third party were not asserted by the main party intentionally or by gross negligence.”

Sec. 74 ZPO Effect of a third-party notice.

- (1) “If the third party joins the party who filed the third-party notice, its relation to the parties shall be determined in accordance with the principles governing auxiliary third-party intervention.
- (2) If the third party refuses to join the lawsuit or fails to declare its intention, the legal dispute shall be continued without regard to such party.
- (3) In all cases under this section, the provisions of § 68 shall be applied to the third party, with the only deviation that, instead of the time of joining, the decisive time shall be that time when joining was possible as a result of the third-party notice.”

<sup>348</sup> In Austria, sec. 21 Austrian ZPO does not explicitly provide for a preclusive effect. However, the Austrian *Oberste Gerichtshof* held that Austrian law provides for a preclusive effect similar to the German solution. The *Oberste Gerichtshof* referred to the legal situation under the Lugano Convention, *OGH*, 4/8/1997, *JB*. 1997, 368; *Rechberger*, in: *Festschrift Schütze*, pp. 711 et seq.

<sup>349</sup> The official title is: „Act on the Initiation of Model Case Proceedings in respect of Investors in the Capital Markets“, *BGBl.* 2005 I, the English text can be found at [www.bmj.bund.de/kapmug](http://www.bmj.bund.de/kapmug). The new Act is analysed by *M. Stürner*, *Model Case Proceedings in the Capital Markets – Tentative Steps Towards Group Litigation in Germany*, *C.J.Q.* 26 (2007), 250 et seq.

<sup>350</sup> The binding effect of the judgment is not derived from *res judicata*, but from a legal effect similar to the third party notice according to secs. 74 and 68 ZPO, see sec. 16 of the Master Proceedings Act, see *Wolf*, *NJW Sonderheft* 3/2006, 13.

but from a legal provision which is formed similar to the model of the third party notice according to secs. 74 and 68 ZPO.<sup>351</sup> In the European Judicial Area, the master decision is recognised under Article 32 JR and its binding effects operate under Article 65 (1) JR.<sup>352</sup>

### (3) *Evaluation of the Different Models*

233 From a comparative perspective, both systems operate efficiently. The main advantage of the first model is the concentration of connected lawsuits in one forum and the comprehensive decision on parallel disputes in one proceeding. However, the joining of parallel lawsuits among different parties may be complicated and delay the main proceedings. In addition to this, the defendant gets a privileged position, as he may sue the third party at his domicile.<sup>353</sup> The most striking advantage of this system is the clear outcome of the litigation, which is stated in the judgment in favour or against the third party.

234 The “notice system” is based on the expectation that in most cases, a second lawsuit will not be necessary. Due to the preclusive effect of the judgment in the main proceedings, the disputed facts between the defendant and the third party are addressed by the judgment in the main proceedings. Accordingly, the defendant and the third party will normally settle their dispute on the basis of the factual and legal findings of the judgment in the main proceedings. The main advantages of this model are the simplification of the main proceedings and the avoidance of the costs of a second proceeding. However, the solution is more complicated and more costly should the third party and

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<sup>351</sup> According to German procedural law, the scope of the binding effect of the judgment (*res judicata*) does not extend to the factual findings of the judgment. The legal grounds (*Entscheidungsgründe*) for a decision do not have any binding or limiting effect. Accordingly, it was impossible to bind the parallel actions by the *res adjudicata* of the master decision. As the preclusive effect of sec. 68 ZPO relates to the factual findings of the judgment in the main proceedings, the German legislator extended this model to the parallel actions in the master proceedings.

<sup>352</sup> Hess, ZIP 2005, 1713 et seq. The application of Article 65 JR is disputed by Wolf/Lange, Commentary on Section 14 KapMuG, para. 3, fn. 8.

<sup>353</sup> Stürner, in: Festschrift Geimer, pp. 1307, 1315.

the defendant not settle their dispute on the basis of the judgment in the main proceedings, as a second litigation is necessary.

235 Some current developments should be noted in this context. In Germany<sup>354</sup>, the courts deviate to some extent from the legal regime of secs. 68, 74 ZPO and allow a counterclaim against a third party.<sup>355</sup> However, such a counterclaim must be directed against the plaintiff and the third party (*parteierweiternde Widerklage*).<sup>356</sup> In exceptional cases, the counterclaim may even be directed solely against the third party (*isolierte Drittwiderklage*).<sup>357</sup> These counterclaims presuppose, as a rule, that the court of the main proceedings is competent to hear the lawsuit against the third party and that the court deems it appropriate to join the lawsuits. In recent years, the attitude of the courts is becoming more liberal in allowing a third party counterclaim when the underlying claims are closely connected.<sup>358</sup> However, in the present state of affairs, German procedural law does not generally permit the inclusion of claims against a third party for indemnity or guarantee in the main proceeding.<sup>359</sup> Nevertheless, an additional extension of the case law to constellations which are at present dealt with by secs. 68 and 74 ZPO might be welcome.

#### *bb) Third Party Proceedings under the Judgment Regulation*

##### *(1) The Legal Regime of Articles 6, 11 and 65 JR*

236 In the present state of affairs, the Judgment Regulation does not harmonise the different models, but simply addresses the jurisdic-

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<sup>354</sup> Austrian law does not allow a counterclaim against a third party, Fasching/*Simotta*, Article 96, para. 2. The issue has never been decided by case law.

<sup>355</sup> *BGH*, 02/22/2000, NJW 2000, 1871; 04/05/2001, NJW 2001, 2094; 13/03/2007, NJW 2007, 1753.

<sup>356</sup> See sec. 59 and 60 ZPO on the inclusion of parties.

<sup>357</sup> *BGH*, 04/05/2001, NJW 2001, 2094 (assignment of the claim).

<sup>358</sup> *BGH*, 03/13/2007, NJW 2007, 1753. In addition the interests of the third party defendant must not be impaired (accordingly, a third party complaint in the second instance is generally not admitted).

<sup>359</sup> *Stürner*, in: Festschrift Geimer, pp. 1307, 1313.

tional issues. The national systems are coordinated by two different provisions on third party proceedings: Articles 6 (2) and 65 JR.<sup>360</sup>

- 237 (a) Article 6 (2) JR transfers third party proceedings to the European level: Article 6 (2) JR provides for a specific head of jurisdiction against the third party which is located at the court where the main proceedings are pending.<sup>361</sup> However, jurisdiction over third parties under Article 6 (2) JR is explicitly limited by procedural fraud.<sup>362</sup> In addition to this, the exclusive grounds for jurisdiction (esp. in insurance, consumer and employment cases, but also Articles 22 and 23 JR<sup>363</sup>) prevail over Article 6 (2) JR. Furthermore, third party proceedings are subject to the general provisions of the Judgment Regulation: Articles 27 and 30 JR apply to the pendency of proceedings/lit pendens; Articles 32 and 38 JR guarantee the cross-border enforcement of a judgment against or in favour of the third party. According to the case law of the *ECJ*, the additional conditions of third party proceedings are determined by the national laws of the Member States.<sup>364</sup>
- 238 (b) Article 65 JR implements the third party notice at the European level. According to its first paragraph, the jurisdiction specified in Articles 6 (2) and 11 JR may not be resorted to in Austria, Germany and

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<sup>360</sup> Jurisdiction in insurance matters is dealt with by Article 11 JR. Under this Article, the insurance company may be sued at the domicile of the injured party, see Recital 16 (a) of Directive 2005/14/EC – this question was recently referred to the ECJ by the Bundesgerichtshof 9/26/2006, NJW 2007, 71.

<sup>361</sup> Unlike Article 6 (1) JR, the main proceedings must not be based on the defendant's domicile (Articles 2, 59 and 60 JR), but on one of the heads of jurisdiction of Articles 2 – 24 JR. .

<sup>362</sup> *ECJ*, 05/26/2005, C-77/04, *Réunion Européenne*, ECR 2005 I-4509, no. 33.

<sup>363</sup> The prevalence of exclusive jurisdictional agreements over Article 6 (2) JR is not undisputed, see *Layton/Mercer*, European Civil Practice, Article 6 (2) JR, para. 15.144 with references to the case law in the Member States. However, according to the general system of the JR, exclusive heads of jurisdiction generally prevail over the general and specific heads of jurisdiction under the JR. *Briggs & Rees*, Civil Jurisdiction and Judgments, para 2.168.

<sup>364</sup> *ECJ*, 05/15/1999, C-365/88, *Kongress Agentur Hagen GmbH./Zeehage BV*, ECR 1990, I-1845, *ECJ*, 05/26/2005, C-77/04, *Réunion Européenne*, ECR 2005 I-4509, para. 34.



Hungary.<sup>365</sup> At present, the present wording of these articles does not include the Member States Estonia, Latvia, Poland and Slovenia, which also provide for third party notices. However, the national provisions on third party notices contained in the procedural laws of these Member States apply at the European level. Accordingly, it is possible to serve a third party notice on a French party when main proceedings are pending in Hungary, Germany or Austria.<sup>366</sup> The preclusive effect of a German judgment in the main proceedings is recognised in France (and in all other Member States) according to Article 65 (2) JR.<sup>367</sup> Vice versa, defendants domiciled in the said Member States may be sued in France (and in other Member States) and the judgment given against or in favour of these parties is also recognised in Austria, Hungary and Germany and other new Member States under Article 65 (2) JR. The case law of the *ECJ* and the Member States shows that these cases are quite common in the European Judicial Area.<sup>368</sup>

*(2) Practical Impacts of Article 65 JR*

239 (a) At first sight, the non-application of Article 6 (2) JR may prejudice claimants who wish to initiate an action on a warranty or guarantee (or other third party proceedings) before a German, Austrian or Hungarian court, respectively in Estonia, Latvia, Poland and Slovenia. Yet, as explained above, German law offers a (limited) choice as far as a separate counterclaim of the defendant against a third party is admitted. However, this counterclaim presupposes jurisdiction over

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<sup>365</sup> Article 65 is not only a reservation to the JR but also – and in the first place – makes sure that the effects of the Austrian German and Hungarian instruments for dealing with third-party interests are effective on the European level. It might be called into question whether Articles 33 ff. would be a sufficient basis to assure that such effects are respected in the other Member States, see Additional Communication of Prof. *Oberhammer* and Dr. *Domej* to the general reporters of May 24, 2007.

<sup>366</sup> According to the legal situation in the Member States, the scope of the provision should also include Estonia, Latvia, Poland and Slovenia.

<sup>367</sup> The recognition of the preclusive effects of Articles 68, 74 ZPO is subject to the conditions of Article 34 JR, *Kropholler*, Article 6 JR, paras. 23 and 24.

<sup>368</sup> *ECJ*, 05/15/1999, C-365/88, *Kongress Agentur Hagen GmbH./Zeehage BV*, ECR 1990 I-1845.

the third party according to Articles 2–26 JR.<sup>369</sup> Otherwise, the plaintiff must resort to secs. 74 and 68 ZPO and serve a third party notice on the third party. Information obtained from lawyers in Member States shows that the third party notice is also (often) applied in international litigation.<sup>370</sup>

240 In addition to this, some uncertainties exist with regard to the application of secs. 74 and 68 ZPO in international cases. In internal cases, German courts regularly do not address the admissibility of the third party notice. As explained above, it is the task of the court of the second proceedings (between the defendant and the third party) to verify whether the conditions of secs. 68 and 74 ZPO are met. Under Article 65 (1) JR, this verification is often performed by the courts of other Member States. This constellation takes place when the third party is not subject to the jurisdiction of Austrian, German or Hungarian courts. Yet, the application of foreign procedural law is a rather unusual task for civil courts in international cases. As a matter of principle, courts only apply the *lex fori*. In German legal literature, some authors have proposed that the courts of the main proceedings should explicitly address the admissibility of the third party notice.<sup>371</sup> Such practice would certainly facilitate the application of secs. 68 and 74 ZPO in cross-border cases. Unfortunately, German courts have not yet taken up the proposal.<sup>372</sup>

241 An example demonstrates the practical difficulties encountered with the application of Article 65 JR:<sup>373</sup> A German wine merchant ordered

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<sup>369</sup> As modern German procedural law tentatively permits third party counterclaims, it seems advisable to delete Article 65 (1) JR and to extend the scope of Article 6 (2) JR to Germany. The same considerations apply to Austria and Hungary.

<sup>370</sup> Prof. Hess recently discussed this issue with practising lawyers at the Deutscher Anwaltstag in Mannheim. There was a strong tendency favoring the resort to the third party notice in international litigation.

<sup>371</sup> Hess, JZ 1998, 1021, 1029; v. Hoffmann/Hau, RIW 1996, 89. Contrary opinion Roth, IPRax 2003, 515, 517; Stein/Jonas/Bork, sec. 72 ZPO, para. 10d.

<sup>372</sup> OLG Köln, 6/3/2002, IPRax 2003, 531; OLG Hamburg, 6 W 102/105, judgment of 11/28/2005 – unpublished.

<sup>373</sup> The case was reported by the French attorney Mtre. Hiblot, Paris, to Prof. Hess. The French lawyers asked for a clarification of the German provisions.

Bordeaux wine from France. The seller organised the transport from Bordeaux to Meckenheim (Germany) which was undertaken by a French carrier. The carrier was insured with a French insurance company. The lorry with the wine was parked in an unsecured parking lot over the weekend. During that time several pallets containing 182 boxes of wine worth about € 330.000 were stolen. Finally, proceedings were instituted against the seller in the *Landgericht Hamburg*, and the carrier sent a third party notice to the French insurer. The insurer did not appear in the German proceedings.<sup>374</sup> Later, the carrier instituted proceedings against the insurance company in France. In these proceedings, the preclusive effect of the German judgment was disputed – it was also disputed in additional, parallel proceedings in Germany (in the Regional Court Bonn). The practical problem of the French carrier was, however, to inform the judges in France about the preclusive effects of the German judgment under German law. In addition to this, the French party was obliged to litigate twice on the same issue: Firstly as a defendant in Germany and later to claim the reimbursement of the German judgment in France.

242 This example demonstrates that the “recognition” of the effects of the third party notice in other Member States is difficult. Accordingly, it seems advisable to complement Article 65 (1) JR by an additional sentence. Thus the provision should state that the court in the main proceedings shall decide on the admissibility of the third party notice. Under the new provision, the courts of the other Member States will be relieved from the verification whether the conditions of the third party notice under Austrian, German or Hungarian law are met.<sup>375</sup>

243 bb) According to the wording of Article 65 (1) JR, persons domiciled in Germany, Hungary and Austria may be sued under Article 6 (2) JR in other Member States. Published case law shows that this type of

<sup>374</sup> For a foreign party, an appearance as intervenor in an Austrian, German or Hungarian court may be burdensome, as their respective procedural laws do not know this procedural institution.

<sup>375</sup> This amendment corresponds to proposals put forward by the legal literature see *v. Hoffmann/Hau*, RIW 1997, 91.

litigation is a common phenomenon in Europe.<sup>376</sup> In the legal literature, Prof. *Geimer* has raised doubts as to whether Article 65 JR is compatible with Article 12 EC-Treaty.<sup>377</sup> Under Article 65 JR persons domiciled in Austria, Germany and Hungary are not protected from being sued under Article 6 (2) JR in other Member States, judgments rendered in these Member States are recognised and enforced in Germany.<sup>378</sup> Conversely, these persons must litigate twice when they are sued in their home countries and intend to implement a warranty or similar kind of guarantee in the European Judicial Area.

244 However, as demonstrated by the example above, third party notices are also available in relation to persons not domiciled in Austria, Germany and Hungary.<sup>379</sup> Certainly, disputes involving defendants domiciled in these Member States might occur more often than disputes against defendants coming from other Member States. However, third parties from other Member States who are targeted by third party notices are equally obliged to defend themselves twice. Accordingly, the criticism on Article 65 JR goes too far. In many cases, a second proceeding is not necessary, because the defendant and the third party might settle the case. Thus, the present situation does not amount to a direct or indirect discrimination of litigants domiciled in these Member States.<sup>380</sup>

### *cc) Possible Improvements*

245 From a legal-political perspective it seems advisable to improve the legal situation in Austria, Germany and Hungary.<sup>381</sup> However, the admissibility of third party counterclaims (and similar relief) depends

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<sup>376</sup> Example: *Rechtsbank Assen*, 5/7/1985, N.J. 1985 para. 812; *ECJ*, 05/15/1990, C-365/88, *Kongress Agentur Hagen GmbH./Zeehaghe BV*, ECR 1990 I-1865.

<sup>377</sup> *Geimer*, IPRax 2002, 69, 74; *Rüfner*, IPRax 2005, 500.

<sup>378</sup> Example: *OLG Hamburg*, 08/05/1993, IPRax 1995, 391.

<sup>379</sup> As well as in Estonia, Latvia, Poland and Slovenia.

<sup>380</sup> Same opinion: *Schlosser*, Commentary to Article 6 JR, para. 8.

<sup>381</sup> In this context, it should be noted that Switzerland recently adopted a mixed system, providing equally for third party notices and actions for warranty.

on the internal procedural laws of the Member States concerned. Any improvement of the current situation seems primarily a matter for internal legislation, not for Community action.

246 In the present state of affairs, different avenues seem possible. At first sight, the creation of a uniform rule seems a real “Community-minded solution”. However, creating a uniform rule would presuppose that such a regime (based on the model of the national laws of some of the Member States) was also acceptable for (and corresponded to practical needs of) all Member States. Seen from the background of the existing different models, the adoption of the Belgian-French model may entail considerable changes to the existing procedural practices in other Member States, because the “Leitmotiv” in their procedural systems is to avoid a complication of the proceedings by clearly separating the main proceedings from secondary proceedings.<sup>382</sup> In these Member States, complex litigation involving the same party in different roles (as a plaintiff and as a defendant) is either unknown or a rare exception. From the perspective of these Member States, the abolition of Article 65 JR would imply a change of the (internal) procedure and not of the rules on jurisdiction and, accordingly, go beyond the (present) scope of the JR.<sup>383</sup> However, as described above, the procedural laws of some Member States are currently changing and permitting “third party counter claims”. Therefore, the deletion of the first sentence of Article 65 JR will open the door for actions on warranty and similar remedies in these Member States in international cases and create a genuine European rule for cross-border proceedings. This proposal would create a more open and competitive procedural situation among the Member States without prescribing a uniform solution for all national jurisdictions.<sup>384</sup>

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<sup>382</sup> Rosenberg/Schwab/Gottwald, *Zivilprozessrecht* (16<sup>th</sup> e. 2004), § 40, para 26 et seq.

<sup>383</sup> Communication of the Austrian reporters (Prof. Oberhammer/Dr. Domej) to the general reporter of May, 24, 2007.

<sup>384</sup> In addition to this, it does not seem advisable to provide for a binding uniform rule (application of Article 6 (2) JR) at the Community level without prescribing any change of the internal procedures of the Member States. As the case law shows, third party proceed-

- 247 Therefore, a complete deletion of Article 65 JR should not be recommended. In the present state of affairs, the procedural systems of the Member States with regard to third party proceedings are too diverse. To completely delete Article 65 JR would entail a considerable change of the procedural practice in Austria, Germany and Hungary, furthermore in Estonia, Latvia, Poland and Slovenia.<sup>385</sup> Without parallel reform of national legislation, litigants domiciled in these countries would neither dispose of the third party notice nor of third party proceedings.<sup>386</sup>
- 248 In addition to this, it must be noted that the legal-political superiority of the third party proceedings in relation to the third party notice has not yet been clearly established. Accordingly, it seems more appropriate to modify Article 65 (1) JR to a limited extent and to provide for the application of Article 6 (2) and 11 JR in all Member States. Due to this amendment, the case law in these Member States may change and permit counterclaims and similar relief against third parties domiciled in other EC-Member States. Eventually, in these Member States the litigants will finally have a choice between third party proceedings and third party notice.
- 249 After all, it must be noted that all third party proceedings (equally the warranty and the third party notes) generally impose a heavy burden on the third party. Under Articles 6, 11 and 65 JR third parties must defend himself in a court without any relationship to him or the subject matter of the claim against him.<sup>387</sup> Recent case law to articles 6

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ings often involve domestic third parties and third parties from other Member States. Treating them differently under European and national laws may impair their right of equal treatment in civil litigation.

<sup>385</sup> Consequently, the complete deletion of Article 65 JR would amount to a harmonisation of the internal procedural laws of the Member States. In the present state of affairs, the main objective of the Judgment Regulation is to coordinate the different procedures of the Member States without harmonising them, see *supra* at D.I.2, para. 63.

<sup>386</sup> A simple deletion of Article 65 JR would not entail the introduction of warranty proceedings in these Member States. In addition to this, the procedural laws of those Member States must be adapted in order to permit actions for warranty.

<sup>387</sup> *Stürmer*, in: Festschrift Geimer, pp. 1307, 1314 quotes as an example the case that goods are sold by a Greek seller to a German buyer who sells them to a Portuguese cus-

(2) and 11 JR clearly shows that insurers and other litigants must be aware to be sued in any Member State.<sup>388</sup> What counts in this respect, is the place of the harmful event and (more often) the domicile of the infringed person.<sup>389</sup> Any substantial relationship between the deciding court and the underlying claim is not required. From this perspective, the legal regime of Articles 6 and 11 JR is not in line with the general policy of the JR, but provides for exorbitant grounds of jurisdiction encouraging forum shopping. However, it is not recommended to change generally the jurisdictional regime on third party proceedings under the JR. But it seems to be appropriate to clarify Articles 6 (2) and 65 JR so that the jurisdiction of the court of the main proceedings cannot be based on Article 4 JR,<sup>390</sup> but only on the heads of jurisdiction of Articles 2, 5-24 JR.

250 Conclusion: It seems advisable to amend Article 65 (1) JR as follows:

251 *The first sentence of para. 1 should be deleted. The second sentence of Article 65 should be framed as follows: "In Austria, Germany, Hungary, Estonia, Latvia, Poland and Slovenia resort to Articles 6 (2) and 11 is permitted by virtue of the respective procedural laws. Any per-*

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tomer. The customer initiates legal proceedings in Lisbon, the German defendant sues the Greek for a guarantee under Article 6 (2) JR in Lisbon. Defending himself against the lawsuit in Portugal may amount to a heavy burden for the Greek defendant. However, the situation is not different under German law, as the opposite example demonstrates. A Portuguese businessman delivers goods to a Greek merchant who sells them to German customers. The customers start proceedings in Berlin against the Greek party and the Greek defendant serves a third party notice (Articles 74 and 68 ZPO) to the Portuguese seller. In this constellation the Portuguese seller must intervene in Germany for the preservation of his legal position. Accordingly, the position of the third party is similar in both alternatives. He must defend himself abroad in a forum without any substantial connection to the substance matter of the claim.

<sup>388</sup> Cour de Cassation, 5/10/2006, *Axa Colonia Versicherung AG ./ Soc. Dorey et autres*, Rev. Crit. 2007, 157 (contractual relationship in France, the German insurance company must defend himself in France); Higher Regional Court Hamburg, 4/28/2006, NJW-Spezial 206, 499 (Accident in England, the British insurance company was sued by the German victim in Germany); Bundesgerichtshof, 9/26/2006, NJW 2007, 71 (Accident in the Netherlands, the Dutch insurance company is sued by the German injured party in Aachen – the BGH referred the case to the ECJ).

<sup>389</sup> *Cytermann*, Rev. Crit. 2007, 159 et seq.

<sup>390</sup> *Briggs&Rees*, Civil Jurisdiction and Judgments, para. 2.168; French Courts based the jurisdiction of the main proceedings on Article 14 Code Civil, TGI Paris, 2/22/1990, Clunet 1991, 152; the C. Cass. rejected the *pourvoir en cassation*, 5/14/1992, Clunet 1993, 153 (*Huet*), see *Gaudemet-Tallon*, Compétence, para 250 with further references.

*son domiciled in another Member State may be sued in the courts of those Member States as prescribed by Annex IV to the JR.” Jurisdiction under this provision shall not be based on the grounds provided for by Article 4 (2).*

*Accordingly, a new Annex IV to the JR should contain information on the proceedings of those Member States providing for the third party notice.*

252 *Two new sentences should be added to the first paragraph which can be drafted as follows:*

*“The court of the main proceedings shall decide on the admissibility of the third party notice. The exclusive heads of jurisdiction prevail over the third party notice.”<sup>391</sup>*

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<sup>391</sup> As the third party notice is not considered as a distinct proceedings, the predominant opinion in Germany does not provide for its exclusions by exclusive heads of jurisdiction, especially by choice of court agreements. However, it seems to be appropriate to deal this issue equally under articles 6(2) and 65 JR and to provide for the prevalence of the exclusive heads of jurisdiction under the JR, *Kropholler*, Commentary on Article 6 JR, para 22.



## *h) Maritime Matters*

### *aa) Introduction*

253 The Judgment Regulation governs maritime matters to the same extent as the other issues. However, it must not be overlooked that maritime matters are characterised by some conspicuous particularities. Therefore, we approached 18 law firms specialised in this field. Only four responded, but they provided very interesting information. Of particular value and rich in analysis is a paper delivered at the request of the Dutch national reporter by the Netherlands Maritime and Transport Law Association.

254 The only provision of the Regulation dealing specifically with maritime matters is Article 7 JR<sup>392</sup>, which, however, refers only to a very particular situation. Subject to a judgment of the Appellate Court of Rouen<sup>393</sup>, the provision as such has left no traces in case law.

255 Yet, the provision refers to a very particular device of maritime law, namely the possibility for a shipper or a ship-owner to limit his liability by using judicial proceedings to set up a liability fund. One of the law firms interviewed stated that the coordination of liability funds and individual claims works well. None of them was fundamentally critical in this respect. However, the impact of such a device on individual proceedings for liability and its limiting effect has given rise to some issues. The most important part of the evaluation's section relating to maritime matters must deal with those connections (see *infra* para. 256). A few minor problems remain worth discussing (see *infra* para. 279).

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<sup>392</sup> Article 5 (7) and Article 64 are negligible in the context of this evaluation.

<sup>393</sup> See below fn. 404.

*bb) Jurisdiction for General Limitation Proceedings*

256 In its *Mærsk* ruling of 14<sup>th</sup> October 2004<sup>394</sup> the Court of Justice made it crystal-clear that proceedings for setting up the fund and proceedings for establishing or limiting individual liability did not involve the same cause of action and, hence, were not mutually exposed to the *lis pendens* effect. The Court of Justice, however, did not exclude that Article 22 JC (now Article 28 JR) could be applied. Nonetheless, several issues are to be clarified.

*(1) Jurisdiction for Setting up a Liability Fund*

257 The proceedings for setting up a liability fund are not necessarily directed against an individual creditor as “defendant”. A mere application not directed against anybody is the act by which the proceedings may be instituted. Germany<sup>395</sup>, France<sup>396</sup> and the Netherlands<sup>397</sup> have such a system. In such a case, the system of Articles 2 et seq. JR cannot operate because the bases of jurisdiction provided there pre-suppose a defendant to be sued. The proceedings for setting up a general liability fund ancillary to individual litigation are dealt with below.

258 In most cases the legal basis for proceedings to establish a liability fund is either the Convention of 10<sup>th</sup> October 1957<sup>398</sup> or the London Convention of 19<sup>th</sup> November 1976 intended to supersede the Convention of 1957<sup>399</sup>. In some Member States, for example in Germany, comparable rules govern inland navigation.<sup>400</sup> Though the point has never been made in legal doctrine, let alone in case law, it seems to be commonly accepted that under the Judgment Conven-

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<sup>394</sup> ECJ, 10/14/2004, C-39/02, *Mærsk./de Haan*, ECR 2004 I-9657 = Rev. crit. 2005, 118.

<sup>395</sup> Secs. 1, 2 Seerechtliche Verteilungsordnung of 07/25/1986, BGBl. I 1130.

<sup>396</sup> Décret of 10/27/1967, see *Bonassies/Scapel*, Droit Maritime, 2006, No. 446.

<sup>397</sup> Report of the Netherlands Maritime and Transport Law Association

<sup>398</sup> German BGBl. 1972 II 653, also in English and French.

<sup>399</sup> German BGBl. 1986 II 786, also in English and French.

<sup>400</sup> For details see MünchKomm/Schmidt, sec. 786a No. 2 ZPO.

tion and now under the Regulation, the Member States are free to vest their courts with jurisdiction to set up a liability fund.

259 In practice, the real problem is, how the setting up of the fund affect individual claims and *vice versa*.

(2) *Limitation of Liability and Recognition of Foreign Judgments*

260 In German law a judgment ordering the shipper or ship owner to pay damages must be executed to its full amount unless the possibility of limitation of the shipper's liability is under explicit reserve (sec. 305a German ZPO). It is unclear whether this rule applies as well if the liability fund is set up by a foreign court under foreign law. For instance, should a German judgment have to be recognised and enforced abroad the way it is drafted?

261 A Hamburg law firm informed us that the issue was dealt with by German and Danish courts.<sup>401</sup> The matter has extensively been discussed by *Erling Selvig* in the essay "The Lugano Convention and limitation of ship owner's liability".<sup>402</sup> The crucial part of the report is drafted as follows.

262 "The question arose first in the "UNO". Following a collision in the Kiel Canal, the wreck of the "UNO" had to be removed by the German maritime authorities (WSN), who thereafter sought and obtained a German judgment holding the Danish owners liable for the costs of the clean-up operation. Under German law, the claim did not come under the rules of the 1976 LLMC Convention, as Germany had made the necessary reservation on acceptance of the convention and had thereafter enacted a special limit on liability for such claims (HGB § 487). After having obtained a final judgment for a sum equivalent to this limitation amount, the WSN sought recovery via the Enforcement Court (*Fogedretten*) in Fredericia (2004-02-06). The ship owners, who

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<sup>401</sup> *LG Itzehoe*, 11/12/2002 – 5 O 136/02 concerning the „Arrest“; *LG Itzehoe*, 04/29/2003 – 5 O 137/02, substance of the matter – not published. Both judgments were not appealed. The Danish courts are referred to in the following quotations.

<sup>402</sup> Scandinavian Institute of Maritime Law Yearbook 2005, pp. 1 et seq. The case is summarised there on pp. 21 et seq.

considered the WSN's claim, together with other claims arising from the accident, to be subject to global limitation in Denmark (MC § 172 No. 4), where somewhat later able to constitute, as a result of enforcement proceedings, a limitation fund pursuant to MC § 177 at the Maritime Commercial Court (Sø-og Handelsretten (2004-04-05)).”

263 “The Enforcement Court then ruled, in its decision (2004-09-13), that the 1976 LLMC Convention took precedence over the Brussels' Convention 1968, and that the German judgment could therefore only be enforced in Denmark insofar as was permissible under rules in the maritime code deriving from the 1976 LLMC Convention. Since the limitation fund had not been constituted before the judgment became final, enforcement could nonetheless be sought pursuant to MC § 180. The ship owner appealed the decision, arguing that the exception in Article 57 of the Brussels Convention 1968 encompassed the 1976 LLMC Convention, that the High Court (Landsretten) was therefore obliged to dismiss the execution proceedings and that the case should be referred to the Maritime Commercial Court so that liability for the WSN's claim could also be limited pursuant to Danish maritime law.”

264 “The Western High Court (Vestre Landsret), however, found in its decision (2005-02-23), that the WSN was entitled to have a final German judgment recognised and enforced in Denmark pursuant to Articles 25 et seq. JC, and that it was not possible for the court to refer the case to the Maritime Commercial Court. The court referred to the fact that the ship owner could have constituted a limitation fund at the German court and that the limitation fund at the Maritime Commercial Court was only established after the German judgment became final. The court stated, in brief, that ‘Article 57 of the convention on jurisdiction cannot lead to any other result, in that the London convention does not establish rules governing the competence of the court or the recognition or enforcement of court decisions.’

265 The question of whether the claim arising under the German judgment could in any case only be satisfied out of the limitation fund resurfaced to its full extent in a decision by the Maritime Commercial Court (2005-05-11). The WSN argued that the claim that was the subject of the Western High Court's decision should be dismissed as a

claim against the fund, i. e. should be excepted from limitation, but the Maritime Commercial Court did not agree:

- 266 ‘Pursuant to Article 57 of the EU convention on jurisdiction [1968], it [the convention] does not affect conventions to which the contracting States are or will be parties, and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. The 1976 convention, in Articles 11–13, contains detailed rules on the constitution of a limitation fund, the distribution of the fund and the barring of other legal proceedings following the constitution of a limitation fund, including a barring of arrest proceedings. These provisions, taking also into consideration the Ministry of Trade and Industry’s intentions in relation to its publication of proposed amendments to the maritime code, must... necessitate that the 1976 convention and the 1996 protocol must take precedence over the EU convention, cf. Article 57 of the EU convention.’”
- 267 “On this basis, the proceedings relation to the “UNO” were concluded by a decision of the Maritime Commercial Court (No. 2005-08-12), which distributed the limitation amount between the WSN and other claimants. The outcome was that the WSN recovered 80% of the amount awarded to it under the German judgment, which probably explains why the court’s interpretation of Article 57 of the Brussels Convention 1968 was subsequently not appealed to the Supreme Court. But the Maritime Commercial Court’s decision, both in principle and in practice, conflicts with the previous final German judgment and is therefore also in conflict with EU/EEA rules.”
- 268 As a matter of fact, in its judgment of 17<sup>th</sup> October 2005 concluding the *Mærsk* litigation, (previously referred to the *ECJ*) the Danish Supreme Court did not have any doubt that even a decision ordering a liability fund to be set up must be recognised to its full extent. After the fund has been set up, a claim not registered with the administration of the fund is precluded. It should, however, not be disregarded that in that case the Danish judgment was to be given subsequently to the establishing of the fund and entailed its setting up.
- 269 Apparently, Dutch law does not provide for judgments conditioned on subsequent limitations pursuant to maritime law. It is to be presumed

that many other legal systems do not provide for such judgments either. Therefore, the Netherlands Maritime and Transport Law Association is concerned that “questions with regard to *lis pendens* and related actions may arise as is obvious from the recent case”.<sup>403</sup> According to this ruling, no connection of *lis pendens* exists between general limitation proceedings and individual liability litigation. In jurisdictions not providing for a conditional awarding of damages, this must certainly be of concern. Therefore, the Association proposes the insertion of a new provision, “whereby after limitation proceedings have been issued and all claimants have been invited to submit their claims to the limitation fund, these claims are – from that time on – only actionable at the court where the limitation fund is established”.

270 In practice, this proposal would amount to a *vis attractiva limitationis* (in analogy to *vis attractiva concursus*) making the debtor’s domicile the mandatory basis of jurisdiction. This solution would make sense. Otherwise, the distribution of the fund would be postponed until the last pending proceedings on liability was definitively resolved. Furthermore, following the proposal, liability issues would be settled according to equal standards which would certainly strengthen the moral credit of the judgment rendered, since victims of an occurrence of damage form by necessity a community of solidarity.

### (3) *Rules for Limitation Proceedings Ancillary to Individual Claims*

271 1. The Netherlands Maritime and Transport Law Association makes also the following point:

272 “...it is felt that Article 7 of Regulation 44/2001 (Article 6a of the Brussels and Lugano Conventions) no longer serves any relevant purpose. The Article was included in the Brussels Convention in order to solve jurisdiction problems in connection with the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships (Brussels, 10<sup>th</sup> October 1957). These problems do not exist with regard to the Convention of Limitation of Liability for Maritime

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<sup>403</sup> The *Mærsk* case of the Court of Justice.

Claims (London, 19<sup>th</sup> November 1976) and/or the protocol of 1996 to amend the Convention of Limitation of Liability for Maritime Claims, 1976 (London, 2<sup>nd</sup> May 1996), which have succeeded the 1957 Convention. As a matter of fact Article 11 of the 1976 Convention which is not changed by the 1996 Protocol contains a rule on jurisdiction with regard to limitation proceedings. Therefore, maintaining Article 7 of Regulation 44/2001/Article 6a of the Brussels and Lugano Conventions seems to create rather than solve problems.”

273 However, it must not be overlooked that in most jurisdictions, even general limitation proceedings must name an individual creditor as a pseudo-defendant. It is just Article 7 JR which gives for that case a jurisdictional basis for limitation proceedings. Article 11 of the 1976 Convention is drafted as follows:

274 “Any person alleged to be liable may constitute a fund with the court... in any State Party in which legal proceedings are instituted in respect of claims subject to limitation...”

275 Against this background, Article 7 JR empowers the ship-owner to establish at his own domicile a basis of jurisdiction for limitation proceedings. Normally, individual proceedings “in respect of claims” for liability are supposed to be instituted against the ship owner at the latter’s domicile. If the ship owner seeks a declaration to the result that he is entitled to limitation under the normal rules of the Judgment Regulation he would have to sue the victim in the latter’s domicile or at the place of the occurrence of damage (if any beyond the high sea). Article 7 JR vests the court competent for claims against the ship owner also with jurisdiction with regard to claims that the latter is entitled to limitation of his liability. Such a lawsuit is also a lawsuit “in respect of claims subject to limitation”. Hence, due to the cumulative application of Article 11 of the 1976 Convention and of Article 7 JR, the practical result is that the ship-owner or carrier, by suing one of the alleged victims for declaratory relief regarding the limitation of his liability at the place of his own domicile, can always institute general limitation proceedings at his own domicile (or, if any, at the place of the occurrence of damage).

- 276 As limitation proceedings resemble insolvency proceedings to a high degree, this may be regarded the proper place of jurisdiction.
- 277 2. However, Article 7 JR does not invariably provide for a concentration of all individual proceedings relating to the limitation of liability in the court where the fund has been set up or was about to be set up. In a case where the fund was set up in London, the Appellate Court of *Rouen*<sup>404</sup> correctly decided that proceedings for limiting liability could be brought at the French domicile of the ship-owner. Previously, the London court had even declined its jurisdiction for that case. This result, however, is not satisfactory. The claims brought against the ship-owner are normally interrelated, because they stem from the same occurrence. Therefore, it is in the interest of efficiently administering justice to facilitate consolidated proceedings.
- 278 In summary: A provision providing for consolidated proceedings including all the victims and their risks of being subjected to a limitation of liability are highly recommendable.

### *cc) The Remaining Issues*

#### *(1) Bills of Lading*

- 279 It is a matter of course that the printing of a jurisdiction provision on the reverse side of the bill of lading does not comply with the formal requirement of Article 17 JC (now Article 23 JR). After having reminded of that, in the ruling of the *Russ* case<sup>405</sup>, the Court of Justice made it clear that a subsequent holder of a bill of lading may become bound to a jurisdiction provision therein if “by virtue of the relevant national law, the third party, upon acquiring the bill of lading succeeds to the shipper’s rights and obligations”<sup>406</sup>.

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<sup>404</sup> Judgment of 07/26/2000, *Darfur*, DMF 2001, 109.

<sup>405</sup> *ECJ*, 06/19/1984, C-71/83, ECR 1984, 2417.

<sup>406</sup> In the bill of lading, a beneficiary may already be named. Then he is a third-party beneficiary who is of course also bound by the conditions of the basic contract. The judgment of 12<sup>th</sup> May 2005 given by the Court of Justice on 05/12/2005, in *Société finan-*



280 The remaining elements of the Court's ruling deal with the relationship of the two original parties to the transportation contract and are drafted such as follows:

281 "A jurisdiction clause contained in the printed condition on a bill of lading satisfies the conditions laid down by Article 17 of the Convention:

If the agreement of both parties to the conditions containing that clause has been expressed in writing, or...

If the bill of lading comes within the framework of a continuing business relationship between the parties, insofar as it is thereby established that the relationship is governed by general conditions containing the jurisdiction clause...".

282 This ruling, however, disregards two issues:

283 1. The first one relates to the formal requirements specified by the Court. Normally, only the carrier (captain of the vessel) expresses himself in writing but not the shipper who may perhaps confirm in writing that the bill of lading has been handed over to him. Nonetheless, it appears to be common that an express jurisdiction agreement in the preprinted text of the bill of lading is binding upon the shipper. This "form" is now covered<sup>407</sup> by Article 23 (1) (c) JR, which did not apply to the *Russ* case.<sup>408</sup>

284 The crucial issue of form, however, is a jurisdiction provision in the charter-party to which the bill of lading makes a general reference ("all terms and conditions as per charter party"). In case of a dispute and short deadlines to meet, it may become difficult for the holder of the bill of lading to identify the respective charter-party and the terms

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*cière et industrielle du Peloux./Axa Belgium and Others*, C-112/03, ECR 2005 I-3707 is limited to policy beneficiaries in insurance matters, in which the third-party beneficiary is now expressly referred to in Article 13 (2) JR, thus indicating that he is under independent protection.

<sup>407</sup> Clearly to be inferred from the *Castelletti* and *Coreck* cases: ECJ, 03/16/1999, C-159/97, *Trasporti Castelletti Spedizioni Internazionali Spa./Hugo Trumphy Spa*, ECR 1999 I-1597; ECJ, 11/09/2000, C-387/98, *Coreck Maritime GmbH./Händelsveem BV a.o.*, ECR 2000 I-9327.

<sup>408</sup> According to *Kropholler*, Article 23 para. 62 this is the ideal teaching example for a commercial usage.

and conditions thereof. The problem has not been discussed so far. The comparable issue, however, is extensively dealt with in the context of arbitration provisions in a charter-party.<sup>409</sup> The English Court of Appeal did not recognise a general reference to the charter-party without specifically mentioning the arbitration provision therein.<sup>410</sup>

285 2. Second, a further point has been raised by the Netherlands Maritime and Transport Law Association. It states:

286 “The presumption... that a third-party bill of lading holder becomes vested in all rights and becomes subject to all obligations of the shipper, seems to show little understanding of the legal notions in operation in respect of bills of lading”.

287 They further refer to the ruling of the Court of Justice given in the *Coreck* case<sup>411</sup> specifying the ruling of the *Russ* case and stating:

288 “A jurisdiction clause agreed between a carrier and a shipper which appears in a bill of lading is enforceable against a third party bearer of the bill of lading if he succeeded to the rights and obligations of the shipper under the applicable national law when he acquired the bill of lading. If he did not, it must be ascertained whether he accepted that clause having regard to the requirements laid down in the first paragraph of Article 17 of the Convention<sup>412</sup>, as amended”.

289 The Association continues its explanations by saying that this ruling

290 “...is interpreted by the courts of some countries so as to require the third-party holder to succeed the shipper in all rights and obligations. As this usually is impossible under the law governing bills of lading, the carrier is not able to invoke a jurisdiction clause against a bill of lading holder, while the carrier in fact will be allowed under the same

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<sup>409</sup> See *Trappe*, LMCLQ 1999, 337 ff.

<sup>410</sup> *The Verena* [1983] 3 All E.R. 645.

<sup>411</sup> ECJ; 11/09/2000, C-387/98, *Coreck Maritime GmbH./Handelsveem BV and others*, ECR 2000 I-9337.

<sup>412</sup> *Bonassies/Scape*, Droit maritime, No. 1165 is vigorously and correctly critical with this drafting because it is logically impossible to ascertain whether the third party holder of the bill of lading has accepted the jurisdiction provision under the requirements of Article 23 JR. Those requirements, in turn, refer to the knowledge of the contracting parties at the time when entering into the agreement.

national law to invoke all other clauses of the bill of lading against the bill of lading holder. This seems to be an abnormality”.

291 The indicated difficulties in applying Article 23 JR to bills of lading are corroborated by the recent development of French and Belgian case law<sup>413</sup>. According to the judgments *Nagasaki*<sup>414</sup> of the First Chamber of the *Cour de Cassation*, French law does not by itself bind the third party holder (consignee of the goods) to a jurisdiction provision in a bill of lading<sup>415</sup>. By express terms, the Commercial Chamber of the same court<sup>416</sup> ruled that the mere delivery of the bill of lading or even the cargo to the consignee or a further third party holder neither amounted to assuming all the rights and obligations of the shipper nor to consenting to the jurisdiction provisions inserted into the bill of lading. A Belgian court is of the opinion that by submitting to the bill of lading a third party holder declares his consent to all the conditions included therein<sup>417</sup>. The recent case law of the French *Cour de Cassation* specifically deals with European law.<sup>418</sup> The Appellate Courts of *Aix*<sup>419</sup> and *Paris*<sup>420</sup> had equally made that point precisely in the context of Article 17 JC (corresponding to Article 23 JR)<sup>421</sup>.

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<sup>413</sup> Extensively explained by Bonassies/*Scapel*, *Droit maritime*, nos. 1157 et seq.

<sup>414</sup> First Chamber of the *Cour de Cassation*, 04/29/1994, DMF 1995, 209 confirmed by judgment of 03/04/2003, Eur TL2003, 321.

<sup>415</sup> Conform: *Hof Antwerp*, 06/27/2005, Eur TL 2005, 704; *Rechtsbank van Koophandel Antwerp*, 02/18/2005, Eur TL 2005, 671.

<sup>416</sup> Judgment of 01/16/1996, *Chang Ping*, DMF 1996, 393; conform: Judgment of 10/15/1996, *Köln Atlantic*, DMF 1997, 705; judgment of 12/08/1998, *Silver Sky*, DMF 1999, 1007; judgment of 02/25/2002, *Apt Mariner*, DMF 2003, 41; judgment of 12/07/2004, *Jerba*, DMF 2005, 133. Equally *Hof Antwerpen*, judgment of 06/27/2005, Eur TL 2005, 704; *Rechtsbank van Koophandel Brussels*, judgment of 02/17/2005, Eur TL 2005, 671. Contra (consenting by submitting the bill of lading) *Rechtsbank van Koophandel Antwerpen*, judgment of 03/11/2003, Eur TL 2004, 54 – issue of limitation of liability rather than jurisdiction.

<sup>417</sup> *Rechtsbank van Koophandel Antwerp*, judgment of 03/11/2003, Eur TL 2004, 54.

<sup>418</sup> Judgment of 03/04/003, Eur TL 2003, 321.

<sup>419</sup> Judgment of 06/29/2000, “*Elpa*”, *Revue Scapel* 2001, 47.

<sup>420</sup> Of 11/29/2000, “*Nuevo Leon*”, DMF 2001, 684.

<sup>421</sup> One should not see any inconsistency of this case law with the respective case law in arbitration, see for example *Cour de Cassation*, judgment of 11/22/2005, *1<sup>er</sup> Chambre civil, Sté Axa c. Sté Nemesis*, *Revue de l'arbitrage* 2006, 437. In arbitration a particular rule governs: The arbitrators should first, and with priority to any court seized, rule on

- 292 Therefore, the Standing Committee of the Dutch Association suggests that a carrier under a bill of lading should be bound by, but should also be allowed to invoke, any stipulation of the bill of lading including a jurisdiction clause against the regular third-party holder, unless of course the stipulation is unclear in such a manner that a third-party holder cannot easily determine in the courts of which place jurisdiction is vested.
- 293 This proposal should be supported. Very often it may become rather difficult to acquire a clear picture of which law should apply to the transportation contract. Whether the consignee or any further third party holder of the bill of lading “[was] or ought to have been aware [of a usage] which in such trade or commerce is widely known to, and regularly observed by, parties to contracts....” may become a complex undertaking to be dealt with in court. For international maritime trade it would feel very artificial to distinguish the binding force of jurisdiction provisions on consignees pursuant to the law applicable to the transportation contract. After all, the third party holder is a third party beneficiary under the contract of transportation. Hence, it is quite normal, that he cannot acquire a better position than the shipper would have himself, should he be also the consignee.

*(2) Provisional Seizure of Seagoing Vessels*

- 294 Regarding provisional measures, maritime law has always been rather favourable to the provisional seizure of seagoing vessels subject to security to be given for release. None of our interview partners complained of anything in the Regulation restricting the effectiveness of justice in this respect. One of them made the point that Article 31 JR should be maintained.
- 295 This view is surprising as the multiplicity of provisional measures across the legal systems of the Member States is particularly marked

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their own jurisdiction unless the arbitration agreement is “*manifestment nulle*” (Article 1458 *NCPC* )

in maritime matters.<sup>422</sup> Furthermore, the relation between the International Convention relating to the Arrest of Seagoing Ships of 10 May 1952 and the Judgment Regulation is rather complicated. However, no attempt is known in judicial practice to seize a vessel not berthing within the jurisdictional boundaries of the court where the seizure was requested. In the latter case, it appears that the jurisdictional issue is easily to be resolved. Should the jurisdiction not be derived from the Arrest Convention of 1952 or of Articles 2 to 24 of the Regulation, the requirement of a “real connecting link between the subject matter of the measure sought and the territorial jurisdiction of the [Member] State of the court before which those measures are sought”<sup>423</sup> would certainly be met. Notwithstanding the lack of a public debate in this respect, the issue of an extraterritorial seizure will certainly come up. May a seizure be ordered concerning a vessel not be found within the territorial boundaries of the issuing court? Such an effort may be made in the hope of the respective ship’s arrival even at a time when it is berthing elsewhere. Then the “real connecting link” may be assumed even if the hope is mere speculation. The order to seize may also be requested in the expectation to have it enforced abroad under the Regulation. The case may even be thus that the applicant was hopeful to seize the vessel before it would leave the domestic harbour but was too late for enforcing the order.

296 The point has been made that due to the “*in rem effect*” of the seizure, the principle of territorial sovereignty would not permit such a device.<sup>424</sup> This view, however, is not compelling. Enforcement of a foreign judicial order is by no means tantamount to intrusion into the sovereignty of the enforcing State. The *in rem* nature of an arrest or a comparable measure of other jurisdictions (such as for example the

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<sup>422</sup> See the very detailed essay of *Theocharidis*, (55) *Revue Hélienne de Droit International* 2002, 453 et seq. including much information on comparative law.

<sup>423</sup> *ECJ*, 11/17/1998, C-391/95, *Van Uden Maritime B. V./Kommanditgesellschaft in Firma Deco-Line*, ECR 1998 I-7091.

<sup>424</sup> *Theocharidis*, *Revue hellénique de droit international*, no. 2 (2002), 453, 469, 492, 496, 498 quoting two decisions of the First Instance Court of Athens.

French *saisie conservatoire*) is limited to authorise execution officials to physically seize the respective object; recognition and enforcement abroad amounts to nothing other than authorising the officials of the recognising state accordingly. Therefore, Article 4 Arrest Convention<sup>425</sup> is not an obstacle to recognising and enforcing a foreign arrest. It is a matter of course that the precondition of adversary proceedings preceding, or subsequent to, the issuing of the arrest (see para. D.III.2.h)cc)(8)) must be met.

297 Regarding the *forum arresti*, see below sub D.III.2.h)cc)(8), para. 308.

### (3) Consolidation of Litigations

298 Only one of the interview partners was mindful of the possibilities to consolidate litigations resulting from one (single) incident. He was of the opinion that the Regulation provided sufficient means to enforce such a consolidation subject only to some rare torpedo claims (action for a negative declaration see sub D.VII.1, para. 804).

### (4) Actions based on Tort and Contract in particular

299 The Netherlands Maritime and Transport Law Association, however, regrets that under the Court of Justice's case law (*Kalfelis* and *Réunion Européenne*) even contractual and extra-contractual claims cannot be regarded as closely connected within the meaning of Article 6 (1). It states:

300 "The alleged loss of or damage to cargo during transport may give rise to claims by several interested parties (cargo owners, bill of lading holders and/or insurers) against different people or companies which may have had some responsibility or other to make sure that the cargo arrived at destination. These claims may be under a contract (charter party, bill of lading) or may be extra-contractual (tort, quasi-contract; quasi delict)."

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<sup>425</sup> "A ship may only be arrested under the authority of a Court or of the appropriate judicial authority of the Contracting State in which the arrest is made."

301 “The relevant conventions which deal with liability for a lost or damaged cargo usually offer a uniform liability regime to the carrier, his agents, employees or independent contractors, regardless of whether they are sued contractually or extra-contractually. It therefore seems unfortunate that – purely because of the conclusions which may be drawn from the above-mentioned judgments – claims for loss or damage of the same cargo, but instituted on different grounds against different people or companies involved with the carriage of that same cargo, may not easily be concentrated at one court.”

302 Particularly in maritime matters, it would certainly be reasonable to give more room for concentrating a multitude of interrelated litigations in one court. The issue, however, is not limited to maritime matters. The point to be further analysed is rather whether Article 28 JR provides sufficient means against improper fragmentation of interconnected litigations.

#### *(5) Collision, Salvage and General Average*

303 The Netherlands Maritime and Transport Law Association, however, confirms that in the field of collision, salvage and general average the Regulation does not, and the Judgment Convention did not give rise to any problems.

#### *(6) Provisional and Protective Measures*

304 In the context of provisional and protective measures, the last issue dealt with in the respective paragraph were orders for obtaining information and evidence. In that context the Netherlands Maritime and Transport Law Association is critical with the *St. Paul Dairy* decision of the Court of Justice (see section Provisional and Protective Measures sub D.VI.2.a), paras. 661 et seq.). It states:

305 “Dutch law provides for the provisional hearing of an expert or for the appointment of a court expert to investigate the condition of cargo or to investigate the possible causes of cargo damage in the course of the carriage.”

306 “If such a provisional hearing of an expert or the appointment of a court expert is also considered not to be covered by the notion of ‘provisional, including protective, measures’ of Article 31 of Regulation 44/2001, this may cause practical problems in maritime matters. E. g. the case may be that cargo arrives damaged in an EC-country, while only the courts of another EC-country will have substantive jurisdiction over the claim for damages. It would be unfortunate that courts of the EC-country where the goods arrived damaged might then not be seized to give a speedy provisional ruling on collection of information at the place where that information is most easily obtainable, particularly, when time may be short to preserve evidence (perishable cargo etc.).”

*(7) Principal Place of Business of Ship Owners*

307 The Netherlands Maritime and Transport Law Association makes the point that often ships are operated through management companies. Then, it may be left in the dark whether shipping companies not having their statutory seat in the EU have a central administration or a principal place of business there.

*(8) Forum Arresti*

308 The Netherlands Maritime and Transport Law Association suggest that “a provision similar to Article 7 of the Arrest Convention 1999” should be adopted. It points to the long lasting tradition of the *forum arresti* in shipping matters. The Convention referred to is not yet in force. It had been adopted by Final Act of the UN/International Maritime Organisation Diplomatic Conference on Arrest of Ships in 1999. The crucial part of Article 7 is drafted as follows:

309 “1. The courts of the state in which an arrest has been effected or security provided to obtain release of the ship shall have jurisdiction to determine the case upon its merits...”.

310 The question remains whether the *forum arresti* is really justified in intra-European relationships, even if limited to the arrest of ships. It



would also be worth contemplating that the EU as such accedes to the Convention.

*i) Insurance, Consumer and Employment Matters*

*aa) Introduction*

311 The Sections 3, 4 and 5 of the first part of the Regulation do what the Judgment Convention did, i. e. make an attempt to protect certain categories of persons who are particularly worth protecting. The respective provisions had been modified several times during the duration of the Judgment Convention, mostly for the purpose of extending the protection. No major problems could be discovered any more. We approached numerous organisations such as trade unions, consumers' associations, organisations of banks and insurance associations asking them whether they felt that the protection of the respective "weaker" party was sufficient, unsatisfactory or exaggerated. We did receive only very few responses and none of them had any complaints.

*bb) Section 3, Insurance Matters*

312 1. Subject to the ruling on the truism that reinsurance is not affected by Section 3,<sup>426</sup> the first and hitherto only preliminary ruling of the Court of Justice was rendered<sup>427</sup> only in 2005. The ruling was:

313 "A jurisdiction clause conforming with Article 12 (3) of the Convention... cannot be relied on against a beneficiary under that contract who has not expressly subscribed to that clause and is domiciled in a Contracting State other than that of the policy-holder and the insurer."

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<sup>426</sup> ECJ, 07/13/2000, C-412/98, *Group Josi/.Universal General Insurance company*, ECR 2000 I-5925.

<sup>427</sup> ECJ, 05/12/2005, C-112/03, *Société financière et industrielle du Peloux (SFIP)/.Axa Belgium a. o.*, ECR 2005 I-3707.

- 314 This ruling has given rise to some concern<sup>428</sup>. The holders of insurance policies, however, are sufficiently protected. Even a high representative of the German Association of Insurance Companies specialised in insurance law, who was interviewed in writing, confirmed that the present legal situation is satisfactory since large risk insurance contracts are excluded from the protective provisions (see Article 14 (5) JR). Case law other than stating truisms is almost totally lacking. It is clear that jurisdiction agreements are governed by Article 23 JR to the degree that they are not invalidated in principle.<sup>429</sup> The only court decision worth mentioning is normally not referred to in this context.<sup>430</sup> A person had operated duty free concessions on cruise ships and had entered into an insurance contract covering liabilities for its employees. This was a case of Article 14 (2) JR, which demonstrates that in maritime matters, even smaller contracts may be exempted from protection against jurisdiction agreements.
- 315 2. The Greek Insurance Industry, supported by the Greek reporter *Kerameus*, brought forward some concerns related to the recent preliminary ruling of the Court of Justice in the *SFIP* case<sup>431</sup>. There, the Court held that an otherwise valid jurisdiction agreement is not operative against a third party beneficiary of an insurance contract, even if the latter was a group insurance contract. They state, that the additional risk of being sued in a foreign court and of inconsistent decisions of a multitude of foreign courts must be taken into account in the insurance's calculation. This fact causes a considerable impact if an insurance contract covering a high risk must be calculated individually. For some jurisdictions such as the German one, it is a matter of course that a third party beneficiary of a contract is bound to all the provisions thereof, including jurisdiction stipulations.

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<sup>428</sup> See below, sub 2, para. 315.

<sup>429</sup> *High Court Ireland*, I.L.Pr. 1999, 5.

<sup>430</sup> *Standard Steamship Owners Protection & Indemnity Association (Bermuda) Limited./GIE Vision Ball* [2004] EWHC 2919.

<sup>431</sup> *ECJ*, 05/12/2005, C-112/03, *Société financière et industrielle du Peloux./Axa Belgium and Others*, ECR 2005 I-3707; see herein above fn. 427.

- 316 It can, however, not be disregarded that contemporary legislation sometimes imposes an obligation to provide insurance protection to others. In such a setting, the legal obligation may include, for the benefit of the protected persons, easy access to justice, even if only for the price of increased insurance premiums.
- 317 3. Recently, the German *Bundesgerichtshof* referred to the Court of Justice<sup>432</sup> a preliminary question which may imply a major issue of community policy: May the victim of a damaging event having occurred in another Member State sue the other party's liability insurance at his own domicile? It is a matter of course that such a law suit only makes sense where domestic law (such as may be adapted to EC-directives) provides for such a direct action of the victim (see Article 11 JR). In legal doctrine, the issue is dealt with controversy<sup>433</sup>.

*cc) Section 4, Consumer Protection*

- 318 (1) So far the Court of Justice has given eight preliminary rulings all of which formally deal with the Judgment Convention but the pertinence of which has not become obsolete by the subsequent modification in the drafting of the Convention and later by its transformation into the Regulation. Legal doctrine regards some preliminary rulings related to other acts of EC-consumer protection legislation to be transferable also to corresponding issues arising in the context of the Regulation<sup>434</sup>.
- 319 The following preliminary rulings deal directly with Section 4 or its previous counterparts:

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<sup>432</sup> *BGH*, 09/26/2006 – VI ZR 200/05; Case C-463/06, *FBTO Schadeverzekeringen N.V./Jack Odenbreit*.

<sup>433</sup> In favour of the possibility of a direct action: *OLG Köln*, *VersR* 2005, 1721, cons. *Looschelders*; contra: *Heiss/Kosma*, in: *Liber amicorum* for J. H. Wansink, pp. 279, 285 et seq.

<sup>434</sup> For example: *ECJ*, 11/22/2001, C- 541/99, *Cape Snc and Idealservice Sri*, ECR 2001, I-9049 and *ECJ*, 11/22/2001, C-542/99, *Idealservice MNRE Sas and OMAI Sri*, ECR 2001 I-9049. The ruling is: "The term consumer, as defined in Article 2 (b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, must be interpreted as referring solely to natural persons" [even if the contracting party acts exclusively for the benefit of its employees] (explanation in brackets added).

- 320 (a) *Société Bertrand./Paul Otto KG* (judgment of 21 January 1978, C-150/77, ECR 1978, 1123). Ruling:

“The concept of the sale of goods on instalment credit terms within the meaning of Article 13 of the Brussels Convention [corresponding to Article 15 (1) (a) JR] is not to be understood to extend to the sale of a machine which one company agrees to make to another company on the basis of a price to be paid by way of bills of exchange spread over a period”.

- 321 (b) *Shearson Lehmann Hutton Inc./TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* (judgment of 19 January 1993, C-89/91, ECR 1993 I-139). Ruling:

„Article 13 of the Convention [corresponding to Article 15 JR] is to be interpreted as meaning that a plaintiff who is acting in pursuance of his trade or professional activity and who is not, therefore, himself a consumer party [but rather only a consumer’s assignee] to one of the contracts listed in the first paragraph of that provision, may not enjoy the benefit of the rules of special jurisdiction laid down by the Convention concerning consumer contracts”.

- 322 (c) *Wolfgang Brenner and Peter Noller./Dean Witter Reynolds* (judgment of 15 September 1994, C-318/93, ECR 1994 I-4275). Ruling:

“The courts of the State in which the consumer is domiciled have jurisdiction in proceedings under the second alternative in the first paragraph of Article 14 of the Convention [corresponding to Article 16 JR] ....if the other party to the contract is domiciled in a Contracting State or is deemed under the second paragraph of Article 13 of that Convention [corresponding to Article 15 JR] to be so domiciled.”

- 323 (d) *Francesco Benincasa./Dentalkit Srl* (judgment of 3 July 1997, C-269/95, ECR 1997 I-3767). Ruling [as far as Section 4 is concerned]:

“The first paragraph of Article 13 and the first paragraph of Article 14 of the Convention [corresponding to Articles 15 and 16 JR] must be interpreted as meaning that a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may not be regarded as a consumer.”

324 (e) *Hans-Hermann Mietz./.Intership Yachting Sneek BV*. (judgment of 27 April 1999, C-99/96, ECR 1999 I-2277). Ruling [as far as Section 4 is concerned]:

“Article 13 [corresponding to Article 15 JR] first paragraph, point 1 of the Convention... must be construed as not applying to a contract between two parties having the following characteristics, that is to say, a contract:

- relating to the manufacture by the first contracting party of goods corresponding to a standard model, to which certain alterations have been made;
- by which the first contracting party has undertaken to transfer the property in those goods to the second contracting party, who has undertaken, by way of consideration, to pay the price in several instalments; and
- in which provision is made for the final instalment to be paid before possession of the goods is transferred definitively to the second contracting party.

325 It is in this regard irrelevant that the contracting parties have described their contract as a ‘contract of sale’. A contract having the characteristics mentioned above is however to be classified as a contract for the supply of services of goods within the meaning of Article 13 [corresponding to Article 15 JR] first paragraph, point 3, of the Convention... It is for the national court, should the need arise, to determine whether the particular case before it involves a supply of services or a supply of goods.”

326 (f) *Gabriel* (judgment of 11 July 2002, C-96/00, ECR 2002 I-6367). Ruling:

“The jurisdiction rules set out in the Convention....are to be construed as meaning that judicial proceedings by which a consumer seeks an order, in the Contracting State in which he is domiciled and pursuant to that State’s legislation, requiring a mail-order company established in another Contracting State to pay him a financial benefit in circumstances where that company had sent to that consumer in person a letter likely to create the impression that a prize would be awarded to him on condition that he ordered goods to a specified amount, and where that consumer actually placed such an order in the State of his domicile without, however, obtaining payment of the financial benefit, are contractual in nature in the sense contem-

plated in Article 13 [corresponding to Article 15], first paragraph, point 3, of that Convention.”

327 (g) *Johann Gruber./Bay Wa AG* (judgment of 20 January 2005, C-464/01, ECR 2005 I-439). Ruling:

“The rules of jurisdiction laid down by the Convention... must be interpreted as follows:

- a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade of profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention [corresponding to Articles 15 to 17] unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect;

- it is for the court seised to decide whether the contract at issue was concluded in order to satisfy, to a non-negligible extent, needs of the business of the person concerned or whether, on the contrary, the trade or professional purpose was negligible;

- to that end, that court must take account of all the relevant factual evidence objectively contained in the file. On the other hand, it must not take account of facts or circumstances of which the other party to the contract may have been aware when the contract was concluded, unless the person who claims the capacity of consumer behaved in such a way as to give the other party to the contract the legitimate impression that he was acting for the purposes of his business.”

328 (h) *Petra Engler./Janus Versand GmbH* (judgment of 20 January 2005, C-27/02, ECR 2005 I-481 Ruling:

329 “legal proceedings by which a consumer seeks an order, under the law of the Contracting State in which he is domiciled, that a mail order company established in another Contracting State award a prize ostensibly won by him is contractual in nature for the purpose of Article 5 (1) of that convention, provided that, first, that company, with the intention of inducing the consumer to enter a contract, addresses to him in person a letter of such a kind as to give the impression that a prize will be awarded to him if he returns the ‘payment notice’ attached to the letter and, second, he accepts

the conditions laid down by the vendor and does in fact claim payment of the prize announced;

330 on the other hand, even though the letter also contains a catalogue advertising goods for that company and a request for a ‘trial without obligation’, the fact that the award of the prize does not depend on an order for goods and that the consumer has not, in fact, placed such an order has no bearing on that interpretation.”

331 For reasons not disclosed, the operative part of the ruling does not deal with Article 13 JC. But in paras. 31–35 of the reasons the following is literally stated:

332 “...Article 5 (1) of the Brussels Convention relates to contractual matters in general, whereas Article 13 thereof relates specifically to various types of contracts concluded by consumers.

333 As Article 13 of the Brussels Convention thus constitutes a *lex specialis* in relation to Article 5 (1), it is first of all necessary to determine whether an action having the characteristics set out in the question referred for a preliminary ruling, as reformulated in paragraph 28 above, may fall within the scope of Article 13.

334 As the Court has repeatedly held, the concepts used in the Brussels Convention – and in particular those featured in Article 5 (1) and (3) and Article 13 – must be interpreted independently, by reference principally to the system and objectives of the Convention, in order to ensure that it is universally applied in all the Contracting States...

335 As regards, more specifically, Article 13, first paragraph, point 3, of the Brussels Convention, the Court has already held, on the basis of the criteria set out in the previous paragraph, that point 3 of that provision is applicable only in so far as, first, the claimant is a private final consumer not engaged in trade or professional activities, second, the legal proceedings relate to a contract between that consumer and the professional vendor for the sale of goods or services which has given rise to reciprocal and interdependent obligations between the two parties and, third, that the two conditions specifically set out in Article 13, first paragraph, point 3 (a) and (b) are fulfilled...

- 336 However, it must be concluded that those conditions are not all satisfied in a case such as that in the main proceedings.”
- 337 (2) Abundant literature exists which is out of proportion to the practical impact of Section 4.
- 338 Most national reporters agree that Section 4 is satisfactory and that no additional consumer protection is needed.
- 339 In respect to consumer contracts such as those affected by the Regulation, (and formerly by the Judgment Convention) published case law of national courts, however, is not as frequent as one would be inclined to consider due to the extent of cross-border consumer-directed marketing. Most national reporters state that there is none in their countries. The purchase of immovable property is not excluded from the protection of consumers.<sup>435</sup> But certainly the Section does not apply if both parties act in a non-professional or commercial capacity. Even middle-class investors may be consumers.<sup>436</sup> In the respective English case, the investor of US-\$ 1.1 million was taken for a consumer and, hence, the validity of the jurisdiction agreement was denied. In another case the Greek court refused to assume jurisdiction because it took the respective London jurisdiction clause for valid whereas the English courts also denied their jurisdiction because, according to them, the respective contract was a consumer contract.<sup>437</sup> This holding gives rise to reflections on the binding force of judgments refusing to assume jurisdiction. It cannot be accepted within the European Community that two courts decline jurisdiction and thus the claimant is completely deprived of his right to seise the courts. Yet, this is only a side-remark. In general terms, the national reporters state that the concept of consumer has been applied

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<sup>435</sup> *Rechtsbank Assen*, NIPR 2004, 371.

<sup>436</sup> *Standard Bank London Ltd./Apostolakis* (No. 1 and 2) [2002] C.L.C. 933 = [2001] Lloyd's Rep Bank 240; Court of Appeal Athens 6401/2002 DEE 2003, 412.

<sup>437</sup> *Polimedes Protodikeio*, Athens 8032/2001 [2003] Euro C.L. May 109.



„strictly“<sup>438</sup>. This means, that recourse to this exception to the general rule *actor sequitur forum rei* must not be extended to what is not necessary for the protection of the consumer as the weaker party. As it is emphasised by the reporters, this is in conformity with the case law of the Court of Justice.<sup>439</sup> By contrast, the concept of contract has been extended to include pre-contractual relationships such as the promise to have won a prize<sup>440</sup> or, as the English reporter suggests, negotiations in bad faith.

340 (3) „Article 15 vests the courts with jurisdiction ‘in matters related to a contract concluded by a person, the consumer, ....’ In addition to this first precondition for jurisdiction it specifies three alternative prerequisites. The second sub-alternative to the third main alternative is that the other side ‘direct such (commercial or professional) activities to that Member State [of the consumer’s domicile] or to several States including that Member State....’”.

Some national courts had difficulties in finding out whether under specific circumstances the activity of the other party was directed to the country where the consumer had his residence.<sup>441</sup> The English judges have found the conspicuous formula that the co-contracting party must have „solicited business“ in the consumer’s country.<sup>442</sup> This problem arose in particular with regard to internet homepages and other forms of internet advertising. For the *Oberlandesgericht Dresden*, a website in German language accessible in Germany is di-

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<sup>438</sup> Example provided by the Scottish reporter: *Prostar Management Ltd./Kevin*, judgment of 08/29/2002, *Sheriff principal Bowen*.

<sup>439</sup> *ECJ*, 01/20/2005, C-464/01, *Gruber./Bay Wa*, ECR 2005 I-439; *ECJ*, 07/03/1997, C-269/95, *Benincasa./Dentalkit*, ECR 1997 I-3767.

<sup>440</sup> *LG Braunschweig*, IPRax 2002, 213. The *ECJ* has confirmed the applicability of consumer protection in that field: *ECJ*, 01/20/2005, C-27/02, *Engler./Janus Versand*, ECR 2005, I-481.

<sup>441</sup> A phone call did not amount to such an activity. *VznGr Den Haag*, NIPR 2005, 168.

<sup>442</sup> *Rayner./Davies* [2003] I.L.Pr. 14. In that case the service provider had not solicited business in Italy.

rected also to Germany within the meaning of Article 15 (1) (c) JR.<sup>443</sup> The website is directed to the Benelux if wording and content do not raise any doubt that it is<sup>444</sup>. The distinction between passive website and active websites is widespread; it goes back to a common declaration of the Council and the Commission.<sup>445</sup> The English reporter refers to a statement of organisations of e-commerce which are concerned that the operation of a passive website would be sufficient to establish jurisdiction. In such a case, online advertising whatsoever would vest all courts Europe-wide with jurisdiction. While some courts have occasionally been rather generous in applying Article 15(1)(c) JR suggesting that advertising by a trans-border accessible website is sufficient<sup>446</sup>, it must not be forgotten that the declaration itself does not distinguish between "active" and "passive" websites. It specifies that the mere accessibility of an internet site does not suffice for the application of Art. 15(1)(c) but that it is equally important that the site solicits the conclusion of distance contracts and that such a contract has actually been concluded. It would seem useful to improve the knowledge among courts and practitioners of the common declaration.<sup>447</sup>

It has been questioned to what extent a "disclaimer" specifying in an e-advertising that the respective products or services are not intended for consumers domiciled in certain Member States could avoid to be subjected to a foreign jurisdiction. The German Bundes-

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<sup>443</sup> A judgment of 12/15/2004 – U 1855/04. Equally, for the *VznGr Den Haag*, NJPR 2005, 168.

<sup>444</sup> *VznGr Den Haag*, NJPR 2005, 168.

<sup>445</sup> 14139/00 COR 2 (De)-JUSTC IV 137 – in German language published in IPRax 2001, 259.

<sup>446</sup> *OGH* 9 Nc 110/02 – “trans-border internet advertising”; *LG Feldkirch* 3 R 259/03 s; *OGH* 10 Nc 19/05 h – the case concerned the Dutch Antills where the Judgment Regulation is not applicable.

<sup>447</sup> See the complaint by the Spanish reporter that the declaration is not sufficiently accessible to the courts and the lawyers in the Member States.

gerichtshof has correctly ruled that such a disclaimer is only operative if it corresponds to the subsequent business practice.<sup>448</sup>

- 341 Overall, it seems that after a few hesitations in the case law, Art. 15-16 JR are generally applied and interpreted in a reasonable manner by the courts. It is expected that such an interpretation will be further streamlined through the development of case law.
- 342 (4) Some courts developed a partial definition of the notion of “consumer” within the meaning of Article 15 though the Judgment Regulation is not the only place where EC-law protects “consumers”. No uniform trend, however, could be identified. The *Oberlandesgericht Nürnberg*<sup>449</sup> ruled that the personal liability of the only shareholder of a company is not a consumer matter within the meaning of Article 15 JR notwithstanding the fact that in another context the *Bundesgerichtshof* had protected the managing director of a *GmbH*. On the other hand, several courts ruled that a minor economic impact of a hobby activity, such as for example breeding horses<sup>450</sup>, does not exclude consumer protection<sup>451</sup>.
- 343 (5) One court ruled that the mere entering into one single trans-border contract qualifies the activity of the consumer’s co-contracting partner as directed to the respective Member State<sup>452</sup>
- 344 (6) One remaining point should not be disregarded. In Article 15 (2) JR the meaning of „establishment“ is taken to be equivalent to the meaning of the respective terms used in Article 5 (5) JR.<sup>453</sup>
- 345 (7) Finally it should be emphasised that the Section must be adapted to Regulation “Rome I”<sup>454</sup>. The Draft Regulation has already adopted

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<sup>448</sup> 03/30/2006, JZ 2006, 1187, 1188.

<sup>449</sup> 07/20/2004, – 1 U 991/04.

<sup>450</sup> OGH, 8 Nd 502/00.

<sup>451</sup> LG Darmstadt, 05/18/2004 – 8 O 137/03; OGH, 10 Nc 103/02 g.

<sup>452</sup> OGH, 2 Ob 206/04.

<sup>453</sup> This is by express words made clear in the English schedule 1, para. 1, of the Civil Jurisdiction and Judgment Order 2001 SI 2001/3929.

as far as possible the wording of Article 15 (1) (c) JR and thus abandoned the distinction of three kinds of consumer contracts.

346 In summary: The materials found and the information brought to our knowledge do not indicate that an amendment of the Regulation's drafting should be suggested.

*dd) Section 5, Employment Matters*

347 (1) Not much case law exists in labour law matters. This holds true for the new provisions of Articles 18 to 21 JR as well as for the Judgment Convention into which, speaking in terms of practical result, the Court of Justice had inserted special rules on jurisdiction for employment law matters. The rulings of the Court of Justice<sup>455</sup> have been in substance integrated into the new provisions of Section 5 and are, therefore, not directly relevant anymore. Two further rulings state interpretations which seem rather self-suggesting<sup>456</sup>. One ruling

<sup>454</sup> Draft: COM(2005) 650 final 2005/0261 (COD).

<sup>455</sup> *ECJ*, 06/25/1982, C-133/81, *Irenel./Schwab*, ECR 1982, 1891; *ECJ*, 01/15/1987, C-255/85, *Shevenai./Kreischer*, ECR 1987, 239; *ECJ*, 02/15/1989, C-32/88, *Six Construction./Humbert*, ECR 1989, 341.

<sup>456</sup> 1. *ECJ*, 02/28/2002, C-37/00, *Herbert Weber./Universal Ogden Services*, ECR 2002 I-2013 (ruling: "Work carried out by an employee on fixed or floating installations positioned on or above the part of the continental shelf adjacent to a Contracting State, in the context of the prospecting and/or exploitation of its natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying Article 5 (1) of the Convention.....Article 5 (1) of that convention must be interpreted as meaning that where an employee performs the obligations arising under his contract of employment in several Contracting States the place where he habitually works, within the meaning of that provision, is the place where, or from which, taking account of all the circumstances of the case, he in fact performs the essential part of his duties vis-à-vis his employer....[followed by supplementary details]").

2. *ECJ*, 07/13/1993, C-125/92, *Mulox IBC Ltd./Hendrick Geels*, ECR 1993 I-4075 (ruling: "Article 5 (1) of the Convention... must be interpreted as meaning that, in the case of a contract of employment in pursuance of which the employee performs his work in more than one Contracting State, the place of performance of the obligation characterizing the contract, within the meaning of that provision, is the place where or from which the employee principally discharges his obligations towards his employer".).

3. *ECJ*, 01/09/1997, C-383/95, *Petrus Wilhelmus Rutten./Cross Medical Ltd.*, ECR 1997 I-57 (ruling: "Article 5 (1) of the Convention... must be interpreted as meaning that where, in the performance of a contract of employment, an employee carries out his work in several Contracting States, the place where he habitually carries out his work, within the meaning of that provision, is the place where he has established the effective centre of his working activities. When identifying that place, it is necessary to take into account the fact that the employee spends most of his working time in one of the Contracting States

deals with an extremely exceptional situation<sup>457</sup>. Most national reporters emphasise that their courts follow the case law of the Court of Justice without giving any reference to judicial rulings. Regarding the latter aspect, the exception is the French reporter *Sinopoli*. Reference is made to a judgment of the *Cour d'appel Nancy*<sup>458</sup> where after weighing the “pros” and “cons” the Court came to the conclusion that it was French territory where the employee had habitually carried out his work. He was the driver of a Luxembourgian firm’s director in chief. The latter’s home was in France and the firm had an administrative centre also in France. The only case which in the description of the respective reporter sheds some doubt in this respect is the following English one<sup>459</sup>. A specialised appellate tribunal for labour law matters was seised with the following situation: At the time of his dismissal an employee was working in the USA within a subsidiary of his initial employer. The latter, however, was held to have continued to be the employer. Nonetheless, the tribunal refused to assume jurisdiction for an action of the employee because “the employment was beyond the limits of the UK-jurisdiction”.

348 An Irish court,<sup>460</sup> after having in its own words summarised the *Rutten* ruling of the Court of Justice,<sup>461</sup> emphasised that the working time is not the only factor to be taken into consideration and that the factor, where the employee had made his tax and social security pay-

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in which he has an office where he organizes his activities for his employer and to which he returns after each business trip abroad.”).

<sup>457</sup> ECJ, 04/10/2003, C-437/00, *Giulia Pugliese and Finnmeccanica SpA, Alenia Aerospazio Division*, C-437/00, ECR 2003 I-3573 (ruling: “Article 5 (1) of the Convention... must be interpreted as meaning that, in a dispute between an employee and a first employer, the place where the employee performs his obligations to a second employer can be regarded as the place where he habitually carries out his work when the first employer, with respect to whom the employee’s contractual obligations are suspended, has, at the time of the conclusion of the second contract of employment, an interest in the performance of the service by the employee to the second employer in a place decided on by the latter. The existence of such an interest must be determined on a comprehensive basis, taking into consideration all the circumstances of the case.”).

<sup>458</sup> 03/08/2006, no. 05/02714.

<sup>459</sup> *Financial Times Limited./Bishop* [2003] WL 23014808, apparently unreported.

<sup>460</sup> *A Complainant v A Company* EE/2000/103 – Equality Tribunal, unreported.

<sup>461</sup> ECJ, 01/09/1997, C-383/95, *Rutten./Cross Medical*, ECR 1997 I-57.

ments should also be addressed. A Dutch court<sup>462</sup> “took into consideration the kind of company and the kind of activities as well as the fact that the employer did engage the employee in England and that there was a choice of English law”. Notwithstanding the fact the latest working place was in the Netherlands, the court ruled that the place, where the employee habitually carried out his work was London.

349 (2) Only four issues worth considering in more detail have been brought to the reporters’ attention.

350 (a) First, the protection of employees has led to a specific problem for employers employing people living nearby but across the border. From Luxemburg and the Netherlands the following situation was reported: Employees generally (Netherlands) or elected into the council of employees’ representation (Luxembourg) are protected against a private notice of termination of their employment contract. In case of any need of termination the employer must request the competent court to terminate the contract. In the case of an employee living abroad (and in practice very often nearby across the border) the tribunal in the neighbouring State may have difficulties applying the law which is foreign law to it. This holds true in particular in respect of the amount of compensation to be awarded. In many States specialised tribunals for labour law relationships exist. Those tribunals do not have any experience with foreign law. Therefore, complicated recourse to expert opinions may become necessary. In the practice of German labour courts, however, the problem did not arise so far. We made an inquiry at the labour courts close to the Dutch and Luxembourgian borders. None of them reported that they had cases where their jurisdiction was based on Article 20 (1) JR, let alone other cases where foreign law was to be applied – except for one case not related to the Regulation where the seat of the employing company was in Germany and the parties had agreed that Dutch law should

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<sup>462</sup> *Kantonsrechter Amsterdam*, JAR 2005/275.

govern the contract, since the director of the firm and the employee were domiciled in the Netherlands.

351 The issue must be seen in the context of the unsuccessful Dutch initiative to make an amendment to the Regulation<sup>463</sup>. The inquiries of the reporters have not revealed any traces that problems exist. Should such problems exist it would not be inconsistent with the basic philosophy of the Regulation to vest the courts designated in Article 19 JR with jurisdiction because these courts may be seised in all other cases where the continuation of the employment relationship is in dispute. Whether a unilateral act of termination suffices or a judicial order is needed does not make any difference regarding the court to be vested with jurisdiction.

352 (b) Second, the main problems relating to employment law are claims not, strictly speaking, “arising out of” an individual contract of employment but after all closely connected to such a contract.

353 At first, an inconsistency of languages must be pointed out: The French and the German texts, respectively, state:

“En matière de contrats individuels de travail” and

“Bilden ein individueller Arbeitsvertrag oder Ansprüche aus einem individuellen Arbeitsvertrag den Gegenstand des Verfahrens...”

354 By contrast, the English text is drafted as follows:

“In matters relating to individual contracts of employment...”

355 An Irish court had no difficulties in ruling that a claim for discrimination in the context of dealing with an application for an employment is covered by Article 18 JR.<sup>464</sup> Notwithstanding the broadness of the English text, the English *High Court* was rather strict in interpreting the provision.<sup>465</sup> A former employee having apparently worked in

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<sup>463</sup> OJ 2002 C 311/16. The Rapporteur (Wallis) of the European Parliament, however encouraged the Commission to make further inquiries relating to the problem (A5-0253/2003, pp. 8 et seq.)

<sup>464</sup> *Equality Tribunal, Gerhard Fahey./McKinsey & Co. Inc.*, EE/2001/146.

<sup>465</sup> *Swithenbank Foods Limited./Bowers* [2002] EWHC 2000 257.

England but now residing in France had been sued by his employer for “conspiracy to injure” the employer’s relationship with suppliers and for breach of “the implied duty of fidelity in his contract of employment”. The English court ruled that only the second claim but not the first one was related to an individual contract of employment.<sup>466</sup>

356 This case raises the general issue whether claims in tort committed in the context of the performance of an employment contract are covered by Section 5. The comparable issue has been referred to in the context Article 5 (1) JR. There, however, it is necessary to clearly distinguish contractual claims from tortuous claims. This necessity does not exist within the framework of Article 18 JR. Extending the protection of employees to tortuous claims related to the employment contract would not carry any inconsistency into the working of Section 5.

357 (c) Third, as in domestic law, the facts of a case do not always easily permit to qualify a relationship as an employment matter. In the Member States, even some sociological divergences have emerged. German law is concerned with *arbeitnehmerähnlichen Personen* (persons comparable to employees). French law is mindful to protect commercial agents who do not really carry out independent work. All these and countless other hypothetical details have been described in the Heidelberg doctorate thesis of *Anne Winterling*<sup>467</sup>. Case law, however, is still lacking in this respect. Trans-border litigation in labour law matters still seems rather seldom.

358 (d) Fourth, the French *Cour de Cassation*<sup>468</sup> recently requested from the Court of Justice a preliminary ruling relating to the issue of whether Section 5 excludes the applicability of Article 6 (1) JR: May two co-employers living in different Member States be sued in one

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<sup>466</sup> The English reporter does not explain whether the incriminated activity was alleged to have been performed during, or subsequent to, the duration of the employment contract.

<sup>467</sup> Entscheidungszuständigkeit in Arbeitssachen im europäischen Zivilprozessrecht, particularly pp. 52 et seq.

<sup>468</sup> Cass. Soc., 11/07/2006, no. 04-44713.



court? The issue however, is broader. May a person other than the employer be included into the lawsuit against the employer? It is conceivable that an employed victim of illegal activities (or passivities) in “his” firm sues also directors and leading employees personally. May Article 6 (1) JR then be applied? It is to be hoped that the ruling of the Court of Justice will be broad enough. It is easily foreseeable that unsuccessful applicants for employment will sue the “employer” for damages invoking illegal discrimination at their own domicile. An Irish judgment dealing with the issue has been reported<sup>469</sup>. However, it is too early to take care of such a situation by explicit terms in the Regulation. To protect a person with whom a contractual relationship has never been entered into would by far be less justified than the employee-privilege of Article 19 JR.

359 In summary: None of the open issues are of a dimension justifying the conclusion that an amendment being drafted is self-suggesting – subject to the necessity to bring the languages of the text in harmony.

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<sup>469</sup> See herein above at para. 355, fn. 464.

### 3. Exclusive Jurisdiction

#### a) General Aspects

360 In general, there are only a few observations by the national reporters that could be interpreted as a source for dissatisfaction with the provisions on exclusive jurisdiction in Article 22 JR.<sup>470</sup>

361 To some extent they relate to the problem whether an (non-exclusive?) annex jurisdiction should be established so that claims closely related to rights in rem or to company matters could be litigated in a forum under Article 22 JR.<sup>471</sup> This may deserve further observation.

362 Furthermore, the Luxembourg report raises the question of exclusive jurisdiction of third States and gives the following example: If someone wishes to file a lawsuit based on a right in rem, located in a third State against a defendant domiciled in a Member State, the courts of this Member State have to grant jurisdiction on the basis of Article 2 JR, although the national autonomous law would accept this third State's exclusive jurisdiction. The Luxembourg report suggests an "opening clause" according to which Member State could accept the exclusive jurisdiction of third States in cases parallel to Article 22 JR. This suggestion is based on the well-known theory of *effet-refléxe*. However, there are no cases reported which would give rise to significant concerns about the practical effect of the present situation.

#### b) Rights in Rem as to Immovable Property

363 A survey of the national reports demonstrates overall satisfaction<sup>472</sup> with the autonomous interpretation of the term "rights in rem" as es-

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<sup>470</sup> For questions concerning remedies against a judgment under Article 22 (5) JR, see the section on free movement of judgments sub D.V.4.b), para. 573. Intellectual property matters shall be dealt with below in paras. 825 et seq. and paras. 834 et seq.

<sup>471</sup> See e. g. the respective 3<sup>rd</sup> questionnaires, 2.2.23 of the national report of Slovenia, and the report of the Swedish Regional Court Lund.

<sup>472</sup> See respective 3<sup>rd</sup> questionnaires, 2.2.18 of the national reports.

tablished by *ECJ* case law.<sup>473</sup> In this context, the English report states that the distinction between rights “*in rem*” as opposed to “*rights in personam*” is difficult to comprehend for an English lawyer (which is certainly correct) but refers to case law which, in the opinion of the general reporters, shows quite well that the concept of rights *in rem*, in spite of these difficulties, is workable also in the UK.<sup>474</sup>

364 Two aspects, however, are disputed:

*aa) Exclusive Jurisdiction*

365 Whereas exclusive jurisdiction for claims having as their object rights *in rem* was undisputed, the exclusive jurisdiction for tenancy cases was, to some extent controversial among the national reporters during the closing conference. In this context, it should be remembered that the reason for establishing an exclusive jurisdiction of the *forum* of the *situs* for tenancy cases was that most legal systems regulate the landlord tenant relationship by special and complicated national rules so that an exclusive jurisdiction of the courts of the State of *situs* (which are deemed to apply their own laws) seemed preferable.<sup>475</sup>

366 Whereas this argument is still undisputed for contracts on the rent of private homes, several reporters saw an urgent need to allow for choice of forum agreements in cases contracts concerning the rent of office space.<sup>476</sup> For instance, it was submitted that, in many cases, new office buildings are rented to a single company which guarantees a certain rent, and that the contractual relationship between the owner and this general rent contractor may form an essential part of the financing package so that the choice forum of the most suitable should not be denied to the parties. Furthermore, it was argued that,

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<sup>473</sup> See esp. *ECJ*, 05/17/1994, C-294/92, *Webb/Webb*, ECR 1994, I-1717.

<sup>474</sup> English report, 3<sup>rd</sup> questionnaire, question 2.2.18.

<sup>475</sup> Jenard Report to the Brussels Convention, section on immovables, OJ 1979 C 59/34.

<sup>476</sup> See also Scottish report, 3<sup>rd</sup> questionnaire, question 2.2.23.

in cases of office space, public regulation is not as significant as in private landlord tenant cases so that a choice of forum is acceptable.

367 The general reporters share the doubts concerning the necessity of an exclusive jurisdiction in contracts relating to a rent of office space and recommend insofar further consideration of narrowing the scope of Article 22 (1) JR in favour of a more flexible approach.

*bb) Holiday Homes*

368 Some of the national reports still feel some dissatisfaction with the application of Article 22 (1) JR in holiday cases. There is some indication that the delineation of Article 22 (1) JR and Article 15 (1) (c) JR in timesharing cases may cause difficulties.<sup>477</sup> Furthermore, it is still doubtful whether Article 22 (1) JR adequately addresses the problems of contracts involving a short-term rent of a holiday home.

369 Example: A from Finland rents a holiday home in Portugal from B-company having its seat (in the sense of Article 60 JR) also in Finland. Due to a merger, B moves to Sweden after the conclusion of the contract but before the lawsuit was commenced.<sup>478</sup> Pursuant to Article 22 (1) JR, a lawsuit between A and B has to take place in Portugal although A could expect that Finnish courts are competent and Portugal is a rather remote forum esp. if the controversy is about certain circumstances in Finland during the conclusion of the contract.

370 According to the opinion of the general reporters, this problem needs further consideration. A more flexible approach in order to avoid the need to litigate in a remote forum seems advisable.

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<sup>477</sup> Dutch report 3<sup>rd</sup> questionnaire, question 2.2.18; for this problem see also *Kropholler*, Article 22, para. 17.

<sup>478</sup> Which is the earliest possible moment that could count, see *Kropholler*, before Article 2, paras. 12–15.

c) *Exclusive Jurisdiction over Company Matters (Article 22 (2) JR)*

aa) *General Aspects*

371 Surprisingly, several national reporters state that there is no case law or no international case law referring to this provision (Greece, Hungary, Lithuania, Malta, and Scotland).<sup>479</sup> Others confirm that national case law relating to the constitutional matters addressed in the wording of the provision prevails.<sup>480</sup> The English and the Irish report address the problem of delineating actions relating to the question whether the directors acted beyond their authority (reportedly covered by Article 22 (2) JR as opposed to breach of duties having their source outside of company law, where Article 22 (2) JR is not applied). However, these “normal” questions of delineation do not give rise to any serious concerns.

bb) *Definition of the Seat*

372 As to the adequacy of the seat as a basis of jurisdiction, no doubts are raised. The provision is seen as special case of the general rule that the forum of the defendant is competent.<sup>481</sup>

373 Yet, it should be noted that Article 22 (2) JR is no longer in line with the definition of the company seat in Article 60 JR. Article 22 (2) JR still refers to the definition of the seat according to the private law of the *forum*. Traditionally, this provision could be construed as a reference to the State of incorporation or to the State of the principle place of business or of the central administration. Based on this situation (but having also in mind the recent *ECJ* case law<sup>482</sup> on the

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<sup>479</sup> See respective 3<sup>rd</sup> questionnaires, 2.2.19 of the national reports.

<sup>480</sup> See e. g. respective 3<sup>rd</sup> questionnaires, 2.2.19 national reports from England, France, Ireland, Luxembourg, Netherlands, Poland, and to some extent: Germany.

<sup>481</sup> Spanish report (EJN), 3<sup>rd</sup> questionnaire, question 2.2.19.

<sup>482</sup> *ECJ*, 11/05/2002, C-208/00, *Überseering BV/Nordic Construction Company Baumanagement GmbH (NCC)*, ECR 2002 I-9919; *ECJ*, 09/30/2003, C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam/Inspire Art Ltd*, ECR 2003 I-10155.

<sup>483</sup>), several national reports confirm that they see a danger of negative or positive conflicts of jurisdiction, although it seems that there are no or only a few cases.<sup>484</sup> The problems reported do not support the conclusion that Article 22 (2) JR is an obstacle to the freedom of establishment;<sup>485</sup> however, it is submitted that Article 22 (2) JR should be adapted to Article 60 JR.<sup>486</sup>

#### 4. Choice of Forum Agreements

374 The case of law of the *ECJ* concerning the requirements stated by Article 23 JR for a valid choice of form agreement<sup>487</sup> is described by some national reports as rather restrictive; however, a survey of the national reports demonstrates that (meanwhile) the national case law is in line with the *ECJ* in this respect.<sup>488</sup> Published decisions often address questions which are specific for a case such as the interpretation of a certain choice of forum agreement.<sup>489</sup>

##### a) Law Applicable to a Choice of Forum Agreement

375 One source of divergence is the question of the law applicable to the validity of the choice of form agreement. A first problem in this context is: In how far does the Judgment Regulation allow a reference to a national law in order to determine consent between the parties; the

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<sup>483</sup> In this respect, there is some uncertainty as to whether Member States which traditionally referred to the central administration have to accept an additional reference to the state of incorporation, see e. g. *Kropholler*, Article 22 para. 41; see also Luxembourg report, 3<sup>rd</sup> questionnaire, question 2.2.21.

<sup>484</sup> See the national reports from Germany, Luxemburg and the Netherlands, 3<sup>rd</sup> questionnaire, question 2.2.20; Cypriote report, 3<sup>rd</sup> questionnaire, question 2.2.21 and 2.2.23.

<sup>485</sup> See the respective 3<sup>rd</sup> questionnaires, 2.2.23, of the national reports.

<sup>486</sup> Cypriote report, 3<sup>rd</sup> questionnaire, question 2.2.21.

<sup>487</sup> This refers to case law which intends to assure that the choice of forum agreement has really been consented by the party, see *ECJ*, 12/14/1976, C-24/96, *Estatís Salotti/Rüwa*, ECR 1976, 1831; *ECJ*, 12/14/1976, *Segoura/Bonakdarian*, ECR 1976, 1851; *ECJ*, 06/19/1984, C-71/83 – *Tilly Russ/Nova*, ECR 1984, 2417; *ECJ*, 03/16/1999, C-159/97, *Trasporto Castelletti/Trumpy SpA*, ECR 1999 I-1597.

<sup>488</sup> See respective 3<sup>rd</sup> questionnaires, 2.2.25.1 of the national reports.

<sup>489</sup> Scottish report, 3<sup>rd</sup> questionnaire, question 2.2.24.

second question in this context is to which national law one has to refer.

- 376 As to the first question, Article 23 JR is phrased in a way that seemingly only mentions formalities of the consent. However, a closer look at the *ECJ* case law (which is in line with the material to the former convention<sup>490</sup>) reveals that Article 23 JR itself requires a certain quality of the consent so that there is little space left, if any, for an application of national rules concerning consent.<sup>491</sup> Nevertheless, Member State practice, as shown by the national reports reveals a widespread reference to national laws as to the formation of consent.<sup>492</sup> This result is probably owed to the circumstance that the Regulation, on one hand, intends to harmonise the requirements for a valid choice of form agreement but, on the other hand, tries to respect the Member State law on the conclusion of contracts.
- 377 As of now, the law of some Member States refers to the *lex fori* (since choice-of-forum agreements constitute a procedural contract) whereas others refer to the *lex causae*. Whilst divergence as such does not necessarily cause harmful effects, the situation may be different here because – due to different choice-of-law rules and, as consequence, differences in the applicable law – jurisdictional agreements may be considered valid in one Member State whereas they are considered invalid in another. This divergence constitutes a permanent source of difficulties for choice-of-forum agreements.
- 378 In the long run, it might be helpful in this respect if the planned Common Frame of Reference for European Contract Law will be ac-

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<sup>490</sup> See Jenard Report, OJ C 59/37, section on choice of forum agreements, According to which Article 17 Judgment Convention (= Article 23 JR) requires a “real” consent.

<sup>491</sup> *Pfeiffer/Pfeiffer*, *Handelsgeschäfte*, § 22, paras. 110–112, pp. 1005 et seq., referring to *ECJ*, 03/10/1992, C-214/89, *Powell Duffryn/Petereit*, ECR 1992, I-1745 (analysing whether a choice of forum clause in the by-laws of a company constitutes sufficient consent) and to *ECJ*, 02/20/1997, C-106/95, *MSG Mainschiffahrtsgenossenschaft/Le Gravières Rhenanes SARL*, ECR 1997 I-911; (analysing under the circumstances under which adherence to usages may constitute consent). See also the English report, 3<sup>rd</sup> questionnaire, question 2.2.25.2.

<sup>492</sup> See respective 3<sup>rd</sup> questionnaires, 2.2.25.2 of the national reports.

cepted; in this case a reference to that instrument, which is intended to operate as a toolbox for European legislation and which therefore could also be used for the purposes of Art. 23 JR, could be advisable. Another option is to be found in the Hague Convention on Choice of Forum Agreements. According to Article 5 (1) of this convention the validity of such an agreement is to be determined according to the law of the State of the designated forum.<sup>493</sup> It is also possible to combine both solutions: Article 5 (1) of the Hague Convention could be adopted, and – nevertheless – the contractual rules in a future Common Frame of Reference could be used as (limited) harmonised European rules for the conclusion of choice of forum agreements.

*b) Judicial Control of Standard Terms*

379 In a great number of cases, choice of forum clauses are part of the standard terms of one of the contract parties. Practically, it would be a significant source of divergence if standard clauses would be subject to different national standards of control under Article 23 JR.

380 Looking at the national reports<sup>494</sup>, the differences are rather limited. Due to Article 24 JR, national courts will exercise control if the jurisdictional issue is raised by the defendant. As to the standard of control national courts will strictly scrutinise whether there is consent between the parties and whether the formal standards of control set by the *ECJ* case law are met. As far as national courts have a tradition to apply certain fairness standards to choice of forum agreements, as e. g. in Malta, it is expected that these standards will not be applied to agreements falling under Article 23 JR.

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<sup>493</sup> This provision is probably to be understood as a reference to this State's choice of law rules as well as to its internal law, *Masato Dogauchi and Trevor C. Hartley*, Preliminary Document No. 26 of December 2004 drawn up for the attention of the Twentieth Diplomatic Session on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, para. 92.

<sup>494</sup> Respective 3<sup>rd</sup> questionnaires, 2.2.15.3.



*c) National Practice in Determining Usages of International Trade or Commerce under Article 23 (1) (c) JR*

381 According to the decision of the *ECJ* in *Mainschiffahrts-Genossenschaft eG (MSG)/.Les Gravieres Rhenanes SARL*<sup>495</sup>, the following principles apply:

- The contract has to come under the head of international trade.
- In the branch of international trade or commerce in which the parties are operating, there has to be a certain practice. A reference to general practices of international trade or commerce is insufficient.
- The question whether there is a practice must not be determined by reference to national law.
- In order to constitute a usage of international trade, a particular course of conduct has to be generally and regularly followed by operators in that branch when concluding contracts of a particular type.
- The parties must have been aware or are presumed to have been aware of that practice.
- Actual or presumptive awareness of such practice on the part of the parties to a contract is given, in particular, “when the parties had previously had commercial or trade relations between themselves or with other parties operating in the sector in question or where, in that sector, a particular course of conduct is sufficiently well known because it is generally and regularly followed when a particular type of contract is concluded, with the result that it may be regarded as being a consolidated practice.”
- It “is for the national court to determine whether the contract in question comes under the head of international trade or commerce and to find whether there was a practice and whether

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<sup>495</sup> *ECJ*, 02/20/1997, C-106/95, paras. 21-24.

they were aware or are presumed to have been aware of that practice”

- The national court “should nevertheless indicate the objective evidence which is needed in order to make such a determination.”

382 Despite of these guidelines by the *ECJ*, there is still considerable uncertainty concerning Article 23 (1) (c) JR. Firstly, and most important, in many Member State there is no (published) case law.<sup>496</sup> The reason for this fact is not quite clear; as far as “new” Member States are concerned, this may be a specific expression of a general lack of experience with the regulation. However, this situation is not limited to “new” Member States so that there have to be other reasons: Most probably, parties need to have reliable choice of law agreements so that they do not refer to an uncertain concept like usages of trade.<sup>497</sup>

383 Secondly, as the above stated outline of the *ECJ* case law demonstrates, the *ECJ* has put attention to the concept of “usages”. A remaining source of uncertainty relates to the concept of “branch of international trade or commerce”. As, e. g., the Dutch report points out, there is considerable uncertainty about this concept.<sup>498</sup>

384 Thirdly, it is submitted that the case law of the *ECJ* does not yet give sufficient guidelines for determining under which conditions a party is aware or presumed to be aware of a certain usage.<sup>499</sup> Although the *ECJ* has addressed that point and stated the standard repeated *supra*<sup>500</sup>, it has to be noted that practitioners seem to have difficulties in this respect.

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<sup>496</sup> Respective 3<sup>rd</sup> questionnaires, 2.2.25.4, of the reports from Greece, Hungary, Ireland, Lithuania, Luxemburg, Malta, Poland, Slovenia.

<sup>497</sup> The Dutch report, 3<sup>rd</sup> questionnaire, question 2.2.25.4. gives a good example by stating that lawyers think that the provision is not workable.

<sup>498</sup> Dutch report, 3<sup>rd</sup> questionnaire, question 2.2.25.4.

<sup>499</sup> Dutch report, 3<sup>rd</sup> questionnaire, question 2.2.25.4.

<sup>500</sup> See para. 381.

385 Fourthly, the *ECJ* has ruled that national courts should indicate the evidence used in order to determine the existence of a usage. As far as there is national experience, it is thus necessary for a party relying on Article 23 (1) (c) JR to prove the existence of a certain usage which is always a risk, especially if this party has to bear the burden of proof.<sup>501</sup>

386 A fifth aspect of unclearness relates to the territorial scope of the usage.<sup>502</sup> Of course, a world-wide usage is sufficient. Yet, since it is also sufficient that parties are aware or could have been aware of a certain usage, it may be argued that the territorial scope of the usage must (only) cover the seat of both parties; but one could also argue that it is sufficient that the scope extends to the seat of one side whereas the other side was aware or must have been aware of the usage.

387 In order to find an overall evaluation, one has to keep in mind that Article 23 (1) (c) JR (Article 17 (1) (c) JC) was enacted in order to avoid the inconveniences caused by the strict case law of the *ECJ* concerning lit. a of this provision. This rationale is still valid. Moreover, there are two other reasons for a reluctant approach as to change or abolish conformity with usages as a way for forming a choice of forum agreement:

- Firstly, in 2005, the Hague Convention on Choice of Forum Agreements has been passed. Article 3 c) of this convention states that an exclusive choice of court agreement must be concluded or documented - in writing; or by any other means of communication which renders information accessible so as to be usable for subsequent reference. If this convention should

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<sup>501</sup> See e.g. Spanish reports (EJN and *Correa Delcasso*), 3<sup>rd</sup> questionnaire, question 2.2.25.4, French report, 3<sup>rd</sup> questionnaire, question 2.2.25.4, and *Cour d'Appel Rouen*, 06/23/2005, case 04/00349. German report, 3<sup>rd</sup> questionnaire, question 2.2.25.4. The English report, 3<sup>rd</sup> questionnaire, 2.2.25.4, cites *Standard Steamship Owners' Protection & Indemnity Ass (Bermuda) Ltd/GIE Vision Bail* [2004] EWHC 2919 Comm where the court referred to its own judgment as to whether a certain practice constitutes a "usage".

<sup>502</sup> *Pfeiffer/Pfeiffer*, *Handelsgeschäfte*, § 22, para. 135, p. 1015; see also *Kropholler*, Article 23, para. 55.

become binding for the Member States, the situation as to choice of forum agreements would change considerably. It seems advisable to coordinate changes of Article 23, if any, with the future role of said Convention. These issues are discussed separately.<sup>503</sup>

- Secondly, it should be kept in mind that the reference to usages in Article 23 JR (Article 17 JC) was taken from Article 9 (2) CISG and that, furthermore, Article 1:105 of the principles of European Contract Law provides for a nearly identical rule.<sup>504</sup> If such a rule should become part of a future Common Frame of Reference for European Contract Law, it may be possible to achieve a more harmonised and predictable understanding of “usages”. By contrast, it is doubtful whether a concept, well established for other agreements, should be abolished in the context of choice of forum agreements.

#### *d) Applicability of Article 23 JR vis-à-vis Third States*

388 In its *Owusu* decision<sup>505</sup>, the *ECJ* has decided that an application of the jurisdictional rule in Article 5 JC/JR does not require a jurisdictional conflict between different Member States. There is an ongoing discussion whether this principle (which is stated in a rather general manner by the *ECJ*) may nonetheless be inapplicable to Article 23 JR. A survey shows that Member State practice is different in this re-

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<sup>503</sup> *Infra* para D.III.4.f).

<sup>504</sup> The wording of this provision is:

Article 1:105

Usages and Practices

(1) The parties are bound by any usage to which they have agreed and by any practice they have established between themselves.

2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable.

<sup>505</sup> *ECJ*, 03/01/2005, C-281/02, *Owusu/Jackson*, ECR 2005 I-1383.

spect.<sup>506</sup> Some Member States apply Article 23 JR, others apply autonomous national law.<sup>507</sup> The general reporters are convinced that this issue can and will be resolved by *ECJ* case law.

*e) Precedence of Article 27 JR over Exclusive Choice of Forum Agreements*

389 The precedence of the mechanism in Article 27 JR over exclusive choice of forum agreements raises serious questions which are analysed elsewhere in this report.<sup>508</sup>

*f) Hague Convention on Choice of Forum Agreements*

*aa) General Remarks*

390 As already mentioned above, after the enactment of the Judgment Regulation, the Hague Choice of Forum Convention has been passed in 2005. A future accession of the EC may be possible, and is an option already discussed in the Member States.<sup>509</sup> The question whether such an accession is advisable goes beyond the scope of this report. Nevertheless, the reporters would like to add the following remarks and possible guidelines:

- The Hague Convention provides for rules on the formation and effect of exclusive choice of forum agreements. Regardless of whether the EC accedes to this convention, its rules could be considered as a possible source for a comparison if an amendment of Article 23 JR should be contemplated.

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<sup>506</sup> Respective 3<sup>rd</sup> questionnaires, 2.2.25.5 Greece; in Germany, the former court practice of applying autonomous national law, is (mostly) considered to be obsolete under *Owusu*, see e. g. *Kropholler*, Article 23, para. 9, p. 285. The Spanish report (Correa Delcasso) 3<sup>rd</sup> questionnaire, question 2.2.25.5, seems to give some indication for the same result in Spain.

<sup>507</sup> Respective 3<sup>rd</sup> questionnaires, 2.2.25.5. of the national reports from England, Estonia, France.

<sup>508</sup> See part D.IV.2.d)cc)(1), sub para. 442 of this report on *lis pendens*.

<sup>509</sup> English report, 3<sup>rd</sup> questionnaire, question 2.2.25.5.

- If the EC should accede to this convention, Article 23 JR needs to be coordinated with the rules of the convention. That does not necessarily mean that (all) the rules of the convention are adopted also within the framework of the Judgment Regulation. However, it has to be decided whether (or in how far) uniform rules within the EC and *vis-à-vis* third States are desirable or whether it is preferable to provide for a special regime within the EC.

*bb) Possible effect on Art. 23 JR*

391 A particular issue is raised by the circumstance that the Hague Convention may conflict with Art. 27 et seqs. JR. As of now, the priority rule in Art. 27 JR applies regardless of an exclusive choice of forum agreement. It is thus guaranteed that no conflicting judgments in different Member States (which have to be recognised) are rendered.<sup>510</sup> Pursuant to Art. 26 (6) of the Hague Convention, the JR remains unaffected only where both parties are resident in a Member State. Consequently, an exclusive choice forum agreement between an EU-resident and a third state party, now falling under Art. 27 JR, will – in case of accession – be also subject to the rules of the convention. In cases of conflicting rules, the Convention will take precedence. Art. 6 of the Hague Convention provides for a rule different from Art. 27 JR because the former gives preference to the chosen court and not to the court seised first.

392 In cases where the Hague convention applies, the following situations may arise:

393 If the court seised first (in a Member State) is the court chosen by the parties, Art. 27 JR applies without serious friction to the Hague Convention, unless an exceptional case under Art. 6 lit. a-e Hague Convention arises. Usually, all other courts have to stay their proceedings. The chosen court may and has to take the case under the con-

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<sup>510</sup> ECJ, 12/09/2003, C-266/01, *Gasser/MISAT*.

vention. In order to achieve this result, it seems sufficient to include a rule stating the preference of the Hague Convention in accordance with Art. 26 (6) or to add a reservation to Art. 27 JR.

394 If the court seised first is not the chosen court, Art. 27 JR will not apply. The chosen court will hear the case under the Hague Convention. The court first seised will dismiss the case under Art. 23 JR because of the agreement. In order to achieve this result, it is again probably sufficient to include a rule stating the preference of the Hague Convention in accordance with Art. 26 (6) or to add a reservation to Art. 27. Furthermore, depending on policy considerations, one could envisage an extension of Art. 23 (3) JR stating that in case of an exclusive choice of forum agreement, courts other than the chosen court have no jurisdiction unless the chosen court has determined its jurisdiction, or to tolerate parallel proceedings, while taking additional steps that ensure that both courts will act expeditiously and will eventually find the same result as to the validity of the choice of forum.<sup>511</sup>

395 If the court seised first is not the chosen court *and* Art. 6 Hague Convention would allow this court to take the case, the situation is more difficult. However, Art. 6 does not by itself confer jurisdiction; the court seised first will have to dismiss the case, unless – according to the applicable jurisdictional provisions – it has jurisdiction. In this case, a different result as to the validity of the choice of forum agreement and eventually a different judgment as to the controversy itself is theoretically possible. This could again be avoided by an extension of Art. 23 (3) JR stating that, in case of an exclusive choice of forum agreement, courts other than the chosen court have no juris-

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<sup>511</sup> In this respect, the British Institute of International and Comparative Law has submitted the following proposal for an additional paragraph in Art. 26 along the following lines:

"If a defendant domiciled in a Member State enters an appearance to contest the jurisdiction, a Member State court shall determine whether it has jurisdiction under the provisions of this Regulation expeditiously and (unless the defendant otherwise specifically requests) without requiring the defendant to answer, or making any determination as to, the substance of the claim. If the court determines that it does not have jurisdiction under this Regulation, it shall immediately decline jurisdiction."

diction unless the chosen court has determined its jurisdiction. On the other hand, such a general preference for the chosen court would raise other serious problems which are discussed in more detail in the *lis alibi pendens* section of this report.<sup>512</sup>

396 The analysis outlined in this section<sup>513</sup> and the situations discussed here demonstrate that Art. 23 JR and Art. 6 Hague Convention go together more smoothly if identical standards apply regardless whether the validity of a choice of forum agreement is analysed under Art. 23 JR or under Art. 3 of the Hague convention. This gives rise to the following additional remarks:

397 Pursuant to its Art. 26 (1), the Hague Convention “shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.” In general, both instruments will be construed harmoniously by the Member State Courts. In particular, the Member State Courts will have to use ECJ jurisprudence as an indirect authority when interpreting the Hague Convention.

- According to Art. 3 lit c Hague Convention, an agreement must be concluded or documented in writing. Under Art. 23 (1) lit. a JR, an agreement must be concluded or evidenced in writing. This difference in wording is not meant to make a difference in interpretation. The use of documented is meant to make clear that this provision, like Art. 23 JR, provides for a rule on form and not for a standard of proof.
- As already mentioned above, Art. 5 (1) and Art. 6 (1) Hague convention refer to the law of the chosen forum in order to determine the validity of a choice of forum agreement. Pursuant to these provisions, both the chosen court and any other court will have to apply the same law in order to determine the validity of the agreement. This reference would include substantive stan-

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<sup>512</sup> Paras. 403 et seqs. *infra*.

<sup>513</sup> Paras. 391–395 *supra*.



dards for the consent as required in ECJ case law concerning Art 23 JR.<sup>514</sup> However, there is a remaining difference between Art. 6 Hague Convention and Art. 23 JR because the former refers to the law of the chosen court in order to determine the validity of the choice of forum agreement. This could either be addressed by the already mentioned extension of Art. 23 (3) JR or by including a reference to the laws of the chosen court in Art. 23 (1) JR.

## 5. Jurisdiction by Appearance (Article 24 JR)

398 In general, this provision does not raise particular problems.<sup>515</sup> This may be one of the reasons why some national reports cannot refer to any relevant case law.<sup>516</sup> Nevertheless, some aspects should be mentioned:

399 According to the *Elephanten Schuh* decision of the ECJ, lack of jurisdiction has to be raised no later than the first statement of defendant which, according to national law, constitutes a defence against the claim.<sup>517</sup> It is obvious that this results into some differences in Member State practice. However, this only is a consequence of the technical diversity between the various Member State procedural laws. The national reports do not give any indication that this results into relevant problems.<sup>518</sup>

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<sup>514</sup> Para. 376 *supra*.

<sup>515</sup> See in particular the English report, 3<sup>rd</sup> questionnaire, question 2.228; only the Greek report (*Klamaris*) refers to a contradictory national practice where, as it seems, courts sometimes simply do not apply Article 24 JR.

<sup>516</sup> This may also be the reason why there is only limited ECJ case law, ECJ, 06/24/1981, C-150/80, *Elephanten Schuh/Jacqmain*, ECR 1981, 1671. A good further example is the Portuguese national report, 3<sup>rd</sup> questionnaire, question 2.2.28., which refers extensively to national case law which is well in line with the requirements of Article 24 JR and said ECJ decision and states some surprise about the extensive analysis of Article 18 JC (= Article 24 JR).

<sup>517</sup> ECJ, 06/24/1981, C-150/80, *Elephanten Schuh/Jacqmain*, ECR 1981, 1671.

<sup>518</sup> National reports, respective 3<sup>rd</sup> questionnaires, 2.2.28.

- 400 In Austria, case law of the *Oberste Gerichtshof* “reads” the requirements of Article 23 JR into Article 24 JR (i. e. that one party must have its domicile in a Member State). As the Austrian report states quite correctly, the correctness of this case law is doubtful since Article 24 JR does not comprehend such a requirement.<sup>519</sup> The general reporters are convinced that this question can and will be resolved by a reference to the *ECJ*.
- 401 The Dutch report mentions case law, according to which it is not sufficient that the defendant denies the competence of the court so that it is necessary to raise an actual argument against the competence<sup>520</sup>. Other reports do not mention such a requirement; e. g. in Austria or Germany, it is sufficient to censure the claimed jurisdiction.<sup>521</sup> In this respect, again, a further clarification by the *ECJ* could be desirable. There is no need for an amendment.

## 6. Summary to Questions of Jurisdiction

- 402 In general, there is satisfaction with the jurisdictional provisions in the Member States. The research underlying this report has shown only few and very limited aspects where a further discussion or an amendment is advisable. The general reporters would like to give the following indications:
- The best way to avoid discrimination against domiciliaries of third States is to enter into reciprocal agreements.
  - There are differences between the Member States as to how the examination of jurisdiction *ex officio* is handled. The general reporters do not give any recommendation in this respect.
  - Concerning the differences as to a separate preliminary determination of the court’s jurisdiction, it may be advisable to add to

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<sup>519</sup> Austrian report, 3<sup>rd</sup> questionnaire, question 2.2.28.

<sup>520</sup> 3<sup>rd</sup> questionnaire, question 2.2.28.

<sup>521</sup> Austrian national report, part 3. 2.2.28; *Kropholler*, Article 24, para. 7.

Section 8 a clause stating that preliminary rulings on jurisdiction should be made without delay.

- Infrastructural and organisational differences in the Member States do not give rise to specific recommendations by the general reporters.
- The mechanism in provided for by Article 26 JR with Article 19 Regulation (EC) No. 1348/2000 is very difficult to understand for practitioners who are not, at the same time, experts for private international law. Finding a more simple solution may be advisable. However, Article 26 (2) JR cannot simply be abolished.
- The mechanism for a determination of the domicile of natural persons is, in some cases, rather complex. It should be discussed whether an autonomous definition can be found acceptable.
- The ramifications of Article 60 JR are not yet clear enough to render a final evaluation. The general reporters recommend observing closely the further development under Article 60 JR.
- Art. 4 (2) results into an unequal system of access to justice in third state cases. Given the political implications of the different avenues open to address this problem, the general reporters refrain from giving a comprehensive recommendation. It might however be advisable, in a first step, to extend Art. 5 and 6 to cases involving third state defendants and to allow a reference to national law only on the basis of a residual provision.
- The general reporters recommend – in Article 5 JR – establishing a (non-exclusive) *forum* based on the situs of movable property for cases where this property is the object of the controversy.
- Any suggestion to change the rule for sales contracts in Article 5 (1) (b), indent 1 JR, would be premature. Further observa-

tion is advised. The same applies to service contracts under indent 2.

- A further ascertainment of Article 5 (3) JR by case law is desirable. There is no indication that this raises insurmountable problems or that the results which could be reached would not adequately serve the needs of legal practice.
- As of now, the reporters do not see a need for recommending any amendments of Article 5 (3) JR with regard to the *Shevill* jurisdiction of the *ECJ*.
- The issue of civil jurisdiction as an annex to criminal jurisdiction needs further observation, possibly in connection with issues of cooperation in criminal matters.
- The courts have been able to narrow down Article 6 (1) JR as far as necessary in order to safeguard potential defendants against inadequate *fora*.
- A provision according to which other bases of jurisdiction are sufficient for Article 6 (1) JR provided that the court has jurisdiction over a certain quorum of defendants should be considered further.
- Article 65 JR (inapplicability of Article 6 (3) JR in certain Member States) is an expression of the diversity of procedural law in the Member States. It seems advisable to amend Article 65 (1) JR as follows: The first sentence of paragraph 1 shall be deleted. A new sentence shall be added to the first paragraph which reads as follows: The court of the main proceedings shall decide on the admissibility of the third party notice.
- The general reporters share the doubts concerning the necessity of an exclusive jurisdiction in contracts relating to a rent of office space and recommend insofar further consideration of narrowing the scope of Article 22 (1) JR in favour of a more flexible approach.

- The problems of an exclusive jurisdiction in cases concerning the rent of holiday homes need further consideration. A more flexible approach in order to avoid the need to litigate in a remote forum seems advisable.
- In spite of some open questions relating to jurisdiction on company matters, a real need for suggestions cannot be recognised.
- A further harmonisation of the law relating to the formation of choice of forum agreements should be considered with regard to the future Common Frame of Reference for European Contract law and to the Hague Convention on Choice of Forum Agreements.
- The same applies to the question of determining “usages” in paragraph 1 lit c of this provision in order to resolve several points of uncertainty in this respect.
- The scope of applicability of Article 23 JR as to third States is still dealt with differently in the Member States. Some Member States apply Article 23 JR, others apply autonomous national law. The general reporters are convinced that this issue can and will be resolved by *ECJ* case law.
- The Hague Convention provides for rules on the formation and effect of exclusive choice of forum agreements. Regardless of whether the EC accedes to this convention, its rules could be considered as a possible source for a comparison if an amendment of Article 23 JR should be contemplated.
- If the EC should accede to this Convention, Article 23 JR needs to be coordinated with the rules of the Convention. That does not necessarily mean that (all) the rules of the Convention are adopted also within the framework of the Judgment Regulation. Appropriate steps could include a rule giving preference to the Hague Convention in conformity to this convention’s Art. 26 (6) and/or a reservation in Art. 27 with regard to Art. 6 Hague Con-

vention. Theoretically, further steps could include either an extension of Art. 23 (3) JR stating that, in case of an exclusive choice of forum agreement, courts other than the chosen court have no jurisdiction unless the chosen court has determined its jurisdiction or additional measures in order to avoid different decisions on choice of forum agreements in the Member States, both possible avenues raise serious policy issues, discussed in detail in the *lis alibi pendens* section.

- Necessary clarifications as to appearance as a basis for jurisdiction can be achieved by *ECJ* case law.

#### **IV. *Lis Pendens* and Similar Proceedings**

##### **1. The Framework of the Regulation**

###### *a) The Underlying Policy*

403 Section 9 of Chapter 2 – Articles 27–30 JR – deals with a core issue of any multistate system of harmonised rules of international jurisdiction and enforcement: the co-ordination of several proceedings involving the same or related actions between the same parties. The rules on this issue should ensure “in so far as possible and from the outset”<sup>522</sup> the following result: Irreconcilable judgments on the same action not enforceable pursuant to Articles 34 (3) and 4 JR or related actions with a risk to non-enforcement should be avoided at the earliest stage possible in order to save the parties and the judicial systems involved time and money – not only economic values but also, in respect to the parties, important components of the right to effective access to justice as guaranteed by and to be optimised under Article 6 (1) ECHR as well as under Community law itself.<sup>523</sup> To put it in

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<sup>522</sup> *ECJ*, 12/08/1987, C-144/86, *Gubisch Maschinenfabrik KG v Giulio Palombo*, ECR 1987, 4861, para. 8.

<sup>523</sup> *ECJ*, 12/17/1998, C-185/95, ECR 1998 I-8417, paras. 50 et seq.: “the general principle of Community law requiring prompt determination of judicial proceedings” unfounded only

the words of the *ECJ*, the *lis pendens* rules are designed to guarantee a “proper administration of justice”.<sup>524</sup>

404 To this end, Article 27 JR requires any court second seised by the same parties for the same cause of action to stay its proceedings until the court first seised has decided upon its own jurisdiction, and if the latter does establish its jurisdiction, the court second seised has to decline jurisdiction. In respect to related actions, Article 28 JR grants the court second seised discretion whether to stay its own proceedings. Article 29 JR requires any court other than the court first seised not merely to stay, but to immediately decline jurisdiction, if the actions fall within the ambit of an exclusive jurisdiction of several courts. Article 30 JR provides for an autonomous definition for the moment of time, in which a court is deemed seised.

#### *b) Cornerstones in the Case Law of the ECJ*

405 The *ECJ* has rendered this framework more precise by a series of judgments – a reliable sign for the practical importance of the *lis pendens* rules but also for the rather general character of the wording of the relevant provisions.

##### *aa) The “same cause of action” under Article 27 JR*

406 In its decisions in *Gubisch*, *Tatry*, *Gantner*, and *Mærsk*, the *ECJ* developed a genuinely European notion of a “cause of action” primarily characterised by its broad scope compared to most of the legal orders of the Member States.<sup>525</sup> As a consequence, two proceedings already involve the same cause of action once the same subject-

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“in those circumstances (scil. duration of proceedings before the Court of First Instance of 22 months)”.

<sup>524</sup> See also e. g. *ECJ*, 10/14/2004, C-39/02, *Mærsk Olie & Gas A/S./Firma M. de Haan en W. de Boer*, ECR 2004 I-9657 at para. 31; *ECJ*, 12/09/2003, C-116/02, *Erich Gasser GmbH./MISAT Srl*, ECR 2003 I-4693, para. 41.

<sup>525</sup> See e. g. the Spanish national report (*Correa Delcasso*), 3<sup>rd</sup> questionnaire 3.1; the Italian national report, 3<sup>rd</sup> questionnaire, 3.5 and 3.7; for further comparative reference see e. g. *Isenburg-Epple*, Berücksichtigung ausländischer Rechtshängigkeit, pp. 157 et seq.

matter lies “at the heart of the two actions”,<sup>526</sup> thereby creating the risk of non-recognition under Article 34 (3) and (4) JR.<sup>527</sup> In order to determine this issue, the court seised has to take account of “the facts and the rule of law relied on as the basis of the action”.<sup>528</sup> In addition regard shall be had to “the end the action has in view” constituting the “object of the action”<sup>529</sup> – an additional requirement drawn from the French version<sup>530</sup> of the Judgment Regulation. In contrast, the procedural position of the parties is irrelevant,<sup>531</sup> and no account must be taken of any grounds of defence raised by the defendant.<sup>532</sup> As a result of this case law, a “positive” action for performance and an action for “negative” declaratory relief from the obligation to perform entail the same cause, and the earlier action for declaratory relief assumes priority under Article 27 JR, if the prospective defendant of the positive action seises a court more expeditiously than the prospective plaintiff.

*bb) The “same persons” under Article 27 JR*

407 In addition to the holding that the requirement of “the same persons” does not depend on the respective party roles,<sup>533</sup> the *ECJ* further broadened the scope of the *lis pendens* rules in that they were held to apply to parties formally not identical if there is “such a degree of identity between the interests” of them “that a judgment delivered

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<sup>526</sup> *ECJ*, 12/08/1987, C-144/86, *Gubisch Maschinenfabrik KG./Giulio Palumbo*, ECR 1987, 4861, at para. 16.

<sup>527</sup> *Id.* at para. 18.

<sup>528</sup> *ECJ*, 12/06/1994, C-406/92, *Tatry./Maciej Rataj*, ECR 1994, 5439, at para. 38.

<sup>529</sup> *Id.* at para. 40.

<sup>530</sup> “Lorsque des demandes ayant le même objet et la même cause (...)”

<sup>531</sup> *ECJ*, 12/06/1994, C-406/92, *Tatry./Maciej Rataj*, ECR 1994, 5439, at para. 30.

<sup>532</sup> *ECJ*, 05/08/2003, C-111/01, *Gantner Electronic GmbH./Basch Exploitatie Maatschappij BV*, ECR 2003 I-4207, at para. 26.

<sup>533</sup> *ECJ*, 12/06/1994, C-406/92, *Tatry./Maciej Rataj*, ECR 1994, 5439, at para. 30; see already *supra* at para. 406.



against one of them would have the force of *res iudicata* against the other”.<sup>534</sup>

cc) *Exclusion of Any Exceptions to the Priority under Article 27 JR*

408 For the sake of “legal certainty”<sup>535</sup> and on the basis of “the trust which the Contracting States accord to each other’s legal systems and judicial institutions”<sup>536</sup> the *ECJ* has interpreted Article 27 JR to the effect that no exception to the priority of the proceedings of the court first seised accrues from any policy consideration such as e. g. manifest lack of jurisdiction of the court first seised, exclusive jurisdiction of the court second seised on the grounds of Article 23 JR, or manifest abuse of the proceedings instituted at the court first seised. For, the court second seised “may not itself examine the jurisdiction of the court first seised”,<sup>537</sup> and “difficulties (...) stemming from delaying tactics (...) are not such as to call into question” this interpretation<sup>538</sup> – a finding that resulted in the holding that such interpretation “cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting States in which the court first seised is established is excessively long”<sup>539</sup> including situations where the court first seised lacks jurisdiction due to an exclusive ground of jurisdiction. Because “the fact is not such as to call into question the application of the procedural rule contained in Arti-

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<sup>534</sup> *ECJ*, 05/19/1998, C-351/96, *Drouot assurances SA./Consolidated metallurgical industries (CMI industrial sites), Protea assurance and Groupement d’intérêt économique (GIE) Réunion européenne*, ECR 1998 I-3075, at para. 19.

<sup>535</sup> *ECJ*, 12/09/2003, C-116/02, *Erich Gasser GmbH./MISAT Srl.*, ECR 2003 I-4693, at para. 51.

<sup>536</sup> *Id.* at para. 72.

<sup>537</sup> *ECJ*, 06/27/1991, C-351/89, *Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd./New Hampshire Insurance Company*, ECR 1991, 3317, at para. 26.

<sup>538</sup> *Id.* at para. 53.

<sup>539</sup> *Id.* at para. 72.

cle 21 of the Convention, which is based clearly and solely on the chronological order in which the courts involved are seised”.<sup>540</sup>

409 In respect to grounds of exclusive jurisdiction, the *ECJ* observed in *Gasser* that “Article 21 does not draw any distinction between the various heads of jurisdiction provided for in the Brussels Convention”.<sup>541</sup> The Court then referred to its judgment in *Overseas* and stated that its ruling was “without prejudice to the case where the court second seised has exclusive jurisdiction under the Convention and in particular under Article 16 thereof”.<sup>542</sup> The principle of mutual trust<sup>543</sup> suggests applying the strict priority rule also in the case of exclusive jurisdiction.<sup>544</sup>

*dd) Exclusion of Anti-suit Injunctions to Enforce Jurisdictional Rules by the Court Second Seised*

410 In addition, since “any injunction prohibiting a claimant from bringing such an action [scil. an anti suit injunction seeking to prevent abusive proceedings] must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention”,<sup>545</sup> anti-suit injunctions must equally be

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<sup>540</sup> *Id.* at para. 47.

<sup>541</sup> *ECJ*, 12/09/2003, C-116/02, *Erich Gasser GmbH./MISAT Srl.*, ECR 2003 I-4693, at para. 43.

<sup>542</sup> *ECJ*, 12/09/2003, C-116/02, *Erich Gasser GmbH./MISAT Srl.*, ECR 2003 I-4693, at para. 45; *ECJ*, 06/27/1991, C-351/89, *Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd./New Hampshire Insurance Company*, ECR 1991, 3317, at para. 26

<sup>543</sup> E. g. *ECJ*, 12/09/2003, C-116/02, *Gasser*, ECR 2003 I-14693; *ECJ*, 04/27/2004, C-159/02, *Turner*, ECR 2004 I-3565; *ECJ*, 03/01/2005, C-281/02, *Owusu*, ECR 2005 I-1383.

<sup>544</sup> The opposite opinion has been expressed by the English national report (sub Question 2.2.19) that perceives an “implied derogation” of Article 27 JR by Article 22 JR. The English Report relies, *inter alia*, on a systematic argument inferred from Article 35 (1) JR: The latter provision is perceived to express a special importance of Article 22 JR, see also *Speed Investments Ltd. v Formula One Holdings Ltd (No. 2)*, [2005] 1 W.L.R. 1936, at para. 38. This argument would then equally apply to the grounds of jurisdiction in sections 3 and 4 of Chapter II. However, as will be explicated in detail *infra* at no. [566], there are good reasons to delete Article 35 JR altogether.

<sup>545</sup> *ECJ*, 04/27/2004, C-159/02, *Gregory Paul Turner./Felix Fareed Ismail Grovit et al.*, ECR 2004 I-3565, at para. 27.

held incompatible with the Judgment Regulation even in a case of blatant violation of provisions providing for exclusive grounds of jurisdiction.

ee) *The Exercise of Discretion under Article 28 JR*

411 On the basis of an alternative reasoning without relevance to the ECJ's ultimate judgment,<sup>546</sup> Advocate General *Carl Otto Lenz* suggested, without further prejudice to possible other circumstances of the particular case to be taken into account, focusing primarily on the following three general criteria: (1) the degree of relatedness and risk of irreconcilability, (2) the progress of the proceedings already reached, and (3) the connections of the courts to the issue.<sup>547</sup> With regard to the first criterion, the Advocate General considered it adequate, in light of the objective of the provision, to stay proceedings under Article 28 JR as soon as there are doubts about the reconcilability of the two future judgments.<sup>548</sup>

412 In *Roche*,<sup>549</sup> the Court held that even under the broadest conceivable interpretation of Article 6 (1) JR, this provision does not apply in European patent infringement proceedings involving a number of companies established in various Contracting States in respect of acts committed in one or more of those States even where those companies, which belong to the same group, may have acted in an identical or similar manner in accordance with a common policy. The formulation used by the Court in *Kalfelis*<sup>550</sup> in order to curtail the application of Article 6 (1) JC (because of its derogating the principle of

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<sup>546</sup> ECJ, 01/20/1994, C-129/92, *Owens Bank Ltd./Fulvio Bracco and Bracco Industria Chimica SpA*, ECR 1994 I-117.

<sup>547</sup> *Id.* at 76.

<sup>548</sup> Opinion of 09/16/1993, C-129/92, ECR 1996 I-117, at para. 75.

<sup>549</sup> ECJ, 13/7/2006, C-539/03, *Roche Nederland BV and Others./Frederick Primus, Milton Goldenberg*; for further discussion of the *Roche* case in respect to Article 6 (1) JR see General Report, sub para. 220, fn. 323, and in the specific context of patent litigation see General Report sub Intellectual Property, para. 825.

<sup>550</sup> ECJ, 09/27/1988, C-189/87, *Kalfelis*, ECR 1988, 5565, para. 12.

*actor sequitur forum rei* as laid down in Article 2 JC/JR) and now inserted in Article 6 (1) JR repeats the wording of Article 22 JC. In *Tatry*,<sup>551</sup> the Court interpreted Article 22 JC as granting discretion as soon as the proceedings create the “risk of conflicting decisions, without necessarily involving the risk of giving rise to mutually exclusive legal consequences”.<sup>552</sup> Therefore, as the Court observed in *Roche*, the concept of irreconcilability in Article 22 JC is wider than under Article 27 (3) JC,<sup>553</sup> since the latter provision, as interpreted by the Court in *Hoffmann*,<sup>554</sup> requires those “mutually exclusive legal consequences” that are not a prerequisite for the application of Article 22 JC. Given these disparities in the interpretation of identical technical terms, the question arises how the wording of Article 28 JR/22 JC should be interpreted in light of its systematic relation to Article 6 (1) JC/JR.

- 413 In his Opinion in the *Roche* case,<sup>555</sup> Advocate General *Philipp Léger* observed that Article 6 (1) JC/JR as opposed to Article 22 JC (Article 28 JR) always excludes the “natural *forum*” under Article 2 JC/JR of the defendant not domiciled in the Member State where the proceeding is pending – which suggests, in the Attorney General’s view, a narrow interpretation of Article 6 (1) JC/JR.<sup>556</sup> A wide interpretation of Article 22 JC (Article 28 JR), on the other hand, will not necessarily, but only accidentally result in the exclusion of a defendant’s “natural *forum*” under Article 2 JC/JR, since the jurisdiction of the court second seised may ground on the defendant’s domicile, specific grounds of jurisdiction applicable to the defendant or even national

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<sup>551</sup> ECJ, 12/06/1994, C-406/92, *Tatry*, ECR 1994 I-5439, para. 58.

<sup>552</sup> ECJ, 13/7/2006, C-539/03, *Roche Nederland BV and Others./Frederick Primus, Milton Goldenberg*, OJ C 224/1, 09/16/2006, para. 22.

<sup>553</sup> *Id.* at para. 23.

<sup>554</sup> ECJ, 02/04/1988, C-145/86, *Hoffmann*, ECR 1988, 645, para. 22.

<sup>555</sup> ECJ, 13/7/2006, C-539/03, *Roche Nederland BV and Others./Frederick Primus, Milton Goldenberg*.

<sup>556</sup> Opinion of AG *Philipp Léger* of 12/98/2005, C-539/03, *Roche Nederland BV et al./Frederick Primus, Milton Goldenberg*, at para. 81.

provisions allowed to be applied by Article 4 JC/JR. In addition, the exercise of the discretion under Article 22 JC (Article 28 JR) will not always result in a stay of the proceedings of the court second seised if the jurisdiction is based on Article 2 JC/JR.<sup>557</sup> The Court in *Roche* expressly left this issue open, since it held that even under a wide interpretation of Article 6 (1) JC/JR the case at hand did not satisfy the conditions for its application.<sup>558</sup> Nevertheless, the Advocate General's argument drawn from the systematic structure of the Regulation raises the question whether the fact that either the court first seised or the court second seised is the "natural *forum*" of the respective defendant based on Article 2 JC/JR calls for an exercise of discretion to the effect that the "natural *forum*" should decide the case. Given that the legitimacy of the notion of a "natural *forum*" at the defendant's domicile appears increasingly doubtful,<sup>559</sup> the fact that one of the defendants of the two pending proceedings in question was sued under Article 2 JC/JR should not guide the exercise of the discretion under Article 28 JR.

## 2. The Implementation in the Member States

414 The analysis of the national reports on the application of the *lis pendens* rules as interpreted by the *ECJ* results in the following observations:

### a) "Proceedings" under Articles 27 and 28 JR

415 In the absence of any express definition of the term "proceedings" used several times in Articles 27 et seq. JR, further, in the absence of any perceivable common concept that could be derived from the legal orders of the Member States, and in light of the *ratio* of the

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<sup>557</sup> Opinion of AG *Philipp Léger* of 12/08/2005, C-539/03, *Roche Nederland BV et al./Frederick Primus, Milton Goldenberg*, at paras. 83 et seq.

<sup>558</sup> Judgment of 07/13/2006, C-539/03, *Roche Nederland BV and Others./Frederick Primus, Milton Goldenberg*, para. 25.

<sup>559</sup> See e. g. General Report D.III.2, paras. 180 et seq.

judgment of the *ECJ* in *Zelger Salinitri*,<sup>560</sup> the courts of the Member States understand that the Judgment Regulation refers this issue to be determined according to the procedural laws of the respective courts seised.<sup>561</sup>

416 For example, in an Irish case<sup>562</sup> the question arose whether a third party notice may constitute the initiation of “proceedings” in the sense of Articles 21, 22 JC (Articles 27, 28 JR). In the proceedings about obligations arising for the insurer from an insurance contract, the insurer issued a third party notice against his re-insurer. The re-insurer had already instituted proceedings in relation to the same cause of action in the courts of another Member State. The Irish Supreme Court held that the concept of “proceedings” is to be defined by the *lex fori* of the court seised. Since Irish procedural law<sup>563</sup> considers the successful application for liberty to issue and serve a third party notice to institute proceedings, Article 21 JC (Article 27 JR) was held to be applicable.

417 Quite in tune with this approach, the *Oberlandesgericht Frankfurt*<sup>564</sup> held that “proceedings” in the sense of Article 21 JC (Article 28 JR)

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<sup>560</sup> *ECJ*, 06/07/1984, C-351/96, *Siegfried Zelger./Sebastiano Salinitri*, ECR 1984, 2397, at para. 15: “Since the object of the Convention is not to unify those formalities, which are closely linked to the organization of judicial procedure in the various states, the question [scil. when the court is deemed to be “seised” for the purposes of the *lis pendens* rules, on this point see now Article 30 JR and *infra* paras. 475 et seq.] must be appraised and resolved (...) according to the rules of its own national law”.

<sup>561</sup> But compare *ECJ*, 10/14/2004, C-39/02, *Mærsk Olie & Gas A/S./Firma M. de Haan en W. de Boer*, ECR 2004, I-9657, at para. 34: “An application (...) for the establishment of a liability limitation fund undoubtedly constitutes proceedings for the purposes of Article 21 of the Brussels Convention”, thereby possibly presupposing an autonomous concept of proceedings by the standards of which the application in question could be considered as “undoubtedly” constituting “proceedings”.

<sup>562</sup> *International Commercial Bank plc./Insurance Corporation of Ireland*, [1989] ILRM 788.

<sup>563</sup> Rules of the Superior Court (RSC), Order 16 (Third Party Procedure) no. 3: “The third-party shall, as from the time of the service upon him of the notice, be a party to the action with the same rights in respect of defence against any claim made against him and otherwise as if he had been duly sued in the ordinary way by the defendant”.

<sup>564</sup> *OLG Frankfurt (Main)*, 06/15/1989, IPRspr. 1989 no. 2b, upholding *LG Frankfurt (Main)*, 02/22/1988, IPRax 1990, 234; see generally Rauscher/*Leible*, Article 27 JR, para. 4.

are instituted by a third party notice provided that the foreign applicable procedural law considers such motion as instituting proceedings.

418 Consequently, without prejudice to the general caveat that any reference to the applicable national law in order to define the scope of technical terms used by the Judgment Regulation brings undoubtedly about a danger of inconsistent interpretation, the survey of the implementation practice relating to the concept of “proceedings” has not revealed any major difficulties.

*b) The “same cause of action” under Article 27 JR*

419 By and large, the courts of the Member States understand and respect the necessity of an autonomous and thus broad interpretation of the concept of “cause of action”.<sup>565</sup> National judgments that appear to be in violation of Article 27 JR by falling back into a narrow interpretation inspired by its own *lis pendens* rules are reported only exceptionally.<sup>566</sup> Thus, the sustained criticism of the strict application of the rule of priority under Article 27 JR as interpreted by the *ECJ*<sup>567</sup> does not primarily focus on the broad interpretation of the concept of the “same cause of action”<sup>568</sup> even though it allows certain tactical procedural steps widely perceived as abusive (“torpedo”)<sup>569</sup> in the

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<sup>565</sup> See e. g. recently, generally recalling the obligation of autonomous interpretation, the French *Cour de Cassation Civ. 1ère*, 12/06/2005, pourvoi no. 01-13447, Bull. civ. I no. 465, p. 392 annexe 3.1; see also the Greek national report, Swedish national report, 3<sup>rd</sup> questionnaire, 3.1. Few national reports criticise this broad interpretation on a conceptual level, see e. g. Hungarian national report, 3<sup>rd</sup> questionnaire, 3.1.

<sup>566</sup> For an example see e. g. the French *Cour de Cassation Civ. 1ère*, 01/17/2006, pourvoi no. 04-16.845, Bull. civ. I no. 16, p. 16, annexe 3.1., and the analysis of this decision by the French national report, 3<sup>rd</sup> questionnaire, 3.1; see also the Greek report, 3<sup>rd</sup> questionnaire, 3.5, mentioning a judgment rendered by the Piraeus court of appeal apparently contrary to Article 21 JC (Article 27 JR); see also the national report of the Netherlands observing a certain tendency towards a narrow interpretation, see 3<sup>rd</sup> questionnaire, 3.1.

<sup>567</sup> For the jurisprudence see *supra* at para. 408; for further analysis and reflections on possible reactions to this critique see *infra* at paras. 423 et seq.

<sup>568</sup> But compare *Tribunal de Grande Instance de Paris*, 28/4/2000, GRUR Int 2001, 173, holding that the French patent infringement proceedings and the Italian action seeking negative declaratory judgment of non-infringement of the patent in question do not involve “the same cause”.

<sup>569</sup> On the issue of „torpedos“ see also *infra* at paras. 424 et seq. and General Report, Intellectual Property, sub D.VII.1, paras. 768 et seq.

first place, namely by comprising actions for performance and actions for negative declaratory relief against performance as the “same cause of action”.

420 Some uncertainty has arisen in respect to the issue whether Article 27 (1) JR requires a court second seised to stay its proceedings in favour of the proceedings of the court first seised if the proceedings involve the same cause of action but might fall outside the scope of application of the Judgment Regulation. For example, in a recent English case, a party argued that it is for the court first seised to decide whether the proceedings are covered by an arbitration agreement and thus fall within the exclusion of “arbitration” under Article 1(2) (d) JR.<sup>570</sup> The court held: “It seems to us to be at least arguable that the court first seised should indeed decide whether any relevant set of proceedings in a Member State is within the Regulation or outside it because the arbitration exception applies, in order to have a clear rule on that question and in order to avoid conflicting judgments on that very question”.<sup>571</sup> The court then turned to the decision of the European Court of Justice in the case *Marc Rich*<sup>572</sup> and observed that the issue was left open there<sup>573</sup> but inferred from the opinion of Advocate *Darmon* that it was not a matter for the court first seised to determine whether the proceedings of the court second

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<sup>570</sup> *Through Transport Mutual Insurance Association (Eurasia) Ltd./New India Assurance Association Company Ltd.*, [2004] EWCA Civ 1598, 12/2/2004; for further discussion of Article 1 (2) (d) JR and the aforementioned case as well as the jurisprudence of the ECJ cited *infra* see General Report, Scope of Application, sub D.II.2.c)aa), paras. 107 et seq.

<sup>571</sup> *Id.*, at para. 24.

<sup>572</sup> ECJ, 7/25/1991, C-190/89, *Marc Rich & Co. AG./Società Italiana Impianti PA*, ECR 1991 I-3855.

<sup>573</sup> ECJ, 7/25/1991, C-190/89, *Marc Rich & Co. AG./Società Italiana Impianti PA*, ECR 1991 I-3855, at para. 26, held that any decision on the application of the Judgment Regulation exclusively turns on the subject-matter of the dispute irrespective of preliminary issues necessary to be decided upon but potentially outside the scope of the Judgment Regulation if they were raised as subject-matter – a ruling that rendered it unnecessary to directly decide upon the question whether the court second seised is required to stay its proceedings until the court first seised has decided upon the applicability of the Judgment Regulation to the proceedings.



seised fell within the arbitration exception,<sup>574</sup> and therefore the English court in the case at hand is not barred under Article 27 JR as the court second seised to continue its proceedings. This holding appears to be correct, because each court of a Member State has to assess, as a preliminary issue, whether the Judgment Regulation applies to the proceedings before it, and only after the application of the Judgment Regulation is established, Article 27 JR confers any obligations upon the court second seised. Therefore, even though each of the two courts seised has to decide upon the applicability of the Judgment Regulation, this decision regularly does not concern the “cause of action” in the sense of Articles 27, 28 JR.

c) *The “same persons” under Article 27 JR*

421 Although most national reports do not indicate any major difficulties in court practice<sup>575</sup> and although most reported decisions seem to decide this issue on the basis of an autonomous interpretation,<sup>576</sup> on a conceptual level the judgment of the *ECJ* in *Drouot* was widely criticised. In this decision, the *ECJ* held that two parties formally not identical are nevertheless deemed “the same persons” if there is such a degree of identity between the interests of them that a judgment delivered against one of them would have the force of *res iudicata* against the other.<sup>577</sup> Many academic commentators argue that this situation should better be dealt with under Article 28 JR,<sup>578</sup>

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<sup>574</sup> *Through Transport Mutual Insurance Association (Eurasia) Ltd./New India Assurance Association Company Ltd.*, [2004] EWCA Civ 1598, 12/2/2004, para. 32.

<sup>575</sup> But see the English national report, 3<sup>rd</sup> questionnaire, 3. 6.

<sup>576</sup> See e. g. *OLG Karlsruhe*, 10/18/2002, IPRspr. 2002 no. 181, p. 472, holding that the claimant in foreign proceedings who appears in domestic proceedings as third party intervenor (*Streithelfer*) is not “the same party” for the purposes of Article 27 JR; see also *OLG Köln*, 09/08/2003, IPRax 2004, 521.

<sup>577</sup> *ECJ*, 05/19/1998, C-351/96, *Drouot assurances SA./Consolidated metallurgical industries (CMI industrial sites), Protea assurance and Groupement d'intérêt économique (GIE) Réunion européenne*, ECR 1998 I-3075, at para. 19.

<sup>578</sup> See e. g. *Gaudemet-Tallon*, *Compétence et Exécution des Jugements en Europe*, p. 263, at para. 325; *Kropholler*, Article 27 JR, para. 4; *Rauscher/Leible*, Article 27 JR, para. 6; but compare *Briggs/Rees*, *Civil Jurisdiction*, para. 2.190.

mainly because the degree of the identity of interests always remains a matter of evaluation which inserts into the application of the Regulation an element of uncertainty not justified by a respective improvement in the administration of justice in the particular case at hand.

422 However, English courts have availed themselves of considerations close to the *Drouot* rule in order to deal with complex multi-party litigations<sup>579</sup> and maritime claims commenced by a service of a claim form upon a ship, i. e. actions *in rem*, *vis-à-vis* proceedings against persons on the same cause of action.<sup>580</sup> English judgments outside maritime law seem to carefully evaluate whether two legal persons can be deemed “the same” with a view to the identity of their interests but nevertheless illustrate the inevitable uncertainty of such an interest-based approach.<sup>581</sup> It appears indeed to be more in conformity with the systematic structure of the *lis pendens* rules to resolve cases of identity of interests under Article 28 JR.

#### d) Exclusion of Any Exceptions to the Priority under Article 27 JR

423 Several national reports express sustained critique about the exclusion of any exceptions to the priority of the proceedings of the court first seised over subsequent proceedings in another court.<sup>582</sup>

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<sup>579</sup> National report of the U.K., 3<sup>rd</sup> questionnaire, 3.6, citing *Glencore International AG./Metro Trading International Inc.*, [1999] 2 All ER (Comm.) 899.

<sup>580</sup> See e. g. *The Deichland*, [1989] 2 All E.R. 1066.

<sup>581</sup> See e. g. *Mecklermedia Corp./DC Congress GmbH*, [1998] 1 All E.R. 148, holding that a licensee who was permitted to use the licensor’s trade name and that licensor are not “the same persons”; but see *Berkeley Administration Inc./McClelland*, [1995] I.L.Pr. 201, at para. 29, holding that wholly-owned subsidiaries could be deemed “the same party” as their parent, but ultimately decided that in the case at hand there were not the “same cause of actions” involved.

<sup>582</sup> See in particular the national report of the U.K., Questions III 3.1, 3.2, 3.3., 3.7; see also e. g. German national report, Questions III 3.2 and 3.7; Greek report (*Klamaris*) 3<sup>rd</sup> questionnaire, 3.7; national report of the Netherlands, 3<sup>rd</sup> questionnaire, 3.2; Austrian national report: 3<sup>rd</sup> questionnaire, 3.7; to some extent also national report of Poland, 3<sup>rd</sup> questionnaire, 3.7; national report of Spain (EJN), Question 3.7; the national reports of the Czech Republic, Estonia, Finland, France, Hungary, Ireland, Lithuania, Luxembourg, Malta, and Slovenia have not reported any experiences with “torpedos” nor do they express serious concerns.

*aa) Tensions in the Implementation of the Member States*

- 424 Detrimental delays in the proper administration of justice arising from “preventive” actions, e. g. for negative declaratory relief, instituted for tactical reasons with courts that obviously lack jurisdiction but are known for slow proceedings in order to profit from the strict rule of priority under Article 27 JR (“torpedo”)<sup>583</sup> have been repeatedly identified in connection with patent litigation and corporate loans.
- 425 Not all legal systems of the Member States provide for the prerequisites for a “torpedo”, since some procedural laws seem to not allow an action for pure negative declaratory relief.<sup>584</sup> However, given that most legal system do provide for such an action, no argument can be drawn from this particularity of one of the Member States’ legal system against the priority of proceedings aiming at negative declaratory relief over subsequent proceedings for “positive” performance as, for example, being an atypical, unwanted result of the interpretation of “the same cause of action” under Article 27 JR by the *ECJ*.

*(1) Corporate Loan Litigations*

- 426 Yet, tensions have been observed, for example, in corporate loan litigations. In the recent *Primacom* case, an English lead bank and agent of a syndicated loan governed by English law and including an exclusive choice of court agreement in favour of the courts of England was sued in Germany, shortly after the German debtor had violated certain financial covenants of the loan agreement.<sup>585</sup> The action

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<sup>583</sup> See also General Report sub Intellectual Property Rights, D.VII.1, paras. 804 et seq.

<sup>584</sup> See e. g. Ireland, Order 19, rule 29, RSC: “No action or pleading shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may, if it thinks fit, make binding declarations of right whether any consequential relief is or could be claimed or not”, this provision being interpreted in *O’Connell./Dun Laoghaire Corporation*, [1991] ILRM 301 as: “[a] declaratory judgment is one which declares the rights of parties”, however not the non-existence of rights, see Irish national report, 3<sup>rd</sup> questionnaire, 3.7.

<sup>585</sup> *LG Mainz*, 09/13/2005, WM 2005, 2319. For another litigation involving the pre-emptive action of a debtor of an international loan agreement against the lenders in disregard of an exclusive choice-of-forum of English courts see *Continental Bank./Aeakos SA*, [1994] 2 All E.R. 540.

aimed for negative declaratory relief from the loan agreement for public policy reasons raised against the interest rate. Subsequently, the agent instituted proceedings in England, *inter alia*, for specific performance of the financial covenants in question and declaratory judgment about the validity and enforceability of the loan agreement as well as the rightful exercise of the default clauses.<sup>586</sup> The English court held: “It is difficult to see how the German courts could find that they are entitled to exercise jurisdiction in the face of the exclusive jurisdiction clause (...).” Nevertheless “I hold that this [scil. strict priority under Article 27 JR] is the effect of the decision of the *ECJ* in *Erich Gasser*,<sup>587</sup> and the proceedings were stayed, until the German court declined jurisdiction.<sup>588</sup> English courts thus do respect the jurisprudence of the *ECJ*, but do not endorse it.

427 Specifically regarding the *Primacom* litigation and the underlying decision in *Gasser*, corporate loan practitioners<sup>589</sup> approached in the course of this study have emphasised that the mere possibility that the debtor may institute pre-emptive proceedings in a court other than the one exclusively agreed upon motivates the lender to institute itself proceedings in the chosen court as soon as any sign of trouble arises, which will trigger the usual default and cross-default clauses in the loan agreements to the result that repayment claims be raised pre-maturely, thereby pre-empting the economically desirable phase of negotiation and co-operation which ultimately destroys values.

428 In the *Primacom* litigation, the *Landgericht* took nine months to reach the decision on its lack of jurisdiction – a time that might be too long for the specific purposes of the cross-border loan business.<sup>590</sup> Yet,

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<sup>586</sup> *JP Morgan Europe Ltd./Primacom AG and Others*, [2005] 2 Lloyd's Rep. 665.

<sup>587</sup> *Id.* at p. 672.

<sup>588</sup> *LG Mainz*, 09/13/2005, WM 2005, 2319, at p. 2321.

<sup>589</sup> See e. g. Linklaters, Submission to study JLS/C4/2005/03 on the Brussels Regulation 44/2001/EC, Proposals to reform the *lis pendens* provisions of the Brussels Regulation – alleviating the risk of global competitive disadvantage for European borrowers, 29 June 2006, henceforth referred to as “Submission”.

<sup>590</sup> Linklaters, Submission, p. 1, para. 1.2.

from a generalising perspective, which must be the approach of an instrument dealing generally with jurisdiction and enforcement, a period of nine months for declining jurisdiction seems perfectly adequate for a proper administration of justice.<sup>591</sup> Nevertheless, English practitioners were reported to have identified the decision as illustrating conceptual deficiencies in the regulatory framework of the Judgment Regulation.<sup>592</sup> It has to be conceded that the *ECJ*'s decisions in *Gasser* as well as in *Turner* and *Owusu*<sup>593</sup> conflict with notions of jurisdictional justice rooted in the common law tradition.

## (2) Patent Litigations

429 Patent litigation practice provides for another area where the danger of a successful attempt to profit from the strict rule of priority under Article 27 JR in a way remote from its *ratio* appears imminent,<sup>594</sup> and several courts of Member States have undertaken steps to prevent litigation practice perceived as abusive<sup>595</sup> - however none of these steps being in line with the strict interpretation of the rule of priority by the *ECJ*.

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<sup>591</sup> See e. g. *ECJ*, 12/17/1998, C-185/95, ECR 1998 I-8417, *Baustahlgewebe GmbH gegen Kommission der Europäischen Gemeinschaften*, paras. 50 et seq.: "the general principle of Community law requiring prompt determination of judicial proceedings" unfounded only "in those circumstances (scil. duration of proceedings before the Court of First Instance of 22 months)".

<sup>592</sup> See English national report, 3<sup>rd</sup> questionnaire, 3.1.

<sup>593</sup> *ECJ*, 12/09/2003, C-116/02, *Gasser*, ECR 2003 I-14693; *ECJ*, 04/27/2004, C-159/02, *Turner*, ECR 2004 I-3565; *ECJ*, 03/01/2005, C-281/02, *Owusu*, ECR 2005 I-1383.

<sup>594</sup> See General Report, sub Intellectual Property Rights, D.VII.1, paras. 804 et seq.

<sup>595</sup> See e. g. *LG Düsseldorf*, 12/19/2002, InstGE 3, 8–20, holding that actions for negative declaratory relief raised in courts that obviously lack jurisdiction will not be taken into account under Article 27 JR on the grounds of bad faith; see also *Rechtbank van eerste aanleg te Brussel*, 05/12/2000, GRUR Int 2001, 170; see also *Rechtbank Den Haag*, 09/29/1999, I.E.R. 2000, 39; see further *Tribunal de Grand Instance de Paris*, 03/09/2001, IIC 2002, 225, holding that instituting proceedings in the courts of another Member State after the claimant has obtained interim measures (*saisie contrefaçon*) in France; but compare *Sepracor Inc./Hoechst Marion Roussel Limited, Marion Merrell Limited, Hoechst AG, Hoechst Marion Roussel AG, Hoechst Marion Roussel Deutschland GmbH, Hoechst Marion Roussel Inc., Georgetown University*, [1999] F.S.R. 746 Ch D (Patents Ct), holding that any exception from the strict priority rule even on the grounds of abuse is inadmissible.

*(3) Purely Domestic Litigations*

430 In addition, practitioners have noticed the disposition to use “torpedos” even in domestic cases by raising pre-emptive actions for negative declaratory relief in the courts of other Member States evidently lacking jurisdiction, e. g. in the construction industry, in respect to purely domestic settings,<sup>596</sup> relying on an interpretation based on the wording of Article 27 JR and the *ECJ*’s decisions in *Owusu*<sup>597</sup> and, to some extent, in *Overseas*<sup>598</sup> that its application requires no more than proceedings “brought in the courts of different Member States” irrespective of any further cross-border element such as e. g. domicile.<sup>599</sup>

431 In light of the aforementioned observations of the implementation practice of the Member States, the question whether the strict interpretation of Article 27 JR by the *ECJ* that does not allow any exception from the priority of the proceedings instituted with the court first seised appears to be the most controversial issue of the *lis pendens* rules of the Judgment Regulation. This finding suggests further consideration and, potentially, a re-evaluation.

*bb) Legal Evaluation*

432 Article 6 (1) ECHR provides that, in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time. The *ECJ* has equally acknowledged that Community law adheres to “[t]he general principle (...) that everyone is entitled to fair legal process, which is inspired by (...) fundamental

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<sup>596</sup> See e. g. *Thode*, *BauR* 2005, 1533, 1535.

<sup>597</sup> *ECJ*, 03/01/2005, C-281/02, *Andrew Owusu./N.B. Jackson et al.*, ECR 2005 I-1383, para. 29.

<sup>598</sup> *ECJ*, 06/27/1991, C-351/89, *Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd./New Hampshire Insurance Company*, ECR 1991 I-3317, at paras. 21, 22; see also e. g. *OLG Frankfurt (Main)*, 4/9/2001, *IPRax* 2002, 515, 519.

<sup>599</sup> See e. g. *Gaudemet-Tallon*, *Compétence et exécution des jugements en Europe*, p. 266, para. 329; *Briggs/Rees*, *Civil Jurisdiction*, p. 207, para. 2.198; *Geimer/Schütze*, *Article 27 JR* para. 14; *Gebauer/Wiedmann*, *Article 27 JR*, para. 137.

rights and in particular the right to legal process within a reasonable period”.<sup>600</sup> It is common ground that excessively long proceedings do not comply with these guarantees.<sup>601</sup>

433 On the other hand, the *ECJ*, in its decision in *Gasser*, expressly rejected the proposition that the court second seised may derogate from Article 27 JR if the court first seised belongs to a jurisdiction that is *generally* known for excessively long proceedings.<sup>602</sup>

434 For the sake of clarity, the Court might have been well advised to take the opportunity to supplementally refer to the guarantee of effective remedies under Community law and European human rights and to directly point out that its holding in *Gasser* does not extend to cases where the duration of the *particular* proceeding in question assumes excessive length and thereby necessitates a derogation from the rule of priority under Article 27 JR by the court second seised in order to comply with the aforementioned guarantees of effective remedies – be it by terminating the stay of its own proceedings under Article 27 (1) JR, be it by resuming jurisdiction after first declining jurisdiction pursuant to Article 27 (2) JR.

435 Evidently, the crucial point is to determine when the danger of a violation of the guarantees of effective remedies has become so imminent that derogation from Article 27 JR appears mandatory. In *Gasser*, the Commission submitted that this “is an issue which cannot be settled in the context of the Brussels Convention. It is for the ECHR to examine the issue and the national courts cannot substitute themselves for it by recourse to Article 21 of the Convention”.<sup>603</sup> However,

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<sup>600</sup> See e. g. *ECJ*, 12/17/1998, C-185/95, *Baustahlgewerbe GmbH./Commission of the European Communities*, ECR 1998 I-08417, para. 21, with further references to earlier decisions; see also Article II-107 (2) Charter of Fundamental Rights of the Union: “Right to an effective remedy”.

<sup>601</sup> See generally *Hess*, in: *Festschrift Jayme* Vol. I, pp. 339 et seq.

<sup>602</sup> *ECJ*, 12/09/2003, C-116/02, *Erich Gasser GmbH./MISAT Srl.*, ECR 2003 I-4693, para. 73.

<sup>603</sup> *ECJ*, 12/109/2003, C-116/02, *Erich Gasser GmbH./MISAT Srl.*, ECR 2003 I-4693, para. 69.

according to the systematic position of international treaty as an integral part of the various legal systems of the signatory states (after transformation, as the case may be), the courts of these states have to directly apply the European Convention on Human Rights as a matter of treaty obligation.

436 The court second seised can only comply with this treaty obligation by derogating from a provision of secondary Community law. If this step is conceived as a result of a restrictive interpretation of Article 27 JR in light of primary Community law (“teleological reduction”), a reference to the *ECJ* appears most appropriate. Yet, Article 68 EC-Treaty only entitles (and obliges) courts of a Member State to refer a question of interpretation of Community acts falling under Title IV such as the Judgments Regulation against whose decisions there is no judicial remedy under national law – which will regularly not apply to the court of first instance second seised. Therefore, these courts will have to decide the matter themselves.<sup>604</sup>

437 If the derogation from Article 27 JR is conceived as a direct application of a treaty falling within the ambit of Article 307 EC-Treaty,<sup>605</sup> the same result – obligation for the court second seised whether or not to derogate from Article 27 JR in the case of excessively long duration of proceedings – accrues immediately.

438 Therefore, the Commission’s submission in *Gasser* on this point cannot be approved. Thus, the legal evaluation of the situation of ex-

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<sup>604</sup> According to *ECJ*, 10/22/1987, C-314/85, *Fotofrost./Hauptzollamt Lübeck-Ost*, ECR 1987, 4199, para. 15, the courts of the Member States “do not have the power to declare acts of the Community institutions invalid”. The exceptional *obligation* – as opposed to the mere entitlement to do so under Article 234 (2) EC-Treaty – of lower courts to refer the question of validity of a Community act to the *ECJ* grounds itself on an extensive interpretation of Article 234 (2) EC-Treaty. It might be extended to Article 68 EC-Treaty. However, a restrictive interpretation of an act of secondary Community law in light of primary Community law does not touch upon the validity of the former. To the contrary, it upholds its validity.

<sup>605</sup> The fact that provisions of treaties falling within the scope of Article 307 EC-Treaty equally constitute integral parts of Community law itself does not affect the Member States’ right to directly follow their treaty obligations, see *Calliess/Ruffert-Schmalenbach*, Article 307 EC-Treaty, para. 3 and 20 with express reference to the example of the ECHR.



cessively long proceedings rather clearly results in the insight that in these cases a restrictive interpretation of Article 27 JR to be carried out by the court second seised is inevitable – a finding that does not collide with the judgment of the *ECJ* rendered in *Gasser*. As has been pointed out *supra*,<sup>606</sup> the Court only excluded derogation from Article 27 JR on the grounds that proceedings in the Member State of the court first seised are *generally* of excessive duration.

439 It might strengthen the acceptance of the principle of mutual trust rather than provoke the danger of its collapse, if it were expressly acknowledged that Article 27 JR is subject to a restrictive interpretation in the case of widely accepted, narrowly framed exceptions based on principles of Community law and human rights, given that the national reports did not indicate any cases in which a duration of proceedings could be invoked that amounted to an excessive duration under the standards of Article 6 (1) ECHR.<sup>607</sup>

440 Other exceptions to or restrictive interpretations of Article 27 JR, however, do not appear to be mandated, neither by Community law nor by human rights, and therefore remain a matter of policy considerations:

*cc) Policy Considerations*

441 On the level of policy, the national reports address three different issues of consideration. The first and most pressing one is the question whether Article 27 JR should be modified in respect to exclusive choice-of-court agreements, the second extends this question to other heads of exclusive jurisdiction, and the third one raises the question whether there should be a general public policy exception.

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<sup>606</sup> See *supra*, at para. 433.

<sup>607</sup> For an overview of the case law of the ECHR see *Grabenwarter*, Europäische Menschenrechtskonvention, pp. 357 et seq.

(1) *Exclusive Choice-of-Court Agreements*

- 442 In particular, the stakeholders of international commerce perceive an imminent necessity to strengthen the effects of an exclusive choice-of-court agreement, thereby honouring the principle of party autonomy. Whereas many commentators praise party autonomy as the primary tool for the parties to “fine-tune” their jurisdictional interests to a degree the inevitably abstracting other grounds of jurisdiction could never achieve,<sup>608</sup> neither the systematic structure of the Judgment Regulation nor its interpretation by the ECJ<sup>609</sup> appear to attribute any particular dignity to the agreement of the parties as a head of jurisdiction.
- 443 On the other hand, the practical relevance of international choice of forum agreements, in particular underlined by the national report of the UK,<sup>610</sup> can hardly be disputed, given that the Hague Conference on Private International Law ultimately brought itself, despite the many difficulties faced, to agree upon the Hague Convention on Choice of Court Agreements of 30 June 2005, the Preamble of which underlines the State Parties’ desire “to promote international trade and investment” by providing “certainty” and ensuring “the effectiveness of exclusive choice of court agreements between parties to commercial transactions”. It is this “certainty” and “effectiveness” that commercial players perceive as being jeopardised by subjecting the choice of court agreement to the strict rule of priority under Article 27 JR.
- 444 The strongest policy consideration to restrict Article 27 JR in favour of exclusive choice-of-court agreements between commercial parties appears to be that the European Community will presumably not ab-

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<sup>608</sup> See e. g. *Geimer*, Internationales Zivilprozessrecht, p. 507, at para. 1596, with further references.

<sup>609</sup> ECJ, 12/109/2003, C-116/02, *Erich Gasser GmbH./MISAT Srl.*, ECR 2003 I-4693.

<sup>610</sup> National report of the UK, 3<sup>rd</sup> questionnaire, 3.1.

stain from making use of its competence to join the aforementioned Hague Convention.<sup>611</sup>

- 445 First of all, it has to be noted that any policy consideration derived from a comparison with the Hague Convention in this part of the report exclusively relates to the question how the *lis pendens* rules under Article 27 JR should be designed in cases where the Judgment Regulation applies exclusively. The policy considerations here thus emerge from a comparison of the rules in an “internal sphere” with those in an “external” sphere under the application of the Hague Convention and seek to clarify the question whether it makes sense to have different sets of rules or whether it appears more advisable to adjust the two instruments.
- 446 According to its principle rule in Article 5 of the Hague Convention, the court or courts designated in the agreement shall have jurisdiction to decide a dispute including the issue of jurisdiction based on agreement. However, two basic principles underlying the Hague Convention should be kept in mind. First, any court of a signatory State seised has full authority to verify whether its jurisdiction has validly been derogated or prorogated by an exclusive choice of court agreement. To be sure, the court possibly derogated has to apply the law of the designated court. Nonetheless, the possibly derogated court has full authority to decide the issue. Secondly, any other court than the one designated shall suspend or dismiss proceedings to which the exclusive choice of court agreement applies, irrespective of whether it was seised first or second or whether at all another court is seised with the same cause, Article 6 Hague Convention – except for the cases enumerated under Article 6 lit. a to e: invalidity under the law of the State of the court designated, incapacity under the law of the State of the court seised, manifest violation of public policy of the State of the court seised, *force majeure*, or, important for the issue

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<sup>611</sup> On this issue see e. g. *Hess*, in: *International Civil Litigation in Europe*, p. 263, at pp. 265 et seq.

under scrutiny here, the court chosen has decided not to hear the case. Thus, the court designated by the parties enjoys far reaching, however not absolute priority over any other court seised with the matter in disregard of the choice of court agreement. The European Community might want to consider parallelising both instruments in respect to choice-of-court agreements between commercial parties in order to avoid inconsistencies with its policy decisions in respect to its “external” sphere. In considering such an adjustment of the two instruments, one must keep in mind that in the framework of the Hague Convention the binding force of a jurisdiction agreement is less strong than a jurisdiction agreement under Article 23 JR. In particular, agreements under Article 23 JR are not subject to a public policy exception. In addition, the applicability of the law of the “chosen court” is of limited impact in intra-Community cases because some issues relating to the validity of the agreement are governed by Community law.

- 447 Beyond these rather technical modalities, the Judgment Regulation and the Hague Convention, though both being *conventions doubles* dealing with jurisdiction and enforcement alike, obviously bear (at least) one significant conceptual difference: whereas the Hague Convention only provides for one and only one ground of jurisdiction – jurisdiction by agreement – the Judgments Regulation provides for an entire system distributing jurisdiction among the participating states that regularly results, for the purposes of jurisdictional justice, in attributing jurisdiction to the courts of more than one participating State. If such a system additionally focuses on certainty rather than flexibility, a strict rule of temporal priority between two courts equally having jurisdiction under the system’s own heads of jurisdiction appears plausible. However, tensions with other objectives of a proper administration of justice, in particular the requirement of providing for effective remedies, arise as soon as temporal priority serves as the sole criterion to co-ordinate parallel proceedings even when the court first seised is manifestly lacking jurisdiction. Nevertheless, a system

may opt for adhering exclusively to this criterion for the sake of certainty but has to acknowledge a significant loss of jurisdictional justice in the case of manifest lack of jurisdiction. If the European legislator, in weighing the policy considerations involved, strikes the balance between competing demands of justice, it should – in principle – do so consistently, i. e. in the way the *ECJ* has done it in *Gasser*: no exceptions in order to avoid inconsistencies within the “internal” sphere.

- 448 However, if it appears feasible to frame certain grounds of jurisdiction in a way that reduces the risk of conflicting decisions to a minimum, the overall objective to optimise all policies involved in order to achieve the greatest possible degree of jurisdictional justice might warrant to do so and then strike the balance to the opposite effect, since the loss of justice in the case of manifest lack of jurisdiction might outweigh the loss of justice by a – slightly – reduced certainty for the entire system.
- 449 In the case of exclusive choice-of-court agreements it does seem possible to at least further reduce the risk of conflicting decisions about jurisdiction. For example, one might consider introducing an additional mode of concluding a choice-of-forum agreement reserved for the “international trade or commerce” in the sense of Article 23 (1) (c) JR and mentioned in the Preamble of the Hague Convention that guarantees the highest possible certainty that the parties in fact do agree upon the exclusive jurisdiction of a particular court.
- 450 A higher degree of certainty could be provided, for example, by requiring the parties to use a standard form. Such a standard form agreement should have to be separately signed by each party. This standard form could read as follows:
- 451 *“[Party 1] and [Party 2] agree that the courts of [Member State] have exclusive jurisdiction to hear and determine any suit, action or proceeding, and to settle any dispute or disputes which may arise out of or in connection with the [Agreement], including, without limitation, a*

*dispute or disputes regarding existence, validity, termination, authority to conclude the agreement, or the consequences of nullity*".<sup>612</sup>

- 452 To be sure, additional formal requirements such as a standard form cannot eliminate the uncertainties relating to the validity of the choice-of-forum agreement arising from issues of e. g. legal capacity or agency – issues that do arise from time to time in trade relations, in particular if internationally trading corporations and their subsidiaries are involved. In addition, these issues will continue to be governed by the law selected by the choice-of-law rules of the respective forum (unless of course a unified choice-of-law rule, possibly modeled on Article 5 (1) Hague Convention, is introduced). The standard form will therefore not entirely eliminate the risk of conflicting decisions upon jurisdiction based on agreement. However, the standard form agreement will reduce controversies about the scope of the agreement in that it clearly covers any dispute out of or in connection with a particular agreement, it provides at least for a strong indication for consent in that it requires a separate document signed by the parties, and all Member State courts are placed under the obligation to accept this additional, simplified mode of concluding a choice of court agreement by such a standard clause that should enable any court seised to decide more expeditiously on the issue of jurisdiction based on agreement – a modification that might already justify leaving the rule of temporal priority under Article 27 JR unaltered.
- 453 Yet, as a matter of policy decision, it might appear more appropriate to release the court designated by such a standard form agreement but second seised from its obligation under Article 27 JR to stay its proceedings until the court first seised has rendered its decision and to tolerate parallel proceedings. Choice-of-court agreements concluded in the modes provided for by Article 23 JR in its present shape would continue to be governed by the strict rule of priority. If this approach turns out to be advantageous, this modification could

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<sup>612</sup> Linklaters, Submission (see *supra* fn. 589), p. 10.

be extended to all exclusive choice-of-forum agreements under Article 27 JR in a future revision.

- 454 One might even consider modifying Article 27 JR to the effect that only the court designated decides upon jurisdiction based on the agreement and that any other court seised in disregard of this designation stays its proceedings irrespective of whether it was seised prior or subsequently to the court designated or whether at all the court designated is seised. The court designated would thus be vested with “competence-competence” by the European legislator, i. e. the competence to decide upon its own competence. At least in the case it does assume its competence and reaches a decision on the merits, its decision on jurisdiction would be final (without prejudice of course to appeal proceedings according to the procedural law of the State whose courts are designated) because its proceedings would take priority under the modified *lis pendens* rule until a decision on the merits is rendered, and this decision takes priority under Article 34 (3) and (4) JR.
- 455 Comprehensive “competence-competence” would, however, entail the power to render binding decisions on any issue determining the jurisdiction of the court designated including, in particular, the decision not to assume jurisdiction, but also e. g. the issue whether the scope of the agreement covers the controversy. The drawback of any solution based on the concept of competence-competence is of course, that in case of nullity a party seeking to establish this nullity needs to seise first the court designated by the void agreement before proceedings can be instituted with other courts. It is a matter of evaluation whether the advantages of this solution – certainty about the court that decides upon any matters relating to jurisdiction based on agreement – outweigh its drawback. Since most instruments of international arbitration and national arbitration laws do not confer

comprehensive competence-competence,<sup>613</sup> the Judgment Regulation should at any rate not go beyond that level.

456 Likewise, it is a matter of evaluation whether to install collateral measures that strengthen the court designated in a choice of forum agreement falling within the ambit of the amendments considered. Should it be held to be adequate not only to relieve the court designated from its obligation under Article 27 JR to stay proceedings, but to vest the proceedings of the court designated with priority, i. e. to reverse the rule of priority in the case of exclusive choice-of-court agreements, it might appear consistent to amend Article 35 (1) JR respectively to the effect that judgments of courts other than the one designated shall not be recognised. On the other hand, judgments of courts that have violated Article 27 JR have not been sanctioned by non-recognition under Article 35 (1) JR so far, and there seems to be no imminent need for further curtailing the general principle of mutual trust<sup>614</sup> that prevents the courts of Member States from reviewing the application of the Judgment by other Member States.<sup>615</sup>

457 Practitioners have further suggested allowing unilaterally exclusive choice-of-court agreements under the amendments considered here.<sup>616</sup> Unilaterally exclusive choice-of-court agreements severely interfere with the balance of interests of the plaintiff and the defendant in that one party may freely choose between the *forum prorogatum* and all additional grounds of general or specific jurisdiction whereas the other party is regularly excluded from these well-justified

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<sup>613</sup> For a comparative overview see e. g. *Lew/Mistelis/Kroell*, Comparative International Commercial Arbitration, paras. 14-12 to 14.22; *Schlösser*, Internationale Schiedsgerichtsbarkeit, paras. 553 *et seq.*

<sup>614</sup> E. g. *ECJ*, 12/09/2003, C-116/02, *Gasser*, ECR 2003 I-14693; *ECJ*, 04/27/2004, C-159/02, *Turner*, ECR 2004 I-3565; *ECJ*, 03/01/2005, C-281/02, *Owusu*, ECR 2005 I-1383.

<sup>615</sup> See General Report, sub V Free Movement of Judgments, D.V.3.a), paras. 538 *et seq.*; see also the English national report criticising even the existing exceptions laid down in Article 35 (1) JR as inconsistent with the principle of mutual trust, see questionnaire 3, question 4.1.5; but compare the French national report, pp. 34 *et seq.*

<sup>616</sup> Linklaters, Submission, p. 6, paras. 3.8 *et seq.*



grounds of jurisdiction.<sup>617</sup> Although Article 23 JR allows the parties to agree upon unilaterally exclusive choice-of-forum agreements, it does not appear advisable to encourage this type of agreement by introducing a second standard form, and unilaterally exclusive choice-of-court agreements should not fall within the scope of amendments that derogate from Article 27 JR in favour of exclusive choice-of-court agreements, at least not in respect to the additional grounds of jurisdiction available to the favoured party. Should there be in fact an imminent practical need for cross-border loan agreements to have unilaterally exclusive choice-of-court agreements available, this interest of a particular activity of the internal market should be taken care of in a particular instrument specifically and exclusively dealing with cross-border loans and as such taking priority over the Judgment Regulation under Article 67 JR rather than in the core instrument of the internal market on jurisdiction and enforcement that seeks to balance the jurisdictional interests on a general level.

## *(2) Other Grounds of Exclusive Jurisdiction*

458 In principle, the same line of arguments applies to other grounds of exclusive jurisdiction such as e. g. Article 22 (1) JR in respect to proceedings involving rights *in rem* in immovable property or tenancy of immovable property. Only if the European legislator considers the risk of conflicting decisions on the issue of jurisdiction to be significantly lower in the case of choice-of-court agreements than in other cases of exclusive jurisdiction, it appears justified to distinguish between the latter and the former, unless the European legislator is prepared to distinguish similar cases in response to a different degree of practical importance or to a pre-eminent dignity of party autonomy. It might of course increase the acceptance of the Judgment Regulation to do so. In addition, there is no practical need ap-

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<sup>617</sup> See e. g. Pfeiffer, IPRax 1998, 17, 24.

parent to frame an exception from Article 27 JR in respect to the exclusive grounds of jurisdiction under Article 22 JR.

*(3) General Public Policy Exception*

459 Due to its inherent vagueness, the criterion of “public policy” or “abuse” imports such a high degree of uncertainty that it can hardly be compared with the suggestions to modify Article 27 JR in specific cases discussed *supra*. The loss of jurisdictional justice as a result of uncertainty would presumably not be compensated, let alone outweighed, by the potential to gain more justice in the individual case whose tensions cannot be determined in advance. A general public policy exception therefore does not appear to be desirable, nor do the national reports reveal any urgent need for it.

*(4) Limitation in Time of Priority*

460 An alternative solution granting a maximum of certainty might be to introduce a limitation in time of the priority the court first seised enjoys, for example a period of six months to decide upon its jurisdiction. Theoretically, this rule could be coupled with an obligation to decide upon jurisdiction within this period including State liability for violations. Alternatively, the rules on recognition might be adjusted in order to enforce the six month’s period. A drawback of this solution is of course that a party may lose a perfectly legitimate forum due to circumstances outside its control. Yet, a limitation in time of the priority might be the preferable solution for some special causes such as patent litigation or the like.

461 It is noteworthy, however, that some courts of the Member States have adopted an expeditious way to deal with appeal proceedings under Articles 43 et seq. JR. For example, the *Oberlandesgericht München* managed to organise itself to the effect that appeals that obviously lack any chances of success are turned down within no more than two weeks, and without giving prior notice to the other

side.<sup>618</sup> It appears therefore feasible to require the courts of Member States to further optimise their organisation by giving priority to decisions upon international jurisdiction that will obviously result in the declining of jurisdiction. In particular, the derogated court should be encouraged to decide its jurisdiction immediately and without awaiting any procedural reaction by the defendant.

e) *Exclusion of Anti-Suit Injunctions – Exclusion of Damages?*

462 An additional support to the efficiency of jurisdiction agreements may be achieved by granting damages for breach of that agreement.<sup>619</sup> An alternative might be to refer the parties to collateral agreements securing compliance with the jurisdictional system, in particular with choice-of-forum agreements, in that the parties agree to compensate the costs of proceedings instituted with a court lacking jurisdiction including follow-up damages e. g. arising from the delay or the exercise of default clauses in loan agreements. The judgment of the *ECJ* in *Turner*<sup>620</sup> excluding anti-suit injunctions issued by a court purporting to avoid “abusive” proceedings does not seem to directly exclude the possibility of such collateral undertakings between the parties and their enforcement by the courts. However, the issue appears not to be fully explored.

f) *The Exercise of Discretion under Article 28 JR*

463 Some national reports suggest providing for more precise criteria for the exercise of discretion.<sup>621</sup> However, most reports do not identify

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<sup>618</sup> See General Report, Free Movement of Judgments, sub D.V.4.c), para. 577.

<sup>619</sup> Damages were granted in an extra-Community case in *Union Discount Co./Zoller* [2002] 1 WLR 1517 CA; see also *Donohue./Armco Inc.*, [2002] 1 Lloyd's Rep. 425 AC.

<sup>620</sup> *ECJ*, 04/27/2004, C-159/02, *Gregory Paul Turner./Felix Fareed Ismail Grovit et al.*, ECR 2004 I-3565.

<sup>621</sup> See e. g. the national reports (3<sup>rd</sup> questionnaire, 3.4) of Estonia, Greece (*Klamaris*), Spain (*Correa Delcasso*); but compare the national reports of Lithuania, Luxemburg, Slovenia, appreciating the flexibility granted by Article 28 JR.

any major difficulties in the application of Article 28 JR. Only few cases are reported that raise questions.

464 For example, in the Irish case *Gonzales./Mayer and Others*,<sup>622</sup> the question arose how to exercise discretion under Article 22 JC. The Court absorbed a test from English national procedural law<sup>623</sup> and held that “there should be a broad common sense approach to the question of whether the actions in question are related bearing in mind the objective of the Article, applying the simple wide test set out in Article 22 JC and refraining from an over sophisticated analysis of the matter”. This test seems to suggest that in case of doubts no “related actions” should be deemed to exist and the both proceedings should continue, whereas Advocate General *Carl Otto Lenz* in his Opinion in *Owen’s Bank*<sup>624</sup>, suggested exercising the discretion to stay the second proceedings already in cases of doubts.

465 An approach similarly remote from the jurisprudence of the *ECJ* was taken in the recent Irish case of *Popely./Popely*<sup>625</sup> where the court was satisfied that as there was no “risk of an irreconcilable judgment” arising from the Irish proceedings for the purposes of Article 27 JR there was held to be no argument possible under Article 28 JR that the Irish proceeding were sufficiently “related” in order to trigger the discretion granted by that provision. However, an argument *a fortiori* is only possible starting from Article 28 JR rather than from Article 27 JR, since the degree of relatedness under the latter provision is higher than under the former.

466 Irrespective of the relatively few decisions based on Article 28 JR and irrespective of the fact that the national reports do not indicate any major practical problems, some doubts have been articulated about the adequacy of the current structure of Article 28(2) JR. This

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<sup>622</sup> [2003] IEHC 43.

<sup>623</sup> *Sarrío S.A./Kuwait Investment Authority*, [1999] 1 AC 32.

<sup>624</sup> Opinion of AG *Carl Otto Lenz*, Case C-129/92, *Owens Bank Ltd./Fulvio Bracco and Bracco Industria Chimica SpA*, ECR 1994, I-117, at para. 75.

<sup>625</sup> [2006] IEHC 134.

provision allows, on application by one party, the court second seised to decline jurisdiction under the conditions of subsection (1) if both actions are pending in first instance, if the court first seised has jurisdiction for the second action, and if the national procedural law permits the consolidation of the two actions.

467 One commentator put into question the condition in Article 28(2) JR that both actions must be pending in first instance.<sup>626</sup> Whereas it appears plausible that the courts second seised should not decline jurisdiction if their proceedings have already reached the second instance, it is more difficult to explain why the court second seised should not be allowed to decline jurisdiction on the mere fact that the proceedings of the courts first seised have reached the second instance. One explanation might be the assumption that most national procedural laws do not allow to consolidate actions pending in second instance with “new” actions.<sup>627</sup> If so, the court second seised would not be allowed to decline jurisdiction anyway. However, the court second seised could reach this result only upon an analysis of the foreign procedural law of the court first seised. It might be more advisable to relieve the courts as far as possible from this time-consuming and costly burden. This aim can be achieved by (upholding) the condition that (also) the action at the court first seised must be still pending in first instance. Therefore, it does not appear to be recommendable to delete the condition in Article 28(2) JR that both actions must be pending in first instance.

468 A more important point relates to the danger of negative competence conflicts: If the court second seised in fact does decline jurisdiction, the court first seised is not bound by this decision and may consider itself not to have jurisdiction under the JR to hear the second action.<sup>628</sup> In this case, a negative competence conflict occurs. In order

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<sup>626</sup> Geimer/Schütze/Geimer, *Europäisches Zivilverfahrensrecht*, Art. 28 JR, at para. 15.

<sup>627</sup> See e.g. *Gottwald*, *Münchener Kommentar*, ZPO, Art. 28 JR, at para. 3.

<sup>628</sup> Whereas there is no doubt under e.g. the German version of Article 28(2) JR on the fact that the court first seised is not bound by the decision on its jurisdiction by the court

to avoid such a negative competence conflict, some commentators have suggested introducing a referral by the court second seised to the court first seised that binds the court first seised on the issue of jurisdiction for the transferred action.<sup>629</sup>

469 The general introduction of a binding referral from the courts of one Member State to another Member State raises several problems that are dealt with below at paras. 487 et seq. In particular, if the initial claimant is granted the right to determine which court should be referred to, a danger of abuse arises, since a party may initiate proceedings simply with the courts whose *lex fori* allows the most expeditious seising in order to obtain the right to determine the future forum. To empower the court first seised to identify the court to which the proceedings be referred to would contravene the principle approach under the Judgment Regulation that no court of a Member State should determine the jurisdiction of the courts of other Member States.<sup>630</sup> Therefore, it does not appear adequate to introduce a binding referral on a general basis (see below at para. 491). However, there might be an argument for an exception of the aforementioned principle to be inserted in Article 28(2) JR in order to render it operable without the risk of a negative competence conflict – a risk that has so far remained theoretical.

470 Even if there were a referral with binding force on the issue of jurisdiction, the national procedural law of the court first seised may in fact not allow the consolidation of the two actions whereas the court second seised might have reached the opposite impression in its analysis of the foreign procedural law. This is a danger that appears

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second seised, there seems to be some ambiguity in the Netherland version (“ook tot verwijzing overgaan”) that might have led the Rechtbank Rotterdam, 23/07/1982, N.J. 1983 no. 753, to hold to the opposite.

<sup>629</sup> E.g. *Kropholler*, Europäisches Zivilprozessrecht, Art. 28 JR para. 9; Rauscher/*Leible*, Europäisches Zivilprozessrecht, Art. 28 JR, para. 1a; *Geimer*, Europäisches Zivilverfahrensrecht, Art. 28 JR, at para. 32.

<sup>630</sup> E.g. *ECJ*, 06/27/1991, C-351/89, *Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd./New Hampshire Insurance Company*, ECR 1991, 3317, at para. 26.

quite manifest, since it is obviously a rather difficult task for the court second seised to accurately evaluate the foreign procedural law and obviously a substantially more difficult task than the application of the Judgments Regulation on the issue whether the court first seised has jurisdiction for the action pending with the court second seised. Any conceivable amendment of Article 28(2) JR could presumably not go so far as to bind the court first seised to the decision of the court second seised about the latter's finding upon the procedural law of the court first seised.

471 One has to bear in mind, however, that this danger is not a danger of a negative competence conflict, since the result of a wrong evaluation of the foreign procedural law by the court second seised would merely be that the second action would have to be brought separately at the courts of the Member State whose courts were first seised with the related action. But a wrong evaluation by the foreign procedural law of the court first seised would of course jeopardize the legitimacy of the decision of the court second seised to decline jurisdiction. For, Article 28(2) JR only vests the court second seised with discretionary power to decline jurisdiction in order to let the parties benefit from the possibility of the consolidation of the two related actions in the proceedings pending at the court first seised. Article 28(2) JR should therefore be drafted in a way that reduces the danger of errors by the court second seised as much as possible.

472 One possibility is of course to eliminate the power of the court second seised to decline jurisdiction, i.e. to simply delete Article 28(2) JR.<sup>631</sup> Since the exercise of the discretionary power under Article 28(2) JR only assumes relevance if one but not both parties seek to consolidate the related actions, a decision under Article 28(2) JR always affects the guarantee of access to justice of the one party un-

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<sup>631</sup> Geimer/Schütze/Geimer, *Europäisches Zivilverfahrensrecht*, Art. 28 JR, at para. 32, holding that there are only the two alternatives of either eliminating the power to decline jurisdiction or to allow a referral that binds on the issue of jurisdiction.

willing to consolidate the actions. It is a matter of weighing the competing interests how to resolve this tension.

- 473 A second possibility might be to extend the “information relevant for judicial cooperation in civil matters” provided by the European Judicial Atlas in Civil Matters to the issue whether the national procedural laws of the Member States allow, and if so, under what conditions, the consolidation of actions in the sense of Article 28(2) JR. This measure could be coupled with an amendment of Article 28(2) JR that reacts to the danger of negative competence conflicts. This amendment would have to place the court second seised under the obligation to reopen the case after the court first seised declined jurisdiction irrespective of a potential *res iudicata* effect of the judgment under Article 28(2) JR by the court second seised.<sup>632</sup> Presumably, the guarantee of access to justice under Community law and Article 6(1) ECHR require the court second seised to reopen the case in this situation anyway.<sup>633</sup> This amendment might even be extended to the situation that the court first seised refuses to consolidate the actions (in contradiction to the information provided for by the European Judicial Atlas in Civil Matters) because in this case the legitimacy to decline the jurisdiction that one of the parties wanted to have access to would be lost.
- 474 In considering the various options, the last possibility appears to be most in conformity with the existing system of the Jurisdiction Regulation: it can be easily integrated within the structure of the European Judicial Atlas in Civil Matters, it respects and expressly acknowledges the guarantees of European Community law of access to justice, and it serves as best as possible the interest of an efficient administration of justice of related actions.

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<sup>632</sup> Rauscher/*Leible*, *Europäisches Zivilprozessrecht*, Art. 28 JR, at para. 1a.

<sup>633</sup> See e.g. *Geimer*, *Europäisches Zivilverfahrensrecht*, Art. 28 JR, at para. 32.



g) *The Interpretation of Article 30 JR*

475 Article 30 JR has been introduced, as one of its “chief innovations”,<sup>634</sup> on the occasion of the conversion of the Judgment Convention into a Regulation in order to provide a unified, autonomous test for the question from which moment of time proceedings are to be considered “pending” for the purposes of the *lis pendens* rules. Recital no. 15 of the Regulation expressly states the objective of Article 30 JR. There must be a clear and effective mechanism for resolving cases of *lis pendens* and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously”.<sup>635</sup>

476 Even though Article 30 JR considerably improved the previous situation under the Judgment Convention,<sup>636</sup> it has been observed<sup>637</sup> that the purpose of “reconciling the various procedural systems while ensuring both that applicants will all be on an equal footing”<sup>638</sup> has not been fully achieved because the determination of the relevant moment of time still depends on the various national legal systems if and insofar the applicable procedural law decides upon the necessary prerequisites of “the document instituting the proceedings” and of the “lodging” with the court as well as about which authority

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<sup>634</sup> Commission of the European Communities, Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 14 July 1999, COM(1999) 348 final, p. 7.

<sup>635</sup> d. at p. 20.

<sup>636</sup> The autonomous definition of the time at which an action is pending for the purposes of Articles 27 and 28 filled a gap in the Judgment Convention that had been dealt with by reference to the applicable national procedural laws according to *ECJ*, 06/07/1984, C-129/83, *Zelger./Salinity*, ECR 1984, 2397, which resulted in the undesirable situation that a defendant could outrun a proceeding by instituting other proceedings in the courts of a Member State that considered an action already pending under very few and expeditiously fulfilled conditions.

<sup>637</sup> Italian national report, 3<sup>rd</sup> questionnaire, 3.2, and 3.3; see also *Geimer/Schütze*, Article 30 JR, para. 1.

<sup>638</sup> Commission of the European Communities, Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 14 July 1999, COM(1999) 348 final, p. 20.

serves, in a given legal system as “the authority responsible for service” and whether the “documents” have in fact been “received” by the responsible authority as well as whether the plaintiff did in fact take “the steps he was required to take to have service effected on the defendant”.

477 The implementation practice in the Member States has indeed revealed certain difficulties in the application of Article 30 JR.

478 For example, it has been reported that in France, Belgium and the Netherlands, “the authority responsible for service” to be effected on a foreign defendant in the sense of Article 30 (2) JR has sometimes not been considered to be the first (French, Belgium etc.) authority involved, i. e. the *huissier judiciaire*,<sup>639</sup> but the “receiving agency” in the case of the court to be seised in the sense of Article 2 of the Service of Documents Regulation.<sup>640</sup> Even if the term “responsible authority” in Article 30 (2) JR may well be understood as referring to an autonomous concept, i. e. simply the first authority receiving the documents irrespective of its responsibility of effecting the legal result of the service, the problem remains that in the aforementioned Member States these authorities apparently do not note or at least do not include in the documents the date of the receipt of the documents because in the respective national procedural systems this date does not play any role,<sup>641</sup> nor does it play a role on the basis of the – incorrect – understanding of Article 30 (2) JR.

479 In addition, the German *Oberlandesgericht Koblenz*<sup>642</sup> held that the provisions of *lis pendens* of the Judgment Convention do not apply to

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<sup>639</sup> See e. g. Article 55 *NCPC*.

<sup>640</sup> Council regulation (EC) No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ L 160 of 30 June 2000, pp. 37–52.

<sup>641</sup> See e. g. Article 653 *NCPC*: “La date de la signification d'un acte d'huissier de justice, sous réserve de l'Article 647-1, est celle du jour où elle est faite à personne, à domicile, à résidence ou, dans le cas mentionné à l'Article 659, celle de l'établissement du procès-verbal”.

<sup>642</sup> *OLG Koblenz*, 11/30/1990, RIW 1990, 63.

proceedings instituted at the same day. In light of the clear wording of the Regulation (“*Zeitpunkt*”, “at the time when”, but see the French version “*à la date, à laquelle*”) which refers to the point of time rather than the date this holding appears to be in violation of Article 30 JR. However, determining the priority on the basis of the moment in time of the institution of proceedings presupposes that this information is available in the court files, which does not seem to be the case in court practice – again a violation of Article 30 JR.

480 A clarification of the wording of Article 30 (2) JR might help to both eliminate the uncertainty about the interpretation of the term “responsible authority” and motivate to correct a practice of national authorities violating Article 30 (2) JR.

481 Uncertainties arising from the interpretation of the other terms in Article 30 JR with a presumably inevitable reference to national procedural law such as “documents instituting the proceedings” or “steps required to be taken to have service effected” have apparently not (yet) resulted in major practical difficulties, but bear a potential to do so. For example, the German ZPO requires, in its sec. 253 (5), the plaintiff to submit the necessary number of copies of the documents instituting the proceedings, However, if these copies are missing, the institution of the proceedings does not necessarily fail, but the court has to provide for the necessary copies itself on the costs of the plaintiff. This may well be different under the procedural laws of other Member States. In addition, under German procedural law the plaintiff might be held to be required to pay the court charges upfront as a “step required to be taken to have the service effected”,<sup>643</sup> which again might be different in other Member States.

482 These technical problems in the application of Article 30 JR linked to the various national procedural laws raises the general question whether a court seised is free or even obliged to review another court’s decision on the moment of time in which the latter considers

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<sup>643</sup> E. g. *Geimer/Schütze*, Article 30 JR, para. 8.

itself having been seised according to Article 30 JR in connection with its procedural law. It has been submitted that a Member State's court is not bound by the establishment of facts of another court or by another court's legal evaluation of these facts in respect to the application of Article 30 JR.<sup>644</sup> German courts seem to determine both moments of time on their own account.<sup>645</sup> However, there are some indications to the contrary in German<sup>646</sup> and Italian<sup>647</sup> case law.

#### *h) The Resolution of Negative Competence Conflicts*

483 Section 9 of the Judgment Regulation only deals with positive competence conflicts but not with negative conflicts. However, cases of negative competence conflicts do arise in practice: for example, a Greek court refused to assume jurisdiction with respect to a choice-of-forum clause, whereas the English courts held to the opposite, i. e. that the forum choice was invalid due to the characterisation of the contract in question as a consumer contract.<sup>648</sup>

484 It has been advanced the proposition to include also rules for the latter conflict that evidently jeopardises equally, if not more strongly, the claimant's right to access to justice.<sup>649</sup> Since Article 27 (1) JR requires the court second seised to stay the proceedings and to only decline jurisdiction under Article 27 (2) JR after the court first seised has established its own jurisdiction, negative competence conflicts will occur not too frequently.<sup>650</sup> And indeed, the national reports did

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<sup>644</sup> E. g. *Geimer*, in: Festschrift Schütze, p. 209, commenting on Article 21 JC.

<sup>645</sup> *OLG Koblenz*, 11/30/1990, RIW 1990, 63.

<sup>646</sup> *OLG Frankfurt (Main)*, 03/05/2001, IPRax 2002, p. 515, dealing with Article 21 JC, held that the court second seised is not competent to review the holding of the court first seised that the service was effectuated correctly according to the procedural law of the court first seised.

<sup>647</sup> *Corte di Cassazione*, 8/2/2002 no. 5127, Riv. dir. int. priv. proc., 2002, 708.

<sup>648</sup> *Polimedes Protodikeio*, Athens 8032/2001 [2003] Euro C.L. May 109; for further discussion of the implications of this case see General Report, Consumer Protection, sub D.III.2.i)cc), para. 339.

<sup>649</sup> See *Burgstaller/Neumayr*, RZ 2003, 242.

<sup>650</sup> See e.g. *Rauscher/Leible*, Article 27 JR, para. 5.

not indicate any problems from the implementation practice of the Member States with regard to negative competence conflicts. Nevertheless, it remains of course possible that the court first seised as well as subsequently the court second seised consider themselves not competent.

485 As far as the negative competence conflict results from differing interpretations of the jurisdictional rules of the Judgment Regulation, at least one, probably both courts (of last instance) will have violated their obligation to refer the issue to the *ECJ* under Article 68 (1) EC Treaty in order to obtain a clarification. However, only the courts of last instance find themselves entitled (and under the obligation) to refer issues of interpretation to the *ECJ*, and if the negative competence conflict results in the differing evaluation of the underlying facts according to the various national procedural rules of evidence, not even a reference to the *ECJ* can fully exclude the risk of negative competence conflicts.

486 Since a *deni de justice* clearly constitutes the maximum of procedural injustice, any remedy is better than denying the claimant entirely access to justice. Therefore: “where there is no other court competent, every court is competent”.<sup>651</sup> This widely accepted principle of the law of international jurisdiction to adjudicate derived, *inter alia*, from national constitutional law and Article 6 (1) ECHR will presumably also govern the European jurisdictional system. However, no decision has so far been reported that turned to this measure of last resort.

487 An alternative would be to include in the Judgment Regulation a mechanism that allows the court first seised, upon the claimant’s motion, to bindingly refer the proceedings to the court it considers competent, if it itself declines jurisdiction<sup>652</sup> – a mechanism that is well

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<sup>651</sup> See *Neuhaus*, 20 *RabelsZ* (1955), 201, 265: „wo sonst kein Gericht zuständig ist, soll jedes Gericht zuständig sein“;

<sup>652</sup> For further discussion see e. g. *Kodek*, *RZ* 2005, 217 et seq.; *McGuire*, *ZfRV* 2005, 83 et seq.

known in many legal systems of the Member States in respect to venue<sup>653</sup> and that is widely used in practice.<sup>654</sup> One reason to do so might be that under the current regime of the Judgment Regulation a claimant that – possibly after years of litigation including references to the *ECJ* – ultimately realises that the court seised with the matter is not competent is faced with an interruption of the pendency of the claim. The result is that time bars running on the claim might elapse and that now the defendant has a chance to quickly seise a court of his choice with the matter – possibly with an abusive attitude.<sup>655</sup>

488 If the European legislator has abstained so far from empowering the Member States' courts to bindingly refer a proceeding to the courts of another Member State with a view to the sovereignty of each of the Member States *vis-à-vis* each other – territorial limits of sovereignty are the reason why there is no possibility for any binding referral to foreign courts under the autonomous rules on international proceedings of the Member States' legal systems<sup>656</sup> – it should be noted that the limitations to the Member States' sovereignty arising from binding referrals appear not substantially greater than those arising from the obligation under Article 27 JR to stay proceedings even if the court first seised is not competent or will render a judgment not enforceable.

489 Irrespective of the fact that the territorial limits of sovereignty bars binding referrals and that there are no rules empowering courts of Member States *vis-à-vis* each other, Austrian judges have expressed their experience that German courts have already “referred” proceed-

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<sup>653</sup> See e. g. Austria: secs. 230a, 261(1) Austrian ZPO; Germany: sec. 281 German ZPO; specifically distinguishing between international jurisdiction and venue sec. 96 NCPC: “Lorsque le juge estime que l'affaire relève de la compétence d'une juridiction répressive, administrative, arbitrale ou étrangère, il renvoie seulement les parties à mieux se pourvoir. Dans tous les autres cas, le juge qui se déclare incompétent désigne la juridiction qu'il estime compétente. Cette désignation s'impose aux parties et au juge de renvoi”.

<sup>654</sup> E. g. in Germany in the year 2000, the courts of first instance have referred to other courts around 6 % of all proceedings (*Amtsgericht*: 5.9%; *Landgericht*: 6.2%), see *Rosenberg/Schwab/Gottwald*, *Zivilprozessrecht*, sec. 39 ZPO, at para. 19.

<sup>655</sup> *McGuire*, *ZfRV* 2005, 83, 84.

<sup>656</sup> See e. g. *Zöller/Greger*, sec. 281 ZPO, para. 5.

ings to Austrian courts in the past instead of merely declining jurisdiction.<sup>657</sup> However, it was impossible to identify any specific judgment to this point, and it appears doubtful whether such “referral” was in fact held to be able to produce a binding effect on the Austrian courts and a continuity of pendency that would keep up the interruption of time bars and effectively bar the defendant from immediately instituting proceedings elsewhere. If so, such holding would appear to be a violation of Article 27 JR since under this rule it is the court second seised that is now entitled and obliged to continue its proceedings rather than the court held to be competent by the court first seised. Any future rule allowing a binding referral by the court first seised may of course restrict this court to a referral to the court second seised. At present however, the only technical device to achieve some results close to a cross-border referral remains the choice-of-court agreement concluded in the proceedings of the court seised but prepared to decline jurisdiction.

490 Yet, a binding referral by one court of a Member State to the courts of another Member States faces substantial conceptual difficulties. If the initial claimant is granted the right to determine which court should be referred to, a danger of abuse arises, since a party may initiate proceedings simply with the courts whose *lex fori* allows the most expeditious seising in order to obtain the right to determine the future forum. To empower the court first seised to identify the court to which the proceedings be referred to would contravene the principle approach under the Judgment Regulation that no court of a Member State should determine the jurisdiction of the courts of other Member States.<sup>658</sup>

491 In weighing the aforementioned arguments, it appears, at least at present, not desirable to empower the courts to bindingly refer the

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<sup>657</sup> *Burgstaller/Neumayr*, RZ 2003, 242.

<sup>658</sup> E. g. *ECJ*, 06/27/1991, C-351/89, *Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd./New Hampshire Insurance Company*, ECR 1991, 3317, at para. 26.

proceeding to the courts of another Member State if the court seised is prepared to decline its jurisdiction. One might, however, take into consideration a rule that specifically addresses the problem of prescription by providing that the proceedings of the court second seised upholds the stay or interruption of otherwise running time bars.<sup>659</sup>

### 3. Summary of Policy Considerations and Recommendations

- 492 Principles of Community law and Article 6 (1) ECHR guarantee effective remedies including the conclusion of proceedings in due time. In case of excessively long proceedings Community law and Article 6 (1) ECHR warrant a – very narrow – exception from the rule of strict priority under Article 27 JR. The existence of this exception and its conformity with the decision of the European Court of Justice in *Gasser* should be expressly acknowledged in order to strengthen the acceptance of the Judgment Regulation.
- 493 It appears appropriate to release the court designated in an exclusive choice-of-forum agreement from its obligation to stay proceedings under Article 27 JR and to tolerate parallel proceedings if the risk of conflicting decisions on jurisdiction can be minimised. One possibility to reduce this risk is to introduce an additional mode to conclude an exclusive choice-of-forum agreement by way of a short and clearcut standard form. Any derogation from Article 27 JR in this revision of the Judgments Regulation could then be restricted to agreements concluded under this standard form. This modification appears more appropriate than any of the following two alternatives:
- 494 Theoretically, Article 27 JR could be modified to the effect that only the court designated in a standard form decides upon jurisdiction

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<sup>659</sup> See e. g. Article 34 (2) of the Swiss *Gerichtsstandsgesetz* co-ordinating the proceedings between the various States (*Kantone*) by, *inter alia*, providing that the date of the commencement of a proceeding terminated because of the court's declining jurisdiction is deemed to be the date of commencement of proceedings instituted with the competent court within 30 days following the decision by the court first seised to decline jurisdiction for the purposes of the running of time bars and prescription periods; for further discussion of this rule in the context of the Judgment Regulation see *McGuire*, ZfRV 2005, 83, 91; see also *Kodek*, RZ 2005, 217, at 221 *et seq.*



based on the agreement and that any other court seised in disregard of this designation stays its proceedings irrespective of whether it was seised prior or subsequently to the court designated or whether at all the court designated is seised (“competence-competence”). However, a major drawback would be that in case of the nullity of the agreement a party seeking to establish this nullity needs to seise first the court designated by the void agreement before proceedings can be instituted with other courts. Therefore, such a far reaching modification of Article 27 JR, i.e. the reversal of its priority rule in favour of the designated court, does not appear to balance the jurisdictional interests of the parties adequately. Merely releasing the designated court from the priority rule under Article 27 JR appears more appropriate.

- 495 A more conservative alternative might be seen in a limitation in time, e.g. of six months, of the priority of the court first seised under Article 27 JR, possibly coupled with the introduction of a standard form agreement that should help accelerating in particular the decision of the court first seised. A major drawback of this solution is, however, that a party may lose a perfectly legitimate forum due to circumstances outside its control. Therefore, releasing the designated court from the priority rule under Article 27 JR appears more appropriate.
- 496 None of the considered modifications of Article 27 JR should be extended to unilaterally exclusive choice-of-court agreements.
- 497 As opposed to Article 23 JR, there seems to be no practical need to frame a similar exception from Article 27 JR in respect of the exclusive grounds of jurisdiction under Article 22 JR.
- 498 Neither does it appear to be desirable to create a general public policy exception from Article 27 JR.
- 499 If the European Community considers the accession to the Hague Convention on Choice of Court Agreements, any modification of the Judgment Regulation should be mindful to avoid frictions between international choice-of-court agreements within and outside the internal

market. This objective, however, is not an obstacle to maintaining the stronger effectiveness of intra-Community choice of court agreements.

- 500 The “information relevant for judicial cooperation in civil matters” provided by the European Judicial Atlas in Civil Matters should be extended to the issue whether the national procedural laws of the Member States allow, and if so, under what conditions, the consolidation of actions in the sense of Article 28(2) JR. In addition and in order to comply with the guarantee of access to justice under Community law and Article 6 (1) ECHR Article 28 JR should place the court second seised under the obligation to reopen the case after the court first seised declined jurisdiction irrespective of a potential *res iudicata* effect of the judgment under Article 28(2) JR by the court second seised.
- 501 A clarification of the wording of Article 30 (2) JR might help to both eliminate the uncertainty about the interpretation of the term “responsible authority” and motivate to correct a practice of national authorities violating Article 30 (2) JR.
- 502 At present, it does not appear desirable to empower the courts to refer with binding force the proceedings to the courts of another Member State if the court seised is prepared to decline its jurisdiction. One might, however, take into consideration a rule that specifically addresses the problem of prescription by providing that the proceedings of the court second seised upholds the stay or interruption of otherwise running time bars.

## V. Free Movement of Judgments

### 1. Exequatur Proceedings

#### a) *The Framework of the Regulation*

503 Articles 38–52 JR provide for an autonomous and accelerated exequatur procedure which is largely determined by Community law. The procedure is mainly effected by standard forms provided by Articles 53–56 JR and set out in the Annex V. According to the case law of the *ECJ*, the European provisions on exequatur prevail over national procedures and any reference to national law is only permitted by (express) permission in the Regulation.<sup>660</sup> Yet, the Regulation does not provide for a uniform procedure, but largely refers to the procedural laws of the Member States. For example, Article 40 (1) JR provides that “the procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.”<sup>661</sup> Accordingly, national legislation and the (pertinent) case law of the Member States supplement the Community framework.<sup>662</sup>

504 In comparison to the Judgment Convention, the provisions of the Judgment Regulation concerning the exequatur procedure contain the most substantial change. The most important progress of the Judgment Regulation was the introduction of an accelerated exequatur procedure.<sup>663</sup> It consists of two stages: In the first stage, the competent national authority grants exequatur without any hearing of the debtor or examination of the grounds for refusal, Article 41 JR. The

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<sup>660</sup> *ECJ*, 4/29/1999, C-267/97, *Éric Coursier./Fortis Bank SA and Martine Bellami*, ECR 1999 I, 2543, 2571 para. 25; *ECJ*, 7/2/1985, C-148/84, *Deutsche Genossenschaftsbank*, ECR 1985, 1981 para. 17; *ECJ*, 4/21/1991, C-172/91, *Sonntag*, ECR 1993 I, 1963, paras. 32 et seq.

<sup>661</sup> Similar provisions exist in Articles 43 and 44 JR.

<sup>662</sup> Cf. for the pertinent provisions the national reports, 3<sup>rd</sup> questionnaire, question 4.1.

<sup>663</sup> *Kennett*, *Enforcement of Judgments*, pp. 216 et seq.; Magnus/Mankowski/*Francoq*, Article 34 Brussels I Regulation, para. 7.

second stage takes place in the 2<sup>nd</sup> instance: The debtor may challenge the decision on exequatur only on appeal, Article 43 JR. In the review proceedings the appellate court examines the objections the debtor has against the granting of exequatur, Articles 34 and 35, 43 JR. Against the decision of the appellate court, a second appeal is open to the Supreme Civil Courts in the Member States, Article 44 JR.<sup>664</sup>

505 The procedure in the first instance is characterised by simplicity and speed: In most Member States the creditor can access the competent authorities without representation by a lawyer;<sup>665</sup> the review by the court (or competent authority) is restricted. In particular, the court verifies its territorial competence, the authenticity of the decision, the existence of a civil or commercial matter and the regularity of the certificate referred to in Article 54 and Annex V JR. In the Member States of Enforcement, the applicant must normally produce a translation of the foreign decision. In practice this is considered necessary in order to permit the court to verify that the foreign decision relates to a civil or commercial matter.<sup>666</sup> A translation of the foreign judgment is not requested if the court is able to understand the foreign

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<sup>664</sup> According to the information obtained from the national reports, appeals according to Article 43 are an exception. Cf. 1<sup>st</sup> questionnaire, question 6: According to the Greece report there were only 2 appeals in 2003/2004; according to the Luxembourgian report 3 appeals could be counted in 2003 and 2004. It follows from this that second appeals according to Article 44 are a rare exception.

<sup>665</sup> In Belgium, representation by a lawyer is necessary, articles 1025 et seq. Belgian Code of Civil Procedure.

<sup>666</sup> It should be noted that declarations of enforceability do not often occur in practice. Even the *TGI Paris* (which is the competent court for the Île de France) issued only 92 declarations on enforceability in 2005, in England and Wales, the total number was 92 (2004/05); in Greece only 35 declarations of enforceability were granted in 2005; according to the Swedish report 30 declarations were granted. In Ireland the number of declarations lies with 47 in 2003 and 39 in 2004. The numbers in the new Member States (with the exception of Poland, where 450-900 declarations of enforceability were granted) are even smaller: The database of the Supreme Court of Slovenia indicates only 4 cases in which Regulation (EC) No. 44/2001 was applied until now (Cp 2/2005, Cp 8/2003, Cp 9/2005, Cp 10/2005). In Hungary 39 declarations of enforceability were granted in 2005. In Italy we received information from *Corte d'Appello Milano* and *Corte d'Appello Bolzano*. The figures for Milan are as follows: 2003: 42; 2004: 43. The figures for Bolzano: 2003: 31; 2004: 43. Accordingly, exequatur proceedings do not belong to "every-day business" in most Member States – only in border regions are exequatur proceedings a common phenomenon (cf. the German national report, questionnaire 2, sub 2.2).

decision. This is normally the case in border regions where judges are experienced with cross-border litigation. In many Member States a translation is not required if the judgment is written in English and if it is brief and easy to understand.<sup>667</sup> In other Member States, courts usually order a translation of the foreign judgment. In some Member States, lawyers often add a translation of the foreign title to the application for a declaration of enforceability.<sup>668</sup>

506 According to information obtained from lawyers in the Member States, most of the decisions on the declaration on enforceability are not appealed.<sup>669</sup> The percentage of appeals is between 1 % and 5 % of all decisions. The national reports show a considerable efficiency of the proceedings: Getting a decision on exequatur is a matter of a few weeks, in some Member States, the decision is granted within a few days. In the present state of affairs, the free movement of judgments (without a substantial control of the foreign title in the Member State of enforcement) is at least *de facto* largely implemented in the European Judicial Area.<sup>670</sup>

#### *b) The Implementation of the Judgment Regulation in the Member States*

507 Most Member States have adopted specific supplementary<sup>671</sup> provisions on the recognition of foreign judgments under the Regulation.<sup>672</sup> From a functional perspective, two different types of imple-

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<sup>667</sup> Italian report, 3<sup>rd</sup> questionnaire, question 4.1.

<sup>668</sup> See *infra* at para. 515.

<sup>669</sup> See *supra* at fn. 664 and the answers of the national reporters to question no. 6 of 1<sup>st</sup> questionnaire.

<sup>670</sup> The Tampere Presidency Conclusions (1999), no. 33 and 34 formulated the political objective of the free movement of judgments and the reduction of so-called interim measures aimed at the control of the judgment in the Member State of Enforcement.

<sup>671</sup> It should be noted that these provisions only support the Regulation which prevails over (parallel national law), see *supra* at para. 503.

<sup>672</sup> Specific implementing legislation exists in: Austria, secs. 80 et seq. *EO*, England, Cyprus, Germany (*AVAG*), the Netherlands (*Uitvoeringswet EG-executie-Vo*), Luxembourg (Articles 677 - 685-1 of the *NCPC*, introduced by Act of 12/16/2003), France (in the *NCPC*, introduced by Act n°2004-836 of 20 August 2004). In Malta the Code of Organization and Civil Procedure was amended in 2004 in order to ensure that European regulations with regard to matters concerning enforcement of foreign judgments prevail

menting statutes can be distinguished: In most Member States, the recognition is effected by the judges in first instance courts on the basis of an accelerated (written) procedure according to the autonomous laws of the respective Member State.<sup>673</sup> Other Member States provide for a simple registration and, consequently, assign the competence to a master or a registrar.<sup>674</sup> This legal solution seems to be more appropriate, since the task of the judge/registrar in the first instance consists only of a formal examination of the prerequisites of Article 41 JR based on the forms provided for in Annex V JR.

508 France recently introduced a new procedure for the recognition of foreign judgments under Articles 38 et seq. JR. Decret no. 2004-836 of August 20, 2004 shifted the competence from the President of the *Tribunals de Grande Instance* to the *Greffier en Chef* (chief registrar) at these courts. The French legislator has been motivated to this shift of competence by the simplified procedure under the Judgment Regulation (see Article 509 *NCPC*). An evaluation of the court files of the court of Paris by the French reporters showed that almost no application for a declaration of enforceability was denied. The *Greffier en Chef* mostly requires a translation of the foreign decision and – in case of a default judgment – the documents certifying the service of

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when said regulations differ from the Code. Accordingly, this state of affairs provides that in cases involving the recognition and enforcement of judgments emanating from Courts of a Member State, this procedure is regulated under the Judgment Regulation. In the Czech Republic, there are rules in sec. 68a of the PILA which refer to the Regulation. However, Italy did not adopt implementing legislation. In these Member States, the Supreme Civil Courts have determined the applicable procedural law, see Italian report, 3<sup>rd</sup> questionnaire, question 4.1. Further, also the Polish legislator did not decide to establish special rules in the k.p.c. to complete the provisions of the Judgment Regulation or to adapt the national provisions to those included in the Judgment Regulation. Thus, the subsidiary application of the general CCP provisions is necessary. There are also no special rules in Slovenia, therefore the general rules are applicable. In Hungary did not need to set up special conditions for the recognition and enforcement of court judgments, authentic instruments and court settlements based on the Judgment Regulation, because the Chapter on Recognition of Legislative Decree No. 13 of 1979 on Private International Law and the Chapter on the Enforcement of Foreign Judgments of the Act of 1994 on Enforcement may be adjusted to the rules contained in Articles 32-58 JR without difficulty. Further, in Belgium and in Greece as well as in Ireland there are no special rules concerning the implementation of the Judgment Regulation.

<sup>673</sup> E. g. Austria, Belgium, Germany, Italy, Latvia, Malta, Spain, Sweden.

<sup>674</sup> England and Wales, Ireland, Scotland, Cyprus, France.

the lawsuit. Representation of the applicant by a lawyer is not necessary. According to the French report, the *Greffiers en Chef* sometimes use outdated standard forms for the declaration of enforceability which were used for the declaration of enforceability under the Judgment Convention.<sup>675</sup> This typical transitory problem also occurred in other Member States.<sup>676</sup>

509 However, the proceedings are more complicated when the foreign judgment does not fully correspond to the formalities of the enforcement laws of the Member State. In this case, an implementation of the foreign title is necessary.<sup>677</sup> The main problems relate to the calculation of legal interest, value added tax or payments by instalment as these are often not fixed by the court but determined by the enforcement organs of the Member State of origin. In the cross-border context, the pertinent legal texts are not always available.<sup>678</sup> Courts in the Member States handle these issues differently: Experienced judges in border regions often dispose of the legal provisions of their neighbouring States and implement the foreign decision on their own motion.<sup>679</sup> Judges not familiar with the enforcement proceedings regularly require the applicant to produce the relevant legal provisions.<sup>680</sup> Accordingly, applicants lose time and money on the implementation of their titles.

510 According to the Irish report, in addition to producing the judgment and certificate, an affidavit is required according to Order 42A, rule 6, RSC. This must entail whether the judgment provides for the payment of a sum or sums of money; whether interest is recoverable on the

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<sup>675</sup> French report: 3<sup>rd</sup> questionnaire, question 4.1.1.

<sup>676</sup> German report, 2<sup>nd</sup> questionnaire, question 1.

<sup>677</sup> Most of the national reports mentioned practical problems in this regard, see, 3<sup>rd</sup> questionnaire, question 4.1 and 4.1.6.

<sup>678</sup> Accordingly, it seems to be advisable to provide for this information in the European Judicial Atlas.

<sup>679</sup> German report, 2<sup>nd</sup> questionnaire, question 2.5 (interviews with judges in German border regions).

<sup>680</sup> It should be noted that the exequatur proceedings are not an every-day business for the majority of the Member States' courts.

judgment or part thereof in accordance with the law of the State in which the judgment was given, and if so, the rate of interest, the date from which the interest is recoverable, and the date on which interest ceases to accrue; an address within Ireland for service of proceedings on the party making the application and, the name and usual or last known address or place of business of the person against whom judgment was given; the grounds on which the right to enforce the judgment is vested in the party making the application; as the case may require, that at the date of the application the judgment has not been satisfied, or the judgment has not been fully satisfied, and the part or amount in respect of which it remains unsatisfied.<sup>681</sup>

511 It seems advisable to ameliorate the current situation by addressing these issues at the Community level. The most appropriate way could be an extension of the standard form of Annex V JR. The form could be adapted to the forms provided for by the parallel instruments. These forms also address the issue of interest (and taxes) and require the court of the Member State of origin to indicate the amount due.

512 The pertinent provisions are the following:

Annex no. 1 of the Regulation creating a European order for payment procedure<sup>682</sup>

#### 7. Interest

Codes (please combine number with letter):

01 Statutory 02 Contractual 03 Capitalisation of interest 04 Interest rate on a loan 05 Amount calculated by the claimant 06 Other

A per year B per half year C per quarter D per month E Other

7.1. ID

7.2. Code

7.3. Interest rate (%)

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<sup>681</sup> Irish report, 2<sup>nd</sup> questionnaire, question 2.1.

<sup>682</sup> Regulation (EC) No. 1896/2006 of 12 December 2006, OJ 2006 L 399/1.



7.4. % over base rate (ECB)

7.5. on (amount)

7.6. Starting from

7.7. To

European Enforcement Order for uncontested claims (Regulation (EC) No. 805/2004 of 21 April 2004)<sup>683</sup>: Annexes I–III

5. Monetary claim as certified

5.1. Principal Amount:

5.1.1. Currency (...)

5.1.2. If the claim is for periodical payments

5.1.2.1. Amount of each instalment:

5.1.2.2. Due date of first instalment:

5.1.2.3. Due dates of following instalments

weekly () monthly () other (explain) ()

5.1.2.4. Period of the claim

5.1.2.4.1. Currently indefinite n or

5.1.2.4.2. Due date of last instalment:

5.2. Interest

5.2.1. Interest rate

5.2.1.1. ... % or

5.2.1.2. ... % above the base rate of the ECB (1)

5.2.1.3. Other (explain)

5.2.2. Interest to be collected as from:"

513 It seems advisable to adapt Annex V JR to the annexes of the parallel instruments. These technical amendments will considerably improve the effectiveness of the exequatur proceedings under Articles 38 et seq. JR. The foreign title will be implemented by a simple

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<sup>683</sup> As amended by Council Regulation (EC) No. 1869/2005, OJ 2005 L 300/6.

reference to the form and without any (often complicated) investigation of the legal provisions on interest in the Member State of its origin.

*c) The Efficiency of Exequatur Proceedings*

514 All national reports agree that, as a rule, exequatur proceedings operate efficiently. The average time for obtaining an exequatur decision is fairly short. According to the information obtained from the national reporters, the creditor obtains a decision on enforceability within less than two weeks if he presents all necessary documents. The relevant time periods are as follows: Austria (1 week),<sup>684</sup> Belgium (n. a.<sup>685</sup>), Cyprus (1–3 months), England and Wales (1–3 weeks), Estonia (3–6 months), Finland (2–3 months), France (10–15 days), Germany (3 weeks), Greece (10 days–7 months), Hungary (1–2 hours), Ireland (1 week or more), Italy (Milan: 20–30 days; Bolzano: 7–20 days), Latvia (10 days), Lithuania (up to 5 months), Luxembourg (1–7 days), Poland (1–4 months), Portugal (n. a.), Slovakia (n. a.), Slovenia (2–6 weeks), Spain (1–2 months), Sweden (2–3 weeks).<sup>686</sup>

515 However, these figures do not include the time the applicant needs to prepare exequatur proceedings: Before filing an application under Article 38 JR, the interested party must collect the necessary documents (see Articles 53 and 54 JR) and (regularly) organise the trans-

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<sup>684</sup> According to the Austrian report, the decision on the declaration of enforceability is issued immediately (in the course of a few days or up to one week). It only takes longer if the application is deficient and a correction is necessary. Sometimes it takes some time until the application is filed in the correct form; one enforcement judge mentioned that the longest period was seven months until the application was filed again. One of the judges providing information stated that a correction procedure was nearly always necessary if the applications concerned German titles (that is, in the majority of cases). According to that judge, this was due to the fact that German parties often filed applications in the way provided for under German national law and do not use the appropriate form.

<sup>685</sup> According to the Belgian report, much depends on the backlog of the competent court. While the situation in Brussels is problematic, the proceedings in Antwerp and Liège are terminated in a shorter period of time. The Belgian report proposed to fix the maximum period of time to one month, Belgian report, 3<sup>rd</sup> questionnaire, 4.1.13 and 5.

<sup>686</sup> See 1<sup>st</sup> questionnaire, question 7.

lation of the judgment. According to the information obtained from lawyers, most courts in the Member States do not apply Article 55 (2) JR<sup>687</sup> correctly, but regularly require a translation of the judgment.<sup>688</sup> This practice does not seem to be appropriate: In most cases, the translation of the operative part of the judgment is sufficient for a proper understanding of the debtor's obligation. In every-day practice, most lawyers provide a full translation (including the reasons) on their own motion. Hence, the expenses for preparing an application are considerably high. In addition to this, the content of the judgment is already largely described by the standard form prescribed by Article 54 JR. Therefore Article 55 (2) JR should be amended and clearly state that a translation of the judgment shall be exceptional.<sup>689</sup> It should only be required if the accompanying standard form is filled in incompletely or if the court or the competent authority doubts the applicability of the Judgment Regulation or the content of the judgment.<sup>690</sup>

516 Another difficulty arises with regard to the costs of the declaration of enforceability<sup>691</sup>: Article 52 JR states that in proceedings for the issue of a declaration of enforceability no fee calculated by reference to the value of the matter at issue may be levied. However, most Member States levy costs for the declaration of enforceability. The way, in which these costs are calculated differs considerably be-

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<sup>687</sup> According to Article 55 (2) JR a translation of the documents shall be produced if the court or competent authority requires so.

<sup>688</sup> The translation of the whole judgment is regularly required in: Austria, Belgium, Cyprus, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Poland, Scotland, Slovenia and in Sweden.

<sup>689</sup> It seems advisable to adopt Article 55 (2) JR to the parallel provisions of Articles 20 (2) of Regulation (EC) No. 805/2004 and Article 22 (2) of Regulation (EC) No. 1896/2006.

<sup>690</sup> Article 55 (2) JR could be redrafted as follows: *"If necessary, the court or competent authority may require the translation of the documents into the official language of the Member State of enforcement or, if there are several official languages in that Member State, the official language or one of the official languages of court proceedings of the place where enforcement is sought, in conformity with the law of that Member State, or into another language that the Member State of enforcement has indicated as acceptable. Each Member State may indicate the official language or languages of the institutions of the European Community other than its for the completion of the certificate. The translation shall be certified by a person qualified to do so in one of the Member States."*

<sup>691</sup> This issue is extensively dealt with by question 2.8 of the 2<sup>nd</sup> questionnaire.

tween the Member States. Thus, many Member States require the payment of a fixed sum<sup>692</sup> while in other Member States the general provisions on court fees are applied.<sup>693</sup> Extra costs may arise from additional requirements of the national procedures such as the need of presenting or certifying additional documents.

517 The most compelling issue related to costs are the costs incurred by the representation by a lawyer. In no Member State representation by a lawyer is mandatory. However, Article 40 (2) JR imposes a duty on the applicant either to designate an address for service of process in the jurisdiction of the court applied to or to appoint a representative *ad litem*. Usually, this representative will be a lawyer practising in the Member State of enforcement.<sup>694</sup> Seen from the perspective of the current harmonisation of European procedural law, Article 40 (2) JR seems to be unnecessary: The service of documents in the European Judicial Area is guaranteed by the Service Regulation which provides for a smooth and efficient communication of documents under Article 14. Therefore, it is recommended to delete Article 40 (2) JR.<sup>695</sup>

518 Yet, even after the deletion of Article 40 (2) JR most creditors will continue appointing a lawyer in the Member State of enforcement. Such an appointment is regularly necessary, because the creditors usually do not dispose of sufficient information about the foreign procedural law. In addition to this, the lawyer in the Member State of enforcement will usually organise and supervise the enforcement of the

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<sup>692</sup> In Germany, the fee is 200,00 € for the declaration of enforceability; in Austria the enforcement procedure itself is subject to court fees according to court tariff number 4 of the Act on court fees (*Gerichtskostengesetz*). According to this provision the court fee depends on the matter in dispute.

<sup>693</sup> In Poland, the national provisions do not address the fees of the proceedings for declaration of enforceability of judgments, settlements and authentic instruments under the Judgment Regulation. Consequently, the general regulations concerning costs and fees in civil cases are applied. However, this practice does not seem to meet the requirements of Article 52 JR.

<sup>694</sup> See for example sec. 5 para. 3 AVAG, German report, 3<sup>rd</sup> questionnaire, question 4.1.1.

<sup>695</sup> French practitioners criticised additional costs incurred by Article 40 (2) JR.

title. Accordingly, the reimbursement of the lawyer's fees will remain a pivotal issue.<sup>696</sup> This issue raises fundamental questions: It does not make much sense for a judgment creditor to attempt enforcement if the amount of the judgment is just sufficient to pay the lawyer's fees and the costs of translation.<sup>697</sup> So far, Member States deal with the reimbursement differently: In France, the costs are not reimbursable because the proceedings are unilateral and representation by a lawyer is not required by law.<sup>698</sup> In Germany, the lawyer's fees are reimbursed according to the general rule of sec. 91 *ZPO* ("costs follow the event") and may be recovered when the judgment creditor enforces the title.<sup>699</sup> Similarly, in many Member States, lawyer's fees are recoverable costs of enforcement proceedings.<sup>700</sup> But, recovering the costs becomes difficult when the remuneration of the lawyer is not fixed by legal provisions, but depends on a fee arrangement with the creditor. The General Reporters tried to get more detailed information about the remuneration of lawyers in the *exequatur* proceeding. According to information obtained from many national reporters, in these Member States a precise calculation is impossible as the lawyer and his client fix the remuneration individually. In these Member States, the recovery of the lawyer's cost seems therefore very difficult.

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<sup>696</sup> The issue is dealt with in the 2<sup>nd</sup> questionnaire, question 2.8.3.

<sup>697</sup> *Schlosser*, RdC 284 (2000), 202 et seq.

<sup>698</sup> Article 18 *NCPC*.

<sup>699</sup> The German report, 2<sup>nd</sup> questionnaire, question 2.8.3, demonstrates the cost and fees by a practical case (file no. 1 O 424/05) which was decided by the Landgericht Freiburg (Baden-Württemberg) in 2005. In this case, a French creditor sought the declaration of enforceability (Article 38 JR) of a French default judgment over 17,370 € and 600 € attorney's fees in Germany. The creditor mandated a German lawyer who applied for the declaration of enforceability which was granted by the Presiding judge of the Landgericht within a period of 14 days. The proceeding triggered the following costs: Court fee 200 €; Fee for the service of documents 4.27 €; Translation of the French judgment 503.37 €; Lawyer's fees 913.84 € (Fee according to the list in annex 2 RVG: 60,00 €; Calculated 1.3 no. 3100 annex 1 RVG 787.80 €); VAT (16 %) 126.04. Total amount of the costs: 1,621.48 €. Then, the costs for the *exequatur*-proceedings in the first instance amount up to 10% of the value of the claim. A calculation of the cost of the second and the third Instance can be found in the German report, 2<sup>nd</sup> questionnaire, question 2.8.3.

<sup>700</sup> This is the case in: Austria, Cyprus, Finland, Greece, Hungary, Ireland, Lithuania, Poland, Slovenia. Cf. 2<sup>nd</sup> questionnaire, question 2.8.3.

519 Financial obstacles may be overcome by legal aid. According to Article 50 JR “an applicant who, in the Member State of origin has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled (...) to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State addressed.” Under Article 50 JR, an applicant, who has benefited from legal aid in the Member State of origin, is equally entitled to legal aid in the Member State of enforcement.<sup>701</sup> The courts in the Member State of enforcement are formally bound by the (foreign) decision to grant legal aid, they are not allowed to review this decision.<sup>702</sup> The applicant’s entitlement to legal aid is certified by the document provided for by Articles 40 (3), 53, 54 and Annex V to the JR.<sup>703</sup> However, the extent of the legal aid is determined by the pertinent laws of the Member States of enforcement. Hence, it depends on the law of the Member State of enforcement whether legal aid covers the lawyer’s fees.

520 According to the information obtained from the national reporters, Article 50 JR is seldom applied. Most of the national reporters did not indicate any case law or experience with the application of Article 50 JR.<sup>704</sup>

521 In Germany, 11 out of 19 courts reported that they had no experience with the granting of legal aid according to Article 50 JR. Five courts explicitly mentioned experience with regard to maintenance claims (*Amtsgericht Hamburg, Amtsgericht Bremen, Amtsgericht Mannheim, Oberlandesgerichte Hamm and Stuttgart*). According to the *Amtsgericht Hamburg*, maintenance claims are often governed by the Hague Convention of 2 Oc-

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<sup>701</sup> Art. 50 JR is considerably wider than its predecessor (Art. 44 JC) as it applies throughout the whole exequatur proceedings – it is not limited to the first instance, Magnus/Mankowski/Palsson, Article 50 Regulation Brussels I, para 1.

<sup>702</sup> *Högsta Domstolen*, NJA 2003, 666, 670.; Magnus/Mankowski/Palsson, Article 50 Regulation Brussels I, para. 3.

<sup>703</sup> *Rauscher/Mankowski*, Article 50 JR, para. 3.

<sup>704</sup> Cf. the answers of the Austrian, Belgian, Cypriot, Czech, English, Estonian, Finnish, French, Greek, Irish, Latvian, Lithuanian, Maltese, Portuguese, Scottish, Slovak, Slovenian, Spanish reporters to question 2.10, 3<sup>rd</sup> questionnaire.

tober 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations and, accordingly, Article 50 of the Regulation is not applied.<sup>705</sup> The *Oberlandesgericht Hamm* refers to applications (of foreign creditors) brought by the *Bundesverwaltungsamt* where legal aid was applied for and granted without any difficulties. Law firms did not have any experience with the granting of legal aid. The German Institute for Youth Welfare Service and Family Law reports on positive experiences with legal aid in England when enforcing maintenance claims for German creditors. Positive experience with the granting of legal aid has also been reported from Hungary, Luxembourg, Poland and Spain.

522 The current version of Article 50 JR is not in line with the EC-Directive on Legal Aid:<sup>706</sup> Firstly, Article 50 JR does not address the legal aid for the judgment debtor.<sup>707</sup> Secondly, Article 50 JR does not define the scope of the legal aid, especially not if it covers the recovery of additional costs incurred in the cross-border context.<sup>708</sup> On the other hand, Article 50 JR is more generous than Art 9 (4) the Legal Aid Directive: Under the latter, the creditor must apply for legal aid in each instance and under the conditions fixed by the legal system of the Member State in which the legal aid is sought. However, Article 9 (2) of the Legal Aid Directive provides that a recipient who has received legal aid in the Member State where the court is situated shall also receive the legal aid provided for by the law of the Member State where recognition or enforcement is sought (continuity of legal aid). In addition, under Article 50 JR, legal persons (and also the insolvency administrator) may obtain legal aid provided that they are entitled for legal aid in the Member State of origin.<sup>709</sup>

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<sup>705</sup> This practice is in line with the most favorable treatment clause in Article 50 JR.

<sup>706</sup> Directive of Jan. 27, 2003, OJ 2003 L 26/41 cf. *Leroy*, L'assistance judiciaire transfrontalière, in: de Leval/Candela Soriano (ed.), *L'espace judiciaire européen* (2007), pg. 123, 143 et seq.

<sup>707</sup> *Rauscher/Mankowski*, Article 50 JR (Commentary), para 7.

<sup>708</sup> See in this respect Article 7 of the Legal Aid Directive, which explicitly refers to additional costs related to the interpretation, the translation of documents and travel costs borne by the applicant and his or her attorney.

<sup>709</sup> This is the case in Germany, see Section 116 ZPO.

523 Due to the differences between Article 50 JR and the Directive on Legal Aid, a further alignment of both instruments seems appropriate. However, a simple referral in Article 50 JR to the Directive of Legal Aid (especially to Article 9 (2)), would not provide for a balanced solution, as currently the application for legal aid is simpler under Article 50 JR than under the Legal Aid Directive. Accordingly, it seems appropriate to redraft Article 50 JR. As far as the conditions for legal aid are concerned, the current regime should be maintained. With regard to the content of legal aid, a reference to the Directive EC/2003/8 seems to be appropriate.

524 Accordingly, it seems advisable to add a second sentence to Article 50 JR which could read as follows:

*“The content of legal aid shall be determined in accordance with Articles 3 (2) and 7 of the Directive EC/2003/8.”*

525 There is no doubt that the current situation is unsatisfactory and even problematic with respect to the guarantee of due process (Article 6 ECHR). Especially creditors seeking the cross-border enforcement of small amounts of money are discouraged from a cross-border collection of their claims.<sup>710</sup> In addition to this, the financial risk of enforcing a judgment abroad is not predictable. However, it seems difficult to prescribe generally that the debtor must bear the creditor’s lawyer’s costs. This solution does not correspond to the legal situation in the Member States. In the present state of affairs, three solutions seem possible: As a first solution, the Judgment Regulation could state that the costs of the declaration of enforceability should be treated as part of the costs of the enforcement proceedings. According to the information obtained by the national reports, this solution exists in many Member States.<sup>711</sup> The second proposal is to further simplify the procedure of granting the declaration of enforceability and to organise it

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<sup>710</sup> It should be noted that in the cross-border context, claims up to 2.000,00 € are considered as small claims

<sup>711</sup> Austria, Cyprus, Finland, Greece, Hungary, Ireland, Lithuania, Luxembourg, Poland, Slovenia. Cf. 2<sup>nd</sup> questionnaire, question 2.8.3.



in a way that a representation by lawyer is not needed.<sup>712</sup> The third proposal is to provide for the reimbursement of reasonable fees in the Judgment Regulation, as far as the court considers it appropriate.<sup>713</sup>

#### d) Possible Improvements

526 As explained above, the following amendments of the exequatur procedure of the Judgment Regulation<sup>714</sup> seem advisable:

- Amendment of Annex V and aligning it to the annexes of Regulation (EC) No. 805/2004 and of Regulation (EC) No. 1896/2006.
- Clarification of Article 55 (2) JR. It seems advisable to redraft this provision and to align it with Articles 22 (2)(b) of Regulation (EC) No. 805/2004 and Article 21 (2)(b) of Regulation (EC) No. 1896/2006.<sup>715</sup>
- Article 40 (2) JR could be deleted.
- The exequatur proceedings could be further simplified.<sup>716</sup>
- A second sentence could be added to Article 50 JR which could read as follows: “*The content of legal aid shall be determined in accordance with Articles 3 (2) and 7 of the Legal Aid Directive EC/2003/8.*”

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<sup>712</sup> Such a simplification would only relate to the proceedings in the first instance. Appellate procedures would still require a representation by a lawyer. However, the reimbursement of the costs of those proceedings should be subject to the general national rules of reimbursing costs.

<sup>713</sup> This proposal corresponds to Article 16 of the Regulation (EC) No. 861/2007 establishing a European Small Claims Procedure, OJ EU 2007 L 199/1. According to this provision, the unsuccessful party bears the costs of the proceedings. However, the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim.

<sup>714</sup> See also *infra* at paras 630 et seq on the prospects of abolishing exequatur proceedings.

<sup>715</sup> See *supra* text at footnote 690.

<sup>716</sup> See *infra* at para 633.

- Reasonable attorney's fees should be recoverable.

## 2. Enforceable Decisions

### a) *The Concept of Article 32 JR*

527 The European guarantee of the free movement of judgments is defined by Article 32 JR. According to the wording of the provision and to the case law of the *ECJ*, the concept of “judgment” in the sense of the Judgment Regulation must be interpreted broadly, including provisional and protective measures given after a hearing of the debtor.<sup>717</sup> However, in the practice of the national courts, uncertainties still exist. One example is a recent judgment of the *Bundesgerichtshof*. The IX<sup>th</sup> Senate refused to recognise a Swedish arrestment which had been ordered without a preliminary hearing of the German defendant.<sup>718</sup> The court referred to the *ECJ*'s judgment in *Denilauler* and held that the recognition under Article 32 JR presupposes the prior service of the complaint. With all due respect, this judgment is regrettable.<sup>719</sup> For the protection of the debtor, the availability of an effective remedy against the decision (even at a later stage of the proceedings) seems sufficient.<sup>720</sup> In addition to this, the differentiation between “provisional measures” and “judgments” is still unclear. While default judgments and orders for payment are not qualified as provisional measures, other decisions obtained in accelerated proceedings are deemed provisional. Some Member States

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<sup>717</sup> *ECJ*, 05/21/1980, C-125/79, *Denilauler./Couchet Frères*, ECR 1980, 1553. The English report proposes to make the limitation of *Denilauler* explicit.

<sup>718</sup> *BGH*, 12/21/2006, IX ZB 150/05.

<sup>719</sup> The *ECJ*, 10/14/2004, C-39/02, *Maersk Olie & Gas A/S./Firma M. de Haan en W. Boer*, ECR 2004 I-9657, paras. 50-52 held that judicial decisions capable of being contested in the Member States of origin before their recognition are judgments within the terms of Article 25 JC (Article 32 JR).

<sup>720</sup> *Hess*, in: *Enforcement Agency Practice in Europe*, p. 271.

have adopted specific legislation implementing the Judgment Regulation which mirrors the terminology of Article 32 JR.<sup>721</sup>

*b) The Application of Article 32 JR in the Member States*

528 The courts of all Member States strictly follow the broad concept of the ECJ.<sup>722</sup> Nevertheless, the national reports stress practical problems with the application of Article 32 JR. On the one hand, these problems relate to decisions of other Member States unknown in the Member States of enforcement. Practical examples are orders for payment from Germany<sup>723</sup>, Italy<sup>724</sup> or Austria. Our empirical research at the courts of Munich, Passau and Traunstein revealed that the vast majority of Austrian judgments submitted were either “*Zahlungsbefehle*” (orders for payment) or default judgments. On the other hand, problems concern borderline decisions between judicial proceedings and execution. For example, writs of execution are not qualified as “judgments” in the sense of Article 32 JR.<sup>725</sup> Another group of decisions entailing difficulties are orders for the reimburse-

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<sup>721</sup> This is the case in the United Kingdom, cf. Rule 74.2 (1) (c) CPR, English report, 3<sup>rd</sup> questionnaire, question 4.1.1. However, it should be noted that despite such enumeration only the case law of the ECJ gives compelling guidance on the interpretation of Article 32 JR.

<sup>722</sup> 3<sup>rd</sup> questionnaire, question 4.1.3

<sup>723</sup> See French report, 3<sup>rd</sup> questionnaire, question 4.1.3.

<sup>724</sup> Examples of the German practice: The *OLG Zweibrücken*, 01/25/2006 – 3 W 239/05 held that also an Italian provisionally enforceable payment order constitutes a “judgment” in terms of Article 32 JR. However, as the same court points out in its decision of 09/22/2005 – 3 W 175/05 that an Italian provisionally enforceable payment order (*decreto ingiuntivo*) does not constitute a “judgment” in terms of Article 32 JR if it has been rendered as an ex-parte decision, i. e. without the defendant being heard. Nevertheless, a *decreto ingiuntivo*, which has been issued in a normal contentious procedure (i. e. no ex-parte) was therefore classified as a decision in terms of Articles 32, 38 JR by the *Oberlandesgericht Köln*, 11/17/2004 – 16 W 31/04. *Landgericht Düsseldorf* also qualified a *decreto ingiuntivo* as a decision in the terms of Article 32 JR (08/08/2006 – I-3 W 118/06). Same opinion: *CA Bourges* 02/22/2005, French report Annex 4.1.3.

<sup>725</sup> For the Dutch *Hoge Raad* it is clear that the judicial assignment of wages to the maintenance of the creditor must be recognised whenever the latter sues the employer. This decision is fully in line with *Denlauler*. In this case, the ECJ held that the recognition of judgments under Article 32 JR (26 JC) presupposes that the defendant had been heard. However, a hearing of the debtor and the third party does regularly not take place in garnishment proceedings, see *Hess*, Study JAI A3/03/2002 on Making More Efficient the Enforcement of Judicial Decisions in Europe, p. 58 et seq.

ment of costs. Here, national courts were often asked to recognise and enforce such orders which were not always given by judicial authorities of other Member States.<sup>726</sup>

529 In the legal doctrine much effort has been made to distinguish effects of a judgment entitled to “enforcement” (coercive measures) and hence subject to a declaration of enforceability and other effects subject only to automatic recognition under Article 33 (1) JR. However, case law on this question is almost completely lacking.

530 The national reporters communicated the following case law:

531 In Austria, the *OGH* held that provisional decisions given under Article 31 CMR were enforceable decisions under Article 32 JR. According to Article 31 (4) CMR provisional decisions expressly not fall under the Convention – the *OGH* has closed the gap by applying Article 32 JR.<sup>727</sup> In another decision, the *OGH* held that “enforceability” of a decision only related to the enforceability in a formal way. The conditions necessary for an execution in the State of origin did not have to be fulfilled. The fact that a French decision cannot be executed in France due to an insufficient service according to Article 503 *NCPC* does not hamper its enforcement in Austria.<sup>728</sup>

532 Belgian courts have apparently not experienced much difficulties in determining judgments under Article 32 JR. Courts have e.g. accepted that a *Vollstreckungsbescheid* issued by a German court constitutes a judgment<sup>729</sup> and that a decision issued by a foreign criminal court could also be qualified as a judgment under Article 32 JR.<sup>730</sup>

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<sup>726</sup> The *BGH* stated that the term judgment has to be construed broadly and autonomously (Judgment of 9/22/2005 – X ZB 7/04). Consequently, a decision of a French president of a *Tribunal de Grande Instance* fixing the costs falls within the concept of “decision” in Article 32 JR.

<sup>727</sup> *OGH* 3 Ob 189/04x, ZfRV-LS 2005, 1 (headnote).

<sup>728</sup> *OGH* 3 Ob 87/04x, RdW 2005, 217.

<sup>729</sup> *Court of Appeals of Antwerp*, 05/12/1997, RW 1998-99, 860.

<sup>730</sup> *Court of Appeal of Mons*, 15 January 1998.

- 533 In the Netherlands the Regional Court of Rotterdam decided that the Swedish limitation procedure fell within the scope of Article 1 JR and was, therefore, a decision according to Article 32 JR.<sup>731</sup>
- 534 A Scottish court considered that an interdict could be included as a judgment within the meaning of Article 32 JR.<sup>732</sup>
- 535 The *Audiencia Provincial Alicante*/Spain considered a decree, an order, a writ of execution and the determination of costs as judgments in terms of Article 32 JR (decision of the *Audiencia Provincial Alicante* of 25th May 2005). In another decision that court included final judgments, provisional judgments, appealable or non-appealable judgments in this concept, as they corresponded to the European concept (decision of the *Audiencia Provincial* of 24<sup>th</sup> of July 1997).
- 536 Despite the practical problems encountered with Article 32 JR in the Member States, the basic concept of the provision seems to be well balanced: It provides for an autonomous concept of “judgment” which must be applied to the heterogeneous decisions of the civil courts of (now) 27 Member States. There is no doubt that the application of the provision may entail uncertainties in the Member States. In the present state of affairs, however, the *ECJ* has elaborated the basic structures of the Community concept, while its application in relation to the different enforceable instruments of the Member States is a matter for the national courts.<sup>733</sup> Accordingly, changing Article 32 JR does not seem necessary. In the cross-border context, it seems predictable that the Regulation (EC) No. 805/04 and the new instruments (on the European Order for Payments<sup>734</sup> and for Small Claims<sup>735</sup>) will facilitate the application of Article 32 JR. Nevertheless, as these instruments apply only to cross-border situations (where the

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<sup>731</sup> *VznGr Rotterdam*, SES 2003/126.

<sup>732</sup> *Barratt International Resorts Ltd./Martin*, 1994, SLT 434.

<sup>733</sup> This situation corresponds to the general collaboration between the *ECJ* and the (Supreme) National Courts in the context of the references under Articles 68 and 234 EC-Treaty, *Hess*, *RabelsZ* 2002, 472 et seq.

<sup>734</sup> Regulation (EC) No. 1896/2006, OJ 2006 L 399/1.

<sup>735</sup> Regulation (EC) No. 861/2007, OJ 2007 L 199/1. The Regulation shall enter into force in January 2009.

parties are domiciled in different Member States) the practical improvement of these new instruments will be limited.<sup>736</sup>

### 3. Grounds for Non-Recognition

537 Article 33 JR seems dead letter. Not a single case of its application has been found or referred to. The *Stolzenberg*-case of the French *Cour de cassation* would have been a paradigm case. However, it was decided that an “*exequatur*” is possible regardless of the character of the decision as enforceable in France.<sup>737</sup>

#### a) *The Concept of Articles 34 and 35 JR*

538 The large majority of the national reports state that the reasons for objections against the recognition laid down in Articles 34 and 35 JR are generally appropriate. Stakeholders in the Member States propose neither an increase nor a reduction of the number of grounds for non-recognition.<sup>738</sup> Only the Lithuanian reporter proposes to delete Articles 34 and 35 JR completely. To the contrary, the Spanish Section of the European Judicial Network demands further objections to be added such as settlements and payment made after the decision. This general point of view is obviously influenced by the improvements of the Judgment Regulation, which has considerably restricted the scope of Article 34 (2) JR (former Article 27 (2)2 JC). However, the English report states that the reservation of Article 35 JR providing for the review of some of the exclusive heads of jurisdiction is not consistent with the general principle of mutual trust so often emphasised by the *ECJ* in recent decisions.<sup>739</sup> Contrary to this,

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<sup>736</sup> Article 3 (1) of the Regulation (EC) No. 1896/2006, OJ 2006 L 399/1.

<sup>737</sup> *C. Cass.* 6/30/2004, JCP Jurisprudence 2004 II 10198. See section regarding provisional measures D.VI.2.b)cc), para. 671.

<sup>738</sup> Cf. the statements of the reporters of the following Member States: Cyprus, Estonia, France, Greece, Luxembourg, Malta, Netherlands, Poland, Scotland, Slovenia and Spain (3<sup>rd</sup> questionnaire, question 4.1.5).

<sup>739</sup> *ECJ*, 12/09/2003, C-116/02, *Gasser*, ECR 2003 I-14693; *ECJ*, 04/27/2004, C-159/02, *Turner*, ECR 2004 I-3565; *ECJ*, 03/01/2005, C-281/02, *Owusu*, ECR 2005 I-1383.

the French report stresses the need for controlling the adherence of the foreign decision to the standards of European procedural law as this was often not the case.<sup>740</sup> The lacking conformity may also result from procedural abuse. Accordingly, the French report states that a residual control by the *exequatur* judge should be retained in order to protect the judgment debtor adequately.

539 In practice, the most important provision for objecting to the recognition of a foreign judgment is still Article 34 (2) JR. This provision mainly applies to default judgments which occur frequently in the European Judicial Area. Most of the problems relate to the service of the document instituting the proceedings. In this context, the application of Articles 14 and 19 of the Service Regulation has proved to be difficult.<sup>741</sup> However, due to the amendment of Article 34 (2) JR in 2001, its practical impact has been reduced considerably. Case law shows that the former defence of a defendant that the document instituting the proceedings was not properly and timely served is not longer successful.<sup>742</sup>

540 The case law shows that deficiencies of the service often imply recourse to Article 34 (2) JR. In the files of the *Oberlandesgericht München*, we discovered a case in which the lawsuit was delivered to the flat of the former girl friend of the debtor in Vienna. The debtor appealed the declaration of enforceability. The *Oberlandesgericht* heard the mother and the girl friend as witnesses and held that the substituted service had not been properly executed.<sup>743</sup> The *Oberlandesgericht Stuttgart* reported similar cases. The Finnish Supreme

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<sup>740</sup> The French report refers to a comprehensive study of *Prof. Niboyet* and *Sinopoli* on the application of the Judgment Convention in France, *Gazette du Palais* 2004, 1739 et seq.; French report, pp. 34 et seq.

<sup>741</sup> Several practical problems have been resolved by the ECJ, 10/13/2005, case C-522/03, *Scania Finance France S.A. ./. Rockinger GmbH & Co KG*, ECR 2005 I-8639, practical problems encountered with the Service Regulation are described by *Hausmann*, *European Legal Forum* 2007, 8, 12 et seq. The application of Articles 14 and 15 of the Service Regulation will be improved by the incoming amendment of the Regulation.

<sup>742</sup> *OLG Köln*, 06/25/2004 – 16 W 21/04; *OLG Zweibrücken*, 09/19/2005 – 3 W 132/05; *Hausmann*, *European Legal Forum* 2007, 8, 13 et seq.

<sup>743</sup> *OLG München*, decision of 09/20/2005 – 25 W 984/05.

Court declared that the documents instituting proceedings were not served in sufficient time for the defendant to prepare the defence since the documents instituting the proceedings were served to an agent working for the Finnish firm and it was not clear from their agreement whether the agent could represent the firm itself in proceedings.<sup>744</sup> A French debtor raised an appeal by reasoning that she was not the debtor declared in the foreign judgment. However, the court rejected the appeal<sup>745</sup>.

541 The application of Article 34 (2) JR by the French *Cour de Cassation* shows that only in exceptional cases objections are accepted. Especially delaying tactics lead to a refusal of the objection. A study undertaken by the authors of the French report shows that defendants often raise the objection of Article 34 (2) JR claiming there was no proper service of the documents and thus preparation of the defence was not possible. However, French judges do not examine whether the service was made in accordance with the provisions of the State of origin. The examination is limited to the questions, whether the defendant had a chance to get knowledge of the action and had sufficient time to prepare his defence.<sup>746</sup> In general it can be stated that judges in most Member States adopt a rather favourable attitude towards the recognition of European judgments and the granting of declarations of enforceability<sup>747</sup>.

542 Under the current wording of Article 34 (2) JR, a defendant is well advised to appear in a court of another Member State and to defend himself in the foreign jurisdiction.<sup>748</sup> As one observer put it with regard to Article 34 (2) JR: "The days of filing foreign writs in the waste

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<sup>744</sup> KKO:2002:34; cf. Finish report, 3<sup>rd</sup> questionnaire, question 4.1.5.

<sup>745</sup> *Cour d'Appel* de Paris (1<sup>re</sup> chambre, 09/22/2005); cf. French report, 3<sup>rd</sup> questionnaire, question 4.1.5.

<sup>746</sup> Cf. French report, questionnaire 3, question 4.1.5.

<sup>747</sup> Cf. French report, 3<sup>rd</sup> questionnaire, question 4.1.5.

<sup>748</sup> Otherwise a judgment is recognised even if irregularities in the service have occurred: *OLG Köln*, 06/23/2004 – 16 W 21/04; *OLG Zweibrücken*, 09/19/2005 – 3 W 132/05.



paper basket have gone.”<sup>749</sup> From the defendant’s perspective, this obligation to defend him- or herself in a foreign forum may amount to a heavy burden.<sup>750</sup> However, under Article 34 (2) JR the defendant will be comprehensively informed about the content of the lawsuit instituted. In addition, needed persons are entitled for legal aid under Articles 3 and 7 of Reg. (EC) 8/2003. All in all, the national reports did not reveal any information about an insufficient protection of the defendant.<sup>751</sup>

### *b) Public Policy*

543 From a legal-political perspective, the public policy objection of Article 34 (1) JR is of pivotal importance. Since its Communication of January 1997,<sup>752</sup> the EC-Commission has been working to abolish the exequatur proceedings and the public policy exception.<sup>753</sup> The European Council formally adopted the concept of mutual recognition at the Tampere Summit (1999)<sup>754</sup>; it was confirmed in the Hague Summit (2004).<sup>755</sup> According to the case law of the ECJ, the principles of mutual trust and mutual recognition underlie and reinforce the fundamental guarantee of the free movement of judgments.<sup>756</sup> Yet, there is a clear difference between the political concept of mutual

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<sup>749</sup> Already with regard to the legal position under Article 27 (2) JC: *Cromie/Park*, International Commercial Litigation, p. 18; *McGuire*, Verfahrenskoordination, p. 178.

<sup>750</sup> However, Chapter II of the JR explicitly protects consumers and employees against excessive forum shopping. Accordingly, the burden of defending oneself in a remote forum mainly applies to businessmen.

<sup>751</sup> Cf. national reports, 3<sup>r</sup> questionnaire, questions 2.1. and 4.1.

<sup>752</sup> COM(1997), 609, final; OJ EC, C 33, 31.1.1998, p. 3, para. 9.

<sup>753</sup> *Hess*, Neue Rechtsakte und Rechtssetzungsmethoden im Europäischen Zivilprozessrecht, 124 II ZSR 183, 191 et seq. (2005); for a critical assessment *Kohler*, Das Prinzip der wechselseitigen Anerkennung im Europäischen Justizraum, 124 II ZSR 263 (2005).

<sup>754</sup> Tampere Summit, 15-16 October 1999, Conclusions of the Finish Presidency, paras 33 – 34.

<sup>755</sup> Hague Program adopted by the European Council, 4/11/2004, no. 3.4.1.

<sup>756</sup> E. g. *ECJ*, 12/09/2003, C-116/02, *Gasser*, ECR 2003 I-14693, para 72; *ECJ*, 04/27/2004, C-159/02, *Turner*, ECR 2004 I-3565, para 24; *ECJ*, 03/01/2005, C-281/02, *Owusu*, ECR 2005 I-1383; *ECJ*, 5/2/2006, *Eurofood*, ECR 2006 I-, paras 39 – 40 (addressing Reg. (EC) no 1346/00).

recognition and its application in the case law of the ECJ: While the former is aimed at the comprehensive abolition of exequatur proceedings (including the public policy exception), the latter is only applied within the framework of Articles 34 et seq. JR. According to the case law of the ECJ, mutual recognition implies that the grounds for non-recognition, especially the public policy exception of Article 34 (1) JR, must be construed narrowly.<sup>757</sup> This case law is now supported by the wording of Article 34 (1) JR where the adverb “manifestly” was introduced to qualify the contradiction between the free movement of judgments and public policy.<sup>758</sup>

544 Seen from the political perspective of mutual trust and recognition, the traditional concept of private international law, which underlies Article 34 (1) JR, does not seem to be in line with the Community concept.<sup>759</sup> According to the political concept, recognition (and similar interim procedures) shall be abolished.<sup>760</sup> However, recent case law of the *ECJ*<sup>761</sup> shows that there are still constellations in the European Judicial Area in which the application of the public policy reservation is needed in order to adequately protect the rights of the defendant. However, these constellations are rare exceptions. The national reporters communicated the following case law:<sup>762</sup>

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<sup>757</sup> *ECJ*, 2/4/1988, case 145/86, *Hoffmann./Krieg*, ECR 1988, 645, para. 21; *ECJ*, 10/10/1996, case C-78/95, *Bernardus Hendrikman und Maria Feyen./Magenta Druck & Verlag GmbH*, ECR 1996 I-4943, para. 23

<sup>758</sup> *Magnus/Mankowski/Francq*, Art. 34 Brussels I Regulation, para. 12.

<sup>759</sup> English report, 3<sup>rd</sup> questionnaire, question 4.1.5.

<sup>760</sup> In the legal literature, public policy is sometimes considered as a residual control of the Member State of enforcement aimed at protecting the fundamental rights of domestic parties against (judicial) acts of foreign sovereigns. However, this concept clearly contradicts the Community concept of mutual trust which scarcely abandons the concept of the “foreign sovereign” with respect to other Member States.

<sup>761</sup> *ECJ*, 3/28/2000, C-7/98, *Krombach./Bamberski*, ECR 2000 I, 1935. It must be noted, however, that the pertinent French legislation on *contumace-proceedings* legislation has been changed.

<sup>762</sup> The reported case law includes judgments under Article 27 BC.

545 For instance, in Greece there have been – in so far as ascertainable – only two cases where the public policy reservation has been raised successfully.<sup>763</sup>

546 So far, in Germany there have also only been five cases<sup>764</sup> where public policy has been regarded as (possibly) being infringed. In two cases a violation of the procedural guarantees (right to be heard) of Article 103 (1) Basic Law (German Constitution) and Article 6 ECHR were at issue. Two other cases dealt with procedural fraud. In the fifth case, the German system of social security as superseding personal liability had been disregarded. - In the first case, the *Oberlandesgericht Zweibrücken*<sup>765</sup> mainly relied on Article 34 (2) JR and its reference to Article 34 (1) JR must be qualified as an *obiter dictum*. The second case was the famous *Krombach* case.<sup>766</sup> The third case concerned the recognition of a Danish judgment. The debtor asserted fraudulent behaviour of the creditor when seeking the default judgment.<sup>767</sup> In a fourth case a fraudulent misrepresentation to the Italian court was invoked<sup>768</sup>. The fifth case was the final decision in the

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<sup>763</sup> In the respective case, the Court of first instance (Drama 251/2000, Harmenopoulos 2001, p. 535) held that a foreign judgment contravened public policy, if the defendant was considered to be of unknown residence, although the petitioner was aware of his whereabouts. Cf. Greek report, 3<sup>rd</sup> questionnaire, question 4.1.7. The second case dealt with the recognition of an English anti-suit injunction. The Court of Pireus, 1/10/2004, held that the recognition of the English judgment would violate the defendants' constitutional rights of access to justice. The judgment was rendered prior to the *Turner* decision of the ECJ. See *Meidanis*, 8 Yb Private Int'lL 281, 283 – 285 (2005).

<sup>764</sup> Only one case relates to the JR, the other cases relate to the JC. In addition, as the German Report (3<sup>rd</sup> questionnaire, answer to question 4.1.7) indicates, in 2004-2006, the national reporters discovered 14 (published) decisions of the *Bundesgerichtshof* and the *Oberlandesgerichte* where the public policy was raised under Article 34 no 1 JR. Only in one case, the OLG Zweibrücken held (in an *obiter dictum*) that German public policy had been infringed – the court mainly relied on Article 34 no 2 JR.

<sup>765</sup> OLG Zweibrücken, 05/10/2005 – 3 W 165/04: In this case, a Belgian court initiated the service of the lawsuit under Articles 4 et seq. Service Regulation. The German receiving authorities did not serve the document to the German defendant, because the address of the German party was uncorrectly designated. The document was sent back to the Belgian Court (Article 7 (2) Service Regulation). The Belgian court did not apply Article 19 (2) of the Service Regulation and gave a default judgment. The Higher Regional Court applied Article 34 (2) JR and declared the judgment unenforceable. In addition to this, the Court held that the recognition would also infringe Article 34 (1) JR, because the Belgian judgment would infringe the procedural guarantees of Article 103 (1) of the German Constitution and Article 6 ECHR.

<sup>766</sup> *BGH*, 06/29/2000 – IX ZB 23/97, BGHZ 144, 390.

<sup>767</sup> *BGH*, 12/16/2005 – IX ZB 276/04; *BGH*, 05/06/2004, NJW 2004, 2386.

<sup>768</sup> See also *infra* at para. 552.

*Sonntag* case<sup>769</sup>, where a preliminary ruling of the Court of Justice<sup>770</sup> had been obtained. In German law the personal liability of a teacher at public schools for injuries suffered by students is substituted by a social security system. For the *Bundesgerichtshof* the following facts amounted to an infringement of German public policy: A German schoolboy at a German school had been the victim of a fatal accident at an excursion to Italy. The Italian court ordered the German teacher personally to pay damages to the parents. However, under German social and administrative laws, only the federal state which employed the teacher as a fonctionnaire could be sued for compensation.<sup>771</sup>

547 In France, the granting of exequatur was refused due to an infringement of public policy according to Article 34 (1) JR in a case where the debtor was charged with a payment without the English court of origin giving any reasoning as to the facts or law because.<sup>772</sup>

548 However, the national reports clearly show that Article 34 (1) JR is often referred to but seldom successful.<sup>773</sup> While academics dispute whether to determine the content of Article 34 (1) JR according to national or European standards, the main practical problems relate to the allegation of procedural fraud.<sup>774</sup> In this context, the following case law addressing Article 34 (1) JR has been reported:

549 A Greek court of first instance decided that a foreign judgment contravened public policy if the defendant was considered to be of unknown residence, although the claimant was aware of his where-

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<sup>769</sup> *BGH*, 09/16/1993 – IX ZB 82/90, BGHZ 123, 268, IPRax 1994, 118 with critical comment *Basedow* at 85.

<sup>770</sup> *ECJ* 02/21/1993, C-172/91, ECR 1993 I-1993.

<sup>771</sup> The judgment of the *Bundesgerichtshof* was strongly criticised by legal literature, see *Basedow*, IPRax 1994, 85; *Haas* ZZP 108 (1995), 126 et seq.; *Rauscher/Leible*, Article 34 JR, para. 20.

<sup>772</sup> C. Versailles (1<sup>re</sup> ch., 1<sup>re</sup> sect.), 05/18/2000, no. 4364-97.

<sup>773</sup> *Kerameus*, Greek report, 3<sup>rd</sup> questionnaire, question 4.1.7. See the national reports of Belgium, Finland, France, Greece, Poland on question 4.1.7. of the 3<sup>rd</sup> questionnaire. See also Magnus/Mankowski/*Franco*, Article 34 Regulation Brussels I, para. 33: “Examples [of the case law of the Member States] show that an argument based on public policy, though often raised, is generally refused.”

<sup>774</sup> This issue is largely dealt with by the National Reports, 3<sup>rd</sup> questionnaire, answers to question 4.1.9. See also Magnus/Mankowski/*Franco*, Article 34 Regulation Brussels I, para. 27.

abouts.<sup>775</sup> This case related to procedural fraud. In another case recognition was refused according to Article 34 (1) JR because the costs were higher than the compensation granted. The court furthermore referred to Article 6 ECHR.

550 The French report lists several cases, where the objection of an infringement of public policy was raised. Nevertheless, in most of them the objection was refused.<sup>776</sup> However, French courts generally refuse the recognition of judgments of other EU Member States given without any motivation. The Cour de Cassation held that any verification of Articles 34 and 35 JR with regard to the foreign title was impossible and, therefore, recognition of that title was excluded under Article 34 (1) JR/27 (1) JC.<sup>777</sup>

551 According to English law, public policy is infringed when there is substantial evidence that the judgment has been obtained by fraud on the foreign court.<sup>778</sup> Another case where public policy was infringed was the case *Maronier./Larmer*<sup>779</sup>. In 1984, *Mr. W. Maronier* sued *Mr. Larmer*, a dentist, in the Regional Court of Rotterdam, Netherlands for damages caused by alleged improper dental treatment. In 1986, the lawsuit was stayed because *Mr. Maronier* went bankrupt. In 1991, *Larmer* moved to England, but before moving, he left his new address in England with the Rotterdam City Hall. Twelve years after obtaining the stay, *Mr. Maronier* took steps to reactivate his lawsuit. *Mr. Larmer's* attorney then declared himself "incapable", indicated that his

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<sup>775</sup> Drama 251/2000, Harmenopoulos 2001, p. 535

<sup>776</sup> Cf. answer to the 3<sup>rd</sup> questionnaire, question 4.1.7: Only four decisions dealing with Article 34 (1) JR since 2004 could be detected, in none of them an infringement of public policy was stated by the court: *Cour d'appel de Paris* 01/20/2005; *Cour d'appel de Paris* 09/22/2005; *Cour d'appel d'Aix en Provence* 02/16/2006; *CA Montpellier* 07/28/2004 n°03/01704. The study of the application of the Judgment Convention in France, conducted by the French national reporters, shows that from 84 applications for recognition and declaration of enforceability, recognition was refused in 11 cases and only in one of these due to an infringement of public policy according to Article 34 (1) JR, *Ni-boyet/Sinopoli*, L'exéquatur des jugements étrangers en France, *Gaz. Pal. (Doctrine)* 2004, 1739.

<sup>777</sup> C.Cass, *Clunet* 106 (1979), 280, note *Holleaux* (concerning Article 27 JC). Contrary opinion: Cassaz, 1/13/1995 quoted by Magnus/Mankowski/*Francq*, Article 34 Regulation Brussels I, para. 32, fn. 114.

<sup>778</sup> *Owens Bank Ltd./Bracco* [1992] 2 AC 443.

<sup>779</sup> *Maronier./Larmer*, [2003] QB 620, English report, 3<sup>rd</sup> questionnaire, question 4.1.9.

client was living in England, and withdrew with the permission of the Court. In 1999, the Rotterdam Court entered a judgment for *Mr. Maronier* in the amount of 17.864 Dutch guilders with interest and costs. The judgment recited that *Mr. Larmer* was living in Rotterdam. On 14 July 2000 the judgment was registered in England. Service of the notice of the registration on *Mr. Larmer* was the first actual notice of the re-activation of the lawsuit that he received. His right to appeal in the Netherlands had expired three months after the judgment was entered, and the judgment had become “unassailable” in the Netherlands. On *Larmer’s* application, a Deputy Master of the English Court set aside the registration of the judgment, and the matter came before the Queen's Bench Division, which ruled that enforcement of the judgment would contravene English public policy because of denial of the right to an effective opportunity to defend oneself in civil proceedings, as protected by Article 6 ECHR. The Court of Appeal upheld this judgment.

- 552 The German *Bundesgerichtshof* seems more generous in permitting the objection of procedural fraud. According to its case law, a party does not have to challenge the judgment in the Member State of origin (as it is stated in Article 34 (2) JR), but may raise this objection in the exequatur proceedings.<sup>780</sup> Obviously, the *Bundesgerichtshof* does not distinguish between judgments from Member States and third States. Recently, the *Bundesgerichtshof* rejected the recognition of a Danish default judgment. The German debtor claimed that the Danish claimant, his former lawyer, had calculated his fees based on a wrong number of working hours. In a first decision, the *Bundesgerichtshof* held that the debtor had to specify the allegations of the abusive behaviour of the adversary and that the foreign judgment was not to be reviewed (the *Bundesgerichtshof* explicitly referred to Article 29 JC)<sup>781</sup>. As the applicant had indeed not sufficiently substantiated his objection, the case was referred back to the *Oberlandesgericht Düsseldorf*, which held that there was no infringement of public policy even assuming the applicant’s allegations were true. The *Oberlan-*

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<sup>780</sup> *BGH*, 4/29/1999, NJW 1999, 3198.

<sup>781</sup> *BGH*, 5/6/2004, NJW 2004, 2386 et seq.

*desgericht* held that the debtor had not sufficiently established misbehaviour of the defendant and thereby disregarded the binding force of the *Bundesgerichtshof's* ruling. The *Bundesgerichtshof* allowed a second appeal and reversed again: The IX<sup>th</sup> Senate held that the allegations of the debtor met the criteria of procedural abuse.<sup>782</sup> Finally, the *Bundesgerichtshof* referred the case back to another Senate of the *Oberlandesgericht Düsseldorf*.<sup>783</sup> In an earlier case (under Article 27 JC),<sup>784</sup> the debtor had alleged, that the Italian claimant had assured him, that nothing was owed but that he needed the default judgment to submit it to his bank. The *Bundesgerichtshof* decided that, assuming the correctness of this allegation, the recognition of the judgment would disregard German public policy and remanded the case to the inferior court to take the requested evidence.

553 On the other hand, the practice of the *Bundesgerichtshof* is not generally permissive. This is demonstrated by the following example: The *Bundesgerichtshof* clearly stated that German constitutional standards of protecting the weaker party in contract law were no obstacle to recognise foreign judgments, which had not adopted the same standard. German courts have developed very stringent rules to protect family members drawn to engage themselves for considerable guarantees for relatives by banking institutions. Though this case law was derived from constitutional principles, the *Bundesgerichtshof* refused to apply it in the context of the public policy objection of Article 34 (1) JR.<sup>785</sup>

554 Similarly, the national reports mentioned the following case law not addressing the allegation of fraudulent behaviour:

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<sup>782</sup> *BGH*, 12/15/2005, IX ZB 276/04.

<sup>783</sup> In a similar case, the *OLG Zweibrücken* (decision of 09/19/2005 – 3 W 132/05) held that the prerequisites of procedural fraud had not been established. In this case, the defendant alleged that the Italian plaintiff, his former lawyer, had concealed a fee arrangement to the Italian court when seeking a default judgment. The *Oberlandesgericht* stated that the alleged procedural fraud amounted to a violation of German public policy, even if the defendant had not defended himself in the foreign court. However, as the defendant failed to substantiate his allegations, the Court rejected the appeal.

<sup>784</sup> IPRax 1987, 236, 237.

<sup>785</sup> *BGH*, 02/24/1999, IPRax 1999, 371 = BGHZ 140, 396 (399).

555 According to the Austrian *Oberster Gerichtshof* Article 34 (1) JR is only applicable, when the decision infringes the national public policy of the enforcement State in the concrete case. The mere (abstract) irreconcilableness of the State of origin's substantive law with the legal system of the Member State of enforcement is not sufficient to assume an infringement of public policy. It is up to the defendant to forward reasons for an infringement of public policy.<sup>786</sup> In another case, the *Oberster Gerichtshof* held that a Swedish judgment affirming the effectiveness of actions carried out by a Swedish insolvency administrator before the entry into force of the European Insolvency Regulation might violate Austrian public policy, since this would circumvent the former Austrian recognition system.<sup>787</sup> However, this question has not been assessed conclusively.

556 In Belgium, courts have refused to accept that a foreign judgment should be refused recognition or enforcement on the ground that the court of origin has refused to apply a specific Belgian statute which is deemed to be, under Belgian law, mandatory in the sense of Article 7(2) of the 1980 Rome Convention. In another case, the Court of First Instance of Brussels<sup>788</sup> refused to accept that the fact that the judgment creditor had modified its claim during the course of the English proceedings that led to the judgment whose enforcement was sought, constituted as such a violation of public policy, even though under Belgian rules of civil procedure, such a modification would not have been accepted.

557 The Irish reports mentioned the case of *Westpac Banking Corporation./Dempsey*<sup>789</sup>, which was decided under Article 27 (1) JC. The Master of the High Court made an order enforcing an English judgment for payment against *Dempsey*. *Dempsey* appealed claiming that the order was a criminal offence in breach of the Exchange Control Act 1954, section 5 of which prohibited without the permission of the Minister, the making of a commitment to make any payment to a per-

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<sup>786</sup> OGH, Ob 242/05t.

<sup>787</sup> OGH, 6 Ob 64/06i (wbl 2006/250 GesRZ 2006, 272 = ecolex 2006/362).

<sup>788</sup> First Instance Court of Brussels, 10/13/2004, RGDC 2005, 125.

<sup>789</sup> High Court, 11/19/1992, *Morris J.*



son resident outside the scheduled territories, accordingly null, and void the court should not enforce it. In dismissing the appeal *Morris J* heard evidence from an official of the Central Bank that the restrictions on exchange control were being removed in anticipation of the coming into effect of the Single European Act and that such payments could now be made. *Morris J* concluded in view of the evidence of the central bank official he did not see any conflict with public policy such as would prevent the recognition of the judgment under Article 27 JC as the public policy of the State was at that time to dismantle all obstacles to the free movement of capital. *Morris J* noted that he did not wish to "injure the innocent, benefit the guilty and put a premium on deceit".

558 The Luxembourg Court of Appeal has held that if the court of origin has given a judgement consistent with its own public policy, the general convergence of laws as between EU Member States makes it improbable that the public policy exception can apply. The case concerned the recognition of a German judgment.<sup>790</sup>

559 The legal literature proposes to distinguish systematically between substantive and procedural public policy.<sup>791</sup> From this perspective, the reported case law in which public policy in its substantive respect was successfully invoked is very rare.<sup>792</sup> This result is explained by the following factors: Firstly, in civil and commercial matters, there are no fundamental differences between the legal systems of the Member States which could trigger the application of substantive public policy.<sup>793</sup> Secondly, as Articles 36 and 45 (2) JR explicitly forbid any review of the substance, it seems difficult to maintain that the

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<sup>790</sup> *Central Bank of Irak, Metzler ./. Dörries Scheuermann AG*, Cour d'Appel Luxembourg, 1/27/2000, quoted by *Layton/Mercer*, European Civil Practice, para 26.015.

<sup>791</sup> *Magnus/Mankowski/Francq*, Article 34 Regulation Brussels I, paras. 20 and 28; *Rauscher/Leible*, Article 34 JR, paras. 13 and 19.

<sup>792</sup> The only exception is *BGH*, 09/16/1993 – IX ZB 82/90, BGHZ 123, 268, IPRax 1994, 118 with critical comment *Basedow* at 85. However, this judgment was rendered before the ECJ's decision in *Renault ./. Maxicar* and the *Bundesgerichtshof* apparently applied a more stringent standard of review.

<sup>793</sup> *Layton/Mercer*, European Civil Practice, para 26.015; *Magnus/Mankowski/Francq*, Article 34 Regulation Brussels I, para. 20.

content of a judgment contradicts public policy.<sup>794</sup> Finally, the ECJ held in *Renault ./. Maxicar* that even a misapplication of the fundamental guarantees of the EC-Treaty did not constitute (per se) a violation of public policy.<sup>795</sup> As a result it must be stated that the application of substantive public policy has been proved to be a rare exception under Article 34 (1) JR. Nevertheless, it cannot be excluded that a substantive public policy exception will be still needed in unavoidable and extreme situations.<sup>796</sup>

560 With regard to procedural public policy, the factual situation is different: The national reports revealed several cases in which the procedural public policy had been infringed. However, most reported cases relate to procedural fraud. This direct relationship between public policy and procedural abuse is not a matter of chance. In this respect, Article 34 (1) JR still permits a residual control which can be exercised by the Member State of enforcement in extreme cases.<sup>797</sup> The reported case law equally illustrates the reticent attitude of the courts in some Member States towards the guiding principle of mutual trust as well as its implicit consequence of not reviewing foreign decisions in particular with regard to any potential procedural abuse. Seen from this perspective, it would be difficult to delete this provision entirely without any substitute.

561 However, from a legal-political perspective it does not seem necessary to assimilate exequatur proceedings with the review of public

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<sup>794</sup> In other fields (i.e. family or insolvency laws) where the substantive laws of the Member States diverge more considerably, the application of substantive public policy may occur more often.

<sup>795</sup> ECJ, Case C-38/1998, *Régie nationale des usines Renault ./. Maxicar SpA and Orazio Formento*, ECR 2000 I-2973, para 33.

<sup>796</sup> Such a situation may arise when a judgment of a Member State by virtue of private international law is based on the civil law of a third state which contradicts the (substantive) public policy of the Member State of enforcement.

<sup>797</sup> It should be noted that the application of the public policy exception entailed positive effects: In some Member States, the national law was changed in the light of the case law of the ECJ. The most prominent example was the abolition of the French contumacy-proceedings after the *Krombach* decision of the ECJ.

policy.<sup>798</sup> What matters for the debtor is not the recourse to public policy, but the availability of effective remedies. In the present state of affairs, this argument is used when Article 34 (1) JR is applied. Especially in the context of (alleged) fraud the judge of the requested State should always ask whether the violation of public policy still exists in view of the possible redress in the Member State of origin.<sup>799</sup> This argument seems decisive: The possibility of invoking procedural fraud (or other procedural irregularities) is always influenced by the availability of means of redress in the Member State of origin. In the context of Article 34 (1) JR, the crucial question is whether procedural irregularities should be remedied in the Member State of origin or in the Member State of enforcement.<sup>800</sup> Accordingly, if Community law provides for available means of redress in the Member State of origin, this safeguard against fraudulent behaviour may replace the current control of the foreign judgment in the framework of exequatur.<sup>801</sup> Similar considerations apply to the other cases of procedural peculiarities. However, in this respect, the control of the foreign judgment should at least be retained when the Member State of origin does not provide for an efficient remedy.<sup>802</sup>

562 As a result it can be stated that the application of Article 34 (1) JR mainly relates to procedural public policy, especially to (the asserted) fraudulent behaviour of the judgment creditor. In this respect, a further reduction of Article 34 (1) JR seems possible, if Community law

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<sup>798</sup> *Oberhammer*, JBl. 2006, 477, 482 et seq. correctly states that the need of a residual control of the regularity of the (foreign title) does not legitimate the preservation of a separate procedure for this control. In addition, the reduction of further grounds of non-recognition (as proposed in this study) entails a strong argument against the control of grounds for non-recognition in a specific (additional) procedure.

<sup>799</sup> Correctly *Layton/Mercer*, European Civil Practice, para 26.024; *Magnus/Mankowski/Francq*, Article 34 Regulation Brussels I, para. 27.

<sup>800</sup> *Magnus/Mankowski/Francq*, Article 34 Regulation Brussels I, para. 27 clearly states: "If such means [of redress] exist [in the Member State of origin] and have not been exercised, recognition should not be refused."

<sup>801</sup> See *infra* at paras 637 et seq.

<sup>802</sup> Example: *Maronier./Larmer*, [2003] QB 620, English report, 3<sup>rd</sup> questionnaire, question 4.1.9, *supra* at para 551.

provides for efficient means of redress in the Member State of origin or in the enforcement proceedings of the Member State addressed.<sup>803</sup> However, as the reported case law demonstrates, a residual control of the (foreign) title is still needed.

*c) Practical Problems with other Grounds for Non-Recognition*

563 Apart from the objections under Article 34 (1), (2) JR, not much case law has been reported on the application of the other grounds for non-recognition. The sparse practice on Article 34 (3), (4) JR may be explained by the fact that the provisions on pendency, as prescribed by Articles 27–30 JR, are generally respected. Accordingly, conflicts between contradictory judgments do not often occur.

564 At the present state of affairs, a further reduction of the grounds for non-recognition could be recommended. As the UK-report correctly states, several inconsistencies exist in the context of Articles 34 and 35 JR.<sup>804</sup> To start with Article 35 JR: The jurisdictional review provided for by the first paragraph refers to secs. 3, 4 and 6 of the Chapter II, but neither to contracts of employment nor to jurisdictional clauses, although the latter also provide for exclusive heads of jurisdiction. In this context, it seems appropriate to further reduce the judicial review and to remove this provision completely: Firstly, is not in line with the general principle of mutual trust. Secondly, its practical importance seems limited as findings of fact of the court of the Member State of origin bind the examination by the recognising court. Thirdly, there are inconsistencies in relation to Article 34 (3), (4) JR: According to Article 34 (3) JR, a judgment shall not be recognised if it is irreconcilable with a judgment in the Member State where the recognition is sought. This objection is not in line with Articles 27 and 28 JR, as it gives preference to a judgment given without respecting the *lis pendens* of the same lawsuit in another Member State. Moreover,

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<sup>803</sup> See *infra* at paras 637 et seq.

<sup>804</sup> See English report, 3<sup>rd</sup> questionnaire, question 4.1.1 (in fine).

Article 34 (3) JR should at least be aligned with Article 21 Regulation on the European Enforcement Order<sup>805</sup>, Article 22 of the Regulation on European Order for Payment<sup>806</sup> and Article 22 of the Regulation on Small Claims<sup>807</sup> which give a preference only to an *earlier* judgment in the Member State of enforcement. However, it seems advisable not to refer to the moment the judgment was rendered, but to the moment of pendency, Articles 27 and 30 JR. Accordingly, Article 21 (1) c) of the Regulation on the European Enforcement Order and Article 22 (1) (c) of the Regulations on the European Order for Payment and on Small Claims limit this objection to situations where the irreconcilability could not be raised in the proceedings in the Member State of origin. However, this formulation seems to be problematic, because it does not refer to the pendency.<sup>808</sup> Therefore, it seems advisable to include a reference to pendency in the Article. Finally, Article 34 (4) JR which gives preference to prior judgments of a third State should also be amended and refer to the moment of the pendency, Article 30 JR.

565 Article 34 (3), (4) JR could be redrafted as follows:

*“A judgment shall not be recognised: (...)*

*3. if it is irreconcilable with an earlier judgment or an order previously given in any Member State or third country, provided that*

*(a) the earlier judgment or an order involve the same cause of action between the same parties, and*

*(b) the earlier judgment or an order fulfils the conditions necessary for its recognition in the Member State of enforcement, and*

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<sup>805</sup> Regulation (EC) No. 805/2004 creating a European Enforcement Order for uncontested claims.

<sup>806</sup> Regulation (EC) No. 1896/2006 of 12/12/2006 creating a European Payment Procedure.

<sup>807</sup> Regulation (EC) No. 861/2007 of 7/11/2007 establishing a European Small Claims Procedure.

<sup>808</sup> Due to the differing efficiency of civil proceedings in the Member States, it is still possible, that civil proceedings are decided earlier in the Member State in which they were pending later than in the another Member State in which they were pending first.

*(c) the pendency of the parallel proceedings, Article 27 and 30 JR, or the irreconcilability could not have been sought in the court proceedings in the Member State of origin.”*

566 In addition to this, Article 35 JR could be deleted.

567 These proposals will further reduce the control of the foreign title by the judicial authorities in the Member State of enforcement. The limitation of grounds for non-recognition will decrease the prospects of success of an appeal against the decision granting exequatur. As a result, most judgments will be recognised in the accelerated, unilateral proceedings provided for by Articles 38–42 JR and the decisions on enforceability will not be appealed. Accordingly, from a practical perspective, the free movement of judgments will be largely ensured. Nevertheless, retaining a residual control of the foreign judgment ensures the protection of the debtor’s rights in extreme cases and safeguards the objectives of justice and efficient legal protection in the European Judicial Area. In addition, the proposed reduction of the grounds for non-recognition will equally facilitate the abolition of exequatur proceedings and their replacement by review proceedings in the Member State of origin in the context of enforcement proceedings.<sup>809</sup>

#### **4. Remedies (Articles 43 and 44 JR)**

##### *a) Appeal Procedures*

568 According to Article 43 JR, the debtor has the right to appeal the decision granting enforceability. Following Article 43 (3) JR, the appeal is dealt with in a contradictory manner. The period for appeal is, for a party domiciled in the State requested to enforce, one month from the notice of registration and, for a party domiciled in another State, two months from the notice of registration, Article 43 (5) JR. How-

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<sup>809</sup> Different avenues of facilitating the free movement of judgments are discussed *infra* at para 631.

ever, for the applicable rules the Judgment Regulation refers to the procedural laws of the respective Member State. Thus, the proceedings are handled according to the different procedural provision of appeal proceedings in the Member States. Several national reports described very precisely the course and the efficiency of the procedure:<sup>810</sup>

569 In England an appeal by either party on an order of a Master granting or denying registration of a judgment of another Member State under Article 43 (1) JR is to be lodged with the *High Court*, (as provided in Annex III JR), and it shall be dealt with under the rules governing procedure in contradictory matters. From the *High Court*, a further appeal on a point of law may be lodged with the *Court of Appeal of England and Wales* or directly from the *High Court* to the *House of Lords* in accordance with the Administration of Justice Act 1969 (1969 c. 58) Part II, in accordance with Annex IV JR.

570 In France, the competent court for deciding the appeal against a decision denying or granting enforceability is either the president of the *Tribunal de Grande Instance*, in case of a refusal of an application for the declaration of enforceability, or the *Cour d'Appel*, in case of an objection raised by the defendant according to Article 43 JR. In the procedure at the *Cour d'Appel* representation by a lawyer is mandatory.

571 In Germany, the appeal is heard by the *Oberlandesgerichte*,<sup>811</sup> the national procedure Article 43 JR refers to is regulated in more detail by sec. 11–14 AVAG<sup>812</sup>. It starts with the filing of an appeal. The application has to be in written form or be recorded at the court's office. A representation by a lawyer is not required.<sup>813</sup> Representation

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<sup>810</sup> 3<sup>rd</sup> questionnaire, question 4.1.13.

<sup>811</sup> In some of the *Oberlandesgerichte* (e.g. *Stuttgart, Karlsruhe, Munich*) all appeals relating to questions of private international and foreign law are assigned to a specific senate. Accordingly, the judges of these senates are experienced in private international law issues.

<sup>812</sup> See *supra* at paras. 568 *et seq.*

<sup>813</sup> Representation by a lawyer is not mandatory since the appeal is decided without a hearing (see sec. 13 (2) AVAG, sec. 78 (5) ZPO), *OLG Zweibrücken*, 08/25/2005 – 3 W 96/05.

is only mandatory when the appellate court schedules an oral hearing (sec. 13 para. 2 AVAG). Oral hearings, however, rarely take place.<sup>814</sup>

572 A special situation has arisen in the Netherlands: Annex III JR is not in accordance with the Dutch Implementation Act, Article 4. In this Article only the '*voorzieningenrechter*' of the courts are competent to hear the appeal under Article 43 JR. Yet, Annex III JR mentions for the defendant the court of first instance (*Arrondissementsrechtbank*) and, for the applicant, the Court of Appeal (*Gerechtshof*). *Rb Arnhem*,<sup>815</sup> decided on this question: The Regulation and Annex III supersedes the Implementation Act. Although the Dutch legislator promised to change the Implementation Act, until now this has not occurred. Another problem is the start of the procedure because it is dealt with in accordance with the contradictory procedure. The consequence is that the procedure has to start with a writ of summons ('*dagvaarding*') although the request for a declaration of enforceability has to start with a request. In practice this could lead to mistakes. Therefore the Supreme Court decided that Article 69 Rv (which allows the court to order a conversion of the opening instrument from a writ of summons to a request or v. v.) is applicable so courts can proceed to the request procedure although it was not commenced by means of a '*dagvaarding*'.

*b) The Admissibility of Defences against the Substantive Claim*

573 In several Member States, the admissibility of substantive defences against the foreign title arising out of events having occurred subsequently to the rendering of the decision in the exequatur proceedings is disputed.<sup>816</sup> The most common defence of this kind is that the debtor has paid the claim or a set-off. There is no doubt that the

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<sup>814</sup> The details of the proceedings are explained in the German report, 2<sup>nd</sup> questionnaire.

<sup>815</sup> NJF 2005, 334.

<sup>816</sup> It is a matter of course that generally no substantive objection against the decision is admissible. Nonetheless, interviews with German judges revealed that quite often parties not represented by lawyers expected that the appeal could be based on the assertion that the foreign judgment is wrong. Therefore, it should be contemplated accompanying the decision declaring the foreign decision enforceable by an official information on the very limited degree of review possibilities.



debtor can apply for a stay of enforcement measures based on these objections according to the national laws on enforcement.<sup>817</sup> The question remains whether the wording of Article 45 JR prohibits these objections. In Austria<sup>818</sup> and Poland,<sup>819</sup> substantive objections are not permitted in the appellate proceedings under Articles 43 and 45 JR. Other Member States have adopted a contrary practice and permit substantive objections, such as Estonia. Here, the Code of Enforcement Procedure includes several substantive objections which are also applied in the context of the Judgment Regulation. In Spain, the procedural code allows raising substantive objections – however, their admissibility has been restricted in the context of the Judgment Regulation.

574 England and Germany seem the most liberal Member States in this respect: English case law recognises both the possibility of a set-off as well as a compromise of a disputed claim as precluding enforcement of a judgment debt, although the rules on set-offs are not straightforward. Further, para. 2 (2) of Sch. 1 to the Civil Jurisdiction and Judgments Order SI 2001/3928 provides: "A judgment registered under the Regulation shall, for the purposes of its enforcement, be of the same force and effect, the registering court shall have in relation to its enforcement the same powers, and proceedings for or with respect to its enforcement may be taken, as if the judgment had been originally given by the registering court and had (where relevant) been entered." (see also para. 3 of the same schedule relating to maintenance judgments). As a result, such objections would appear possible at the enforcement stage. However, the English report did not communicate any case law addressing the issue.

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<sup>817</sup> Ex. Sec. 767 German ZPO.

<sup>818</sup> Cf. Statement of the Austrian national reporter with reference to the *Oberste Gerichtshof*, OGH 3 Ob 93/03b, SZ 2003/174 = RdW 2004/383.

<sup>819</sup> 2<sup>nd</sup> questionnaire, question 2.17.

575 German law provides for an express legal provision: According to sec. 12 AVAG<sup>820</sup> the parties may bring additional substantive objections against<sup>821</sup> the foreign judgment based on substantive law.<sup>822</sup> At present, there is a broad discussion in Germany whether sec. 12 AVAG is compatible with Article 45 JR.<sup>823</sup> However, recent case law of the Appellate Courts follows a “middle course”: Most courts have admitted objections based on undisputed facts or on uncontested evidence.<sup>824</sup> From the perspective of Article 45 (1) JR which refers only to the grounds specified in Articles 34 and 35 JR, the German practice seems to be problematic. Any admission of additional objections against the title regularly delays the proceedings, because the courts must schedule a hearing and representation of the parties by a lawyer is necessary. Unfortunately, the XIIth senate of the Bundesgerichtshof recently held that all objections which arose after the rendering of the foreign judgment are permitted under Article 43 and 45 JR.<sup>825</sup> However, the senate did not address the issues whether such interpretation is in line with Article 10 EC-Treaty (non-discrimination

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<sup>820</sup> In Austria the *Oberste Gerichtshof* held that objections against the title were not permitted. *OGH Ob 20/02s, SZ 2002, 97.*

<sup>821</sup> Accordingly, the debtor may declare that he had paid, he may set off against the judgment and he may assert that the claim was assigned to a third party.

<sup>822</sup> Sec. 12 (1) AVAG reads as follows: “In the miscellaneous appeals directed against the authorisation of the enforcement of a judgment, the party against whom enforcement is sought may also raise objections against the claim itself insofar as the reasons on which they are based came about after the judgment was issued.”

<sup>823</sup> Some authors have expressed doubts that the admission of these objections might impair the functioning of the exequatur proceedings and that, as a rule, these objections should be heard by the first court which rendered the decision. The contrary opinion argues that the expediency of the recognition and the enforcement of the foreign decision are not impaired, because the debtor may object to the foreign judgment under the parallel provision of the German *Zivilprozessordnung* (sec. 767).

<sup>824</sup> The *OLG Düsseldorf*, 03/01/2005 – 3 W 335/04: held that Article 12 AVAG was applicable as far as an uncontested objection was concerned. The *OLG Köln*, 06/04/2004, IHR 2005, 216 and 11/17/2004 – 16 W 31/04 held that undisputed objections against the claim could be heard in the appeal proceedings under Article 45 JR. The *OLG Oldenburg* held in a decision of 03/29/2006 – 9 W 6/06 that sec. 12 AVAG could not be applied within the scope of Article 45. Same opinion: *OLG Koblenz*, 04/05/2004 – 11 UF 43/04).

<sup>825</sup> Bundesgerichtshof, 3/14/2007, FamRZ 2007, 989 with critical annotation of *Gottwald*.

and efficiency<sup>826</sup>) and it did not refer the case to the ECJ under Articles 68 and 234 of the EC-Treaty.<sup>827</sup>

### c) Efficiency

576 In most Member States, the appeal proceedings are handled efficiently. However, the duration of the proceedings differs considerably: Belgium: 1 year in Liège and Antwerp, up to two years in Brussels; Estonia: 6 months to 1-2 years; Finland: 6 months; Greece: 6-10 months; Hungary: in more than 50 % of the cases 3 months; Italy: about 2 years; Lithuania: 2 months; Luxembourg: 10-12 months; Poland: 1-3 months; Slovenia: 2-12 months; Spain: 2-4 months; England: 1-2 months; Germany: 1-6 months; Malta: First hearing after 2 years, decision 3–12 months later. As Articles 43 and 45 JR do not permit a review of the foreign judgment, the cases are regularly not complex<sup>828</sup>. Accordingly, the differing duration of the proceedings is mainly caused by the different procedural cultures in the Member States and by the different workload of the courts.<sup>829</sup>

577 Practical research in the *Oberlandesgerichte Hamm, Karlsruhe, Koblenz, Koeln, München* and *Stuttgart* shows that the judges take care to carry out appeal proceedings efficiently. The 25<sup>th</sup> Senate of the *Oberlandesgericht München* treats appeals under Article 43 JR in an accelerated way. Applications which obviously have no chance of success are immediately refused – without any notification to the

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<sup>826</sup> This judgement seems not to be in line with the current case law of the ECJ, see *EuGH*, 11/8/2005, case C-443/03, *Götz Leffler./Berlin Chemie AG*, paras 45, 50; ECJ, 2/9/2006, case C-473/04, *Plumex./Young Sports NV*, para 28 et seq.; ECJ 5/16/2006, case C-234/04, *Kapferer ./ Schick und Schlank*, Slg. 2006 I-, Rdn. 19 ff. – see *Ward*, *Judicial Review of the Rights of Private Parties* (2007), p. 104 et seq.; *Hess*, *IPRax* 2006, 348, 357.

<sup>827</sup> See the annotation by *Hess* to be published in *IPRax* 2008/1.

<sup>828</sup> Nevertheless, the reporters obtained many reactions from judges referring to the “complexity” of the case. The experience of the judge with handling cases involving issues of foreign law seems to be more important.

<sup>829</sup> Belgium Report, 3<sup>rd</sup> questionnaire, 4.1.13.

other party.<sup>830</sup> These proceedings are closed within a period of 1 or 2 weeks. From February 2005 to October 2006 the Senate decided on 28 appeals, 22 of them were rejected, 6 appeals were successful. The average duration was about 2, 5 months.<sup>831</sup>

#### d) *Costs and Fees*

578 According to Article 52 JR the court's fees cannot be calculated by reference to the value of the claim. Accordingly, the court fees in almost all Member States are rather low. In Belgium, the court fee is 186,00 €; in England, the court fee is GBP 50; in Germany the (fixed) costs for an appeal are 300 €. In Greece, however, the costs for an appeal amount to 600 €. In Malta the costs of appeal proceedings are one third higher than the costs in first instance.<sup>832</sup> In Lithuania and Sweden, no court costs are determined by law.<sup>833</sup> In Poland, the costs for appellate proceedings are PLN 60 (around 15 €). The court fees for the recognition of foreign judgments in Slovenia amount to 5.700 SIT (= approx. 23,80 €; Tariff No. 3 (5) and 7 of the Court Fees Act).<sup>834</sup>

579 According to the large majority of the reports the court fees seem recoverable. In England, Para 2 (1) of Sch. 1 to the Civil Jurisdiction and Judgments Act Order (SI 2001/3929) provides that "Where a judgment is registered under the Regulation, the reasonable costs or expenses of and incidental to its registration shall be recoverable as if they were sums recoverable under the judgment." The amount of

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<sup>830</sup> The 16<sup>th</sup> Senate of the Oberlandesgericht Koeln (Cologne) proceeds similarly. The proceedings are closed within a period of 4 – 6 weeks, information obtained from the Presiding Judge W. *Jennissen*, Sept. 22, 2007.

<sup>831</sup> Practical research effected by Prof. Schlosser and Dr. Vollkommer, German report, 2<sup>nd</sup> questionnaire, question 2.16. Similar accelerated proceedings exist in the Higher Regional Court of Karlsruhe.

<sup>832</sup> National report Malta, 3<sup>rd</sup> questionnaire, question 4.1.13.

<sup>833</sup> National reports Lithuania and Sweden, 3<sup>rd</sup> questionnaire, question 4.1.13.

<sup>834</sup> National report Slovenia, 3<sup>rd</sup> questionnaire, question 4.1.13.

the award of costs is subject to assessment by the court based on reasonableness (see CPR, Part 44).<sup>835</sup>

580 The most problematic issue in relation to the appellate proceedings seems to be the recovery of the lawyer's fees. In most Member States, representation by a lawyer is not mandatory, but a common practice. In Greece, Hungary, Luxembourg and Spain, the debtor may challenge the decision on enforceability without a lawyer. In Germany, the debtor may access the appellate court without the help of a lawyer. When the court schedules a hearing, representation by a lawyer becomes mandatory. Accordingly, the *Oberlandesgerichte* only schedule a hearing when the objections raised by the debtor are pertinent and disputed. Yet, representation by a lawyer is the usual practice in Germany.

581 In Sweden, the Supreme Court found<sup>836</sup> that a Swedish party was entitled to be awarded litigation in a case where Finnish and Norwegian parties had enforced a judgment against him which had later on been overturned on appeal. In the absence of specific rules in the Judgment Regulation or in the Swedish rules regarding recognition and enforcement of foreign judgments, the Supreme Court based the right to be awarded costs on Chapter 18 of the Swedish Procedural Code and case law. The right to be awarded costs arises when the matter becomes contested, e. g. from the time of the appeal of the enforcement decision.

582 In Italy, the appeal follows the ordinary rules and normally a hearing is ordered. Representation by lawyers is mandatory. The costs depend on the value of the matter in the single case, practical research shows that they normally range between 1.000 and 4.000 Euro.<sup>837</sup>

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<sup>835</sup> National report England and Wales, 2<sup>nd</sup> questionnaire, question 2.8.2.

<sup>836</sup> Case Ö 151-04, Swedish report, 2<sup>nd</sup> questionnaire, question 2.8.

<sup>837</sup> Italian report, 3<sup>rd</sup> questionnaire, question 4.1.13.

- 583 In Belgium, the party appealing a judgment is required to pay a fixed fee amounting to 186 Euro. The lawyers' fees are not generally fixed by law – however, representation by lawyer is mandatory.
- 584 Unfortunately, it was impossible to obtain precise information about the remuneration of lawyers from most national reporters. In most Member States the remuneration is not legally fixed but agreed by the parties.<sup>838</sup> Often (see especially Ireland and Scotland) the charges vary according to the following factors: the importance of the matter to the client; the amount or value of money, property or transaction; the complexity of the matter or difficulty or novelty of the question raised; the skill, labour, specialised knowledge and responsibility of the solicitor; the time expended; the length, number, and the importance of any documents or other papers prepared or perused; the place where and circumstances in which the services or any part thereof are rendered and the degree of urgency involved. In England, the remuneration depends on the experience of the solicitor and the location of his practice. In the city of London, the rates range between about GBP 100–150 per hour for a trainee solicitor to over GBP 500 per hour for a senior partner.
- 585 In Germany, Austria, Hungary, Poland and Slovenia the charges are fixed by legal provisions. In Germany the costs are calculated according to Nr. 3100 and 3200 *VV-RVG*: they depend on the amount of the (foreign) title, but are fully recoverable in the enforcement proceedings (sec. 788 *ZPO*).<sup>839</sup>
- 586 In England, the costs are assessed summarily by the court (a Master) in the enforcement proceedings. According to the English report, a cost figure of GBP 500 is normally regarded as appropriate and as-

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<sup>838</sup> According to the national reports on Cyprus, Estonia, Ireland, Hungary, Scotland and Spain, the charges are a matter of contract between lawyer and client. See generally 2<sup>nd</sup> questionnaire, questions 2.8.

<sup>839</sup> A detailed description of the German cost system is provided for in the 2<sup>nd</sup> questionnaire, question 2.8.

essed by the Master. Costs estimated of more than GBP 1000 are generally referred for more detailed assessment.

587 In France, the issue is dealt with by Article 700 *NCPC*. The judge may, at his discretion, order the payment of the costs by the losing party. In practice, a full reimbursement of costs in the first instance does not take place as a representation by a lawyer is not legally required. The French report indicates that the lawyer's fees are about 1.000,00 €. <sup>840</sup>

588 As a result, it must be stated that there still is a considerable lack of information about the procedural costs. As a matter of fact, the court fees as well as the lawyer's fees will often remain unpaid if the claim is paid by the debtor without enforcement. It depends on the ability of the creditor and his attorney whether or not he will induce the debtor to a payment. The position of the creditor is better if the foreign title is enforced. In this constellation, whether the costs of the decision of enforceability are recoverable mainly depends on the national systems for the recovery of the costs. Due to the different approaches in the Member States regarding the recovery of costs it does not seem advisable to address this question in more detail. <sup>841</sup>

589 A pragmatic approach would be to further simplify the proceedings for exequatur in the first instance and to provide for a written procedure in the second instance.

590 Accordingly, Article 43 (3) JR should be changed. The text could be redrafted as follows:

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<sup>840</sup> French report, 2<sup>nd</sup> questionnaire, question 2.8.

<sup>841</sup> Article 14 no. 1 of the Draft Regulation for a European Small Claim Procedure (COM(2005) 87 final) provides that the losing party has to reimburse the costs of the winning party, as far as this does not seem unjust to the court. According to Article 14 no. 2 of this Draft Regulation the losing party, which was not represented by a lawyer, need not reimburse the costs for the lawyer of the winning party. This second paragraph was no longer included in Article 14 of the Draft Regulation by the Council (05/02/2006, 8408/06 JUSTCIV 100). This change was based on the consideration that the parties might renounce the representation by a lawyer due to the costs.

591 *“The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters. When necessary, the court shall order an oral hearing. In written proceedings, representation by a lawyer is not mandatory.”*

## 5. Provisional Measures in Chapter III of the Judgment Regulation

### a) *Protection of the Debtor, Articles 46 and 47 (3) JR*

592 The exceptional character of the appeal under Article 43 JR is largely implemented by the lacking power of the appellate courts to grant any interim measure of protection if the decision granting exequatur is still appealable or appealed. However, according to Article 47 (3) JR, no other measures of enforcement may be taken than protective measures, unless the period for appealing the decision granting exequatur (Article 43 (5) JR) has expired.<sup>842</sup> The procedural laws of the Member States determine the scope of protective measures. In Germany, the debtor is obliged to give a debtor’s declaration and must indicate the whereabouts of his assets (sec. 807 ZPO).<sup>843</sup>

593 All additional measures protecting the judgment debtor against the enforcement of the creditor depend on whether appeal against the foreign title is still possible. The judgment debtor can only apply for a security during the pendency of the appeal in the Member State of origin, Article 46 (3) JR. Under Article 46 (1) JR the appellate proceedings against the decision granting exequatur can be stayed as long as the foreign title (which is provisionally enforceable) is subject to a review in the Member State of origin.<sup>844</sup> According to information obtained from lawyers, this provision is often applied in practice.

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<sup>842</sup> Italian practitioners criticise the lacking efficiency of the enforcement regime under Articles 46 and 47 JR, which only provides for provisional measures as long as the judgment is appealable, Italian report.

<sup>843</sup> *BGH*, 3/2/2006, NJW-RR 2006, 996 – the debtor’s declaration is described in Study JAI A3/02/2002, pp. 35–36.

<sup>844</sup> The application of Article 46 (1) and (3) JR may impose a heavy burden on the debtor when the appeal against the judgment in the Member State of origin is pending for long



*b) Article 47 JR*

- 594 Article 47 JR applies to different situations: Para 1 permits the creditor to secure the debtor's assets even before applying for a declaration of enforceability. Para 2 applies to the situation when the exequatur decision was obtained, but is still appealable, especially during the period of time when the decision granting exequatur is served on the debtor, Article 42 (2) JR. This provision shall ensure the "surprise effect" in enforcement proceedings.<sup>845</sup>
- 595 Para 3 deals with a different constellation: This provision is meant to protect the debtor during the appellate proceedings against the decision granting enforceability in the Member State of enforcement. Accordingly, enforcement measures are limited to protective measures as long as the declaration of enforceability has not become *res judicata*. This limitation of the enforceability operates by law, it does not require any application by the debtor.
- 596 aa) Article 47 (1) JR is derived from Belgian law. In Belgium, the creditor may seek all provisional measures of the Belgian procedural law, on the simple presentation of the copy of a (foreign) enforceable title.<sup>846</sup> Adopting this model, Article 47 JR refers directly to provisional measures provided for by the procedural law of the Member State of enforcement. In addition to this, Article 47 (1) JR is the first provision of European procedural law fully implementing the principle of mutual recognition: As the provision does not require any previous recognition of the foreign title, provisional measures are available

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time, OGH, 11/24/2005, 3 Ob 209/05i, IPRax 2007, 227, *Schlösser*, IPRax 2007, 239 et seq.

<sup>845</sup> Italian report, 3<sup>rd</sup> questionnaire, question 4.2. Article 47 JR has been recently explored by *Georges*, *La saisie des comptes bancaires dans l'espace européen de justice*, in : de Leval/Cadela Soriano (ed.), *L'espace judiciaire européen* (2007), p. 313, 340 et seq.

<sup>846</sup> Article 1445 Code judiciaire, see generally *Rauscher/Mankowski*, *Europäisches Zivilprozessrecht I*, Article 47 JR, para. 6; According to the Belgian Report, 3<sup>rd</sup> questionnaire, 4.2.1, Article 47 JR conforms to a long standing practice of Belgian courts.

without any exequatur proceedings. Yet, the legal-political implications of this provision are largely unknown in the Member States.<sup>847</sup>

597 The national reports show that the basic concept of Article 47 (1) JR has not been adopted yet in most Member States. According to the Estonian report, it is possible that the courts take Articles 34 and 35 JR into consideration.<sup>848</sup> According to Finland, England, Ireland and Poland the enforcement authorities (especially the bailiffs) have neither the qualification nor the competence to decide such questions. In Greece, there have been certain misunderstandings, when judgments were brought before the register of deeds in order to register a notice for mortgage. Land registrars have been very sceptical, asking for legal authorities upon the matter. In Spain, courts still examine whether the judgment or provisional measure infringes public policy. As far as the general reporters could find out, Article 47 (1) JR is not often applied and a controversy exists in legal literature about the interpretation and the implementation of this provision in the national context.

598 In addition, the delineation of Articles 31 and 47 (1) and (2) JR is unclear: In many Member States, the courts apply the provisional measures of their respective enforcement laws.<sup>849</sup> This opinion is largely shared by the legal literature. However, since the wording of Article 47 JR corresponds to the wording of Article 31 JR, it has been maintained that provisional measures under both Articles should be interpreted identically.<sup>850</sup> However, the legal provenience of Article 47

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<sup>847</sup> The new wording of the provision has not yet been comprehensively implemented in the Member States. For instance, the German official instructions for bailiffs (*Geschäftsweisung für Gerichtsvollzieher* („GVGA“)) only address enforcement measures after the declaration of enforceability (sec. 71 no. 6). Therefore, it is doubtful whether bailiffs will comply with requests for provisional measures in accordance with Article 47 (1) JR. It seems that legislators have not realised the new concept of Article 47 JR.

<sup>848</sup> This practice does not correspond to the requirements of Articles 41 and 47 JR. According to Article 41 JR, no review takes place in the first instance under Articles 34 and 35 JR.

<sup>849</sup> *Hess/Hub*, IRax 2003, 93 et seq.

<sup>850</sup> *Schlosser*, IPRax 2007, 239, 240.

JR refers to the internal enforcement laws of the Member States.<sup>851</sup> In order to provide efficient redress for the creditor, it seems appropriate to interpret Article 47 JR broadly as a reference to all kinds of provisional measures provided for by the procedural and the enforcement laws of the Member States.

599 The difficulties of applying Article 47 (1) JR in Germany are demonstrated by the following example: An Austrian creditor presented the copy of an Austrian judgment certified as final to the land register in Munich. The creditor sought to register a mortgage in the register which should secure the judgment's claim (secs. 720a and 867 ZPO). The clerk in charge of the land register denied the application because the judgment had not been served on the German debtor. This corresponds to the general prerequisite of German enforcement proceedings (sec. 750 ZPO). Accordingly, the Austrian creditor could not use the "surprise effect" of Article 47 (1) JR. However, after the judgment was served on the debtor, the mortgage was registered.

600 bb) The purpose of Article 47 (2) JR is disputed in the Member States. According to the predominant view in Belgium and in Germany, Article 47 (2) JR shall ensure the legal protection of a creditor who has successfully sought a declaration of enforceability which is still subject to an appeal. Under Article 47 (2) JR the declaration of enforceability empowers the creditor to proceed to any protective measures available in the Member State of enforcement. Yet, Article 47 (2) JR is only applied after the service of the decision granting exequatur on the debtor, Article 42 (2) JR.<sup>852</sup> According to the contrary opinion (which seems correct) the purpose of Article 47 (2) JR is to secure the surprise effect for the creditor until the decision granting enforceability has been served on the debtor, Article 42 (2) JR.<sup>853</sup> Accordingly, the debtor may immediately seize the accounts of the

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<sup>851</sup> Cf. Article 1445 Belgian Code Judiciaire, the Belgian Report, 3<sup>rd</sup> questionnaire, 4.2.1.

<sup>852</sup> *OLG Saarbrücken*, IPRax 1995, 244. *Georges*, La saisie des comptes bancaires dans l'espace européen de justice, in : de Leval/Cadela Soriano (ed.), *L'espace judiciaire européen* (2007), p. 313, 341 et seq.

<sup>853</sup> *Schlosser*, IPRax 2007, 239, 240.

debtor. However, this provision is rarely used in practice. The *Landgericht Bonn* held that the provisional measures available under Article 47 (2) JR did not presuppose prior service of the declaration of enforceability on the debtor.<sup>854</sup> After the service of the declaration Article 47 (3) JR applies and limits the enforcement measures to measures of protection until the period for appeal against the declaration of enforceability (Article 43 (5) JR) has expired.<sup>855</sup> In other Member States the application of Article 47 (2) JR has also proved to be difficult as the following case law demonstrates:

601 In Italy, Article 47 JR is not frequently applied literally. However, lawyers often request in the application for exequatur to be authorised for protective measures. Italian Courts order the authorisation without any additional review of the foreign decision. In addition to this, it is uncertain whether the possibility to enforce protective measures after the declaration of enforceability as provided for in Article 47 (2) JR requires that the enforcement court has expressly authorised the measures. In some cases, it has been held that the express authorisation is not necessary because it derives directly from the declaration of enforceability.<sup>856</sup>

602 In Greece, the Court of first instance Thessaloniki<sup>857</sup> dismissed a petition for protective measures based on a final English judgment. In this case an application for declaration of enforceability had already been filed during interim proceedings. The court applied the Greek provisions on protective measures and held that as there was no imminent danger, a requirement stipulated under Article 682 of the

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<sup>854</sup> *LG Bonn*, 3/4/2003, RIW 2003, 388: Garnishment of a bank account belonging to Deutsche Telekom with an amount of 33 mio €.

<sup>855</sup> *LG Stuttgart*, IPRax 1989, 41.

<sup>856</sup> Corte di Cassazione 11/16/1987 n. 8380, Giustizia civile 1988, I, 705, Corte di Appello Bologna, 06/24/1993, Riv. dir. int. priv. proc. 1994, 385. In a its decision of 06/22/2001, the Corte di Appello di Palermo, Riv. dir. int. priv. proc. 2002, 165, held that the protective measure enforced on the basis of the declaration of enforceability was subject to the national procedural rules, and so could be revoked due to new circumstances of fact (in that case a transaction between the parties).

<sup>857</sup> Court of first instance Thessaloniki 4826/2004, Harmenopoulos 2004, 736 et seq.

Greek Code for Civil Procedure, since the English judgment was not yet enforceable under Greek law.<sup>858</sup>

603 The Austrian report criticises the concept of Article 47 (2) JR. In Austria, this provision is of no practical relevance: According to Austrian law, measures of enforcement are restricted to protective measures as long as remedies against the declaration of enforceability are open, see sec. 84a no. 2 EO<sup>859</sup>. However, there is a consensus in the legal literature in Austria that this internal rule is not in line with the Judgment Regulation. Yet, when amending the EO in 2000 the Austrian legislator stated that this question was not addressed by Article 47 JR and declared the procedural rules of the lex fori applicable.<sup>860</sup>

604 Courts in the Member States belonging to the common law world have adopted a more liberal view in relation to Article 47 JR: The Irish report refers to two cases on the application of the equivalent provision of Article 39 JC. In *Elwyn (Cottons) Ltd./Pearle Designs Ltd.*<sup>861</sup> the High Court held that the Master was not entitled to refuse the protective measure sought in the form of a Mareva injunction. The Court held that once the Master had made an enforcement order and he was satisfied under sec. 11 (3) of the 1988 Act that it was within the power of the High Court to grant such a protective measure in proceedings within its jurisdiction, then the provisions of Article 39 JC (now Article 47JR) applied and effectively there was no need to seek separate judicial authorisation to proceed with the protective measures.<sup>862</sup>

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<sup>858</sup> Court of first instance *Thessaloniki* 4826/2004, Harmenopoulos 2004, 736 et seq.

<sup>859</sup> However, the criticism of Article 47 JR seems doubtful, as the legal situation in Austria largely corresponds to the „safeguards“intended by Article 47 (1) JR.

<sup>860</sup> Note to the government bill concerning the EO-Amendment 2000, 93 *BlgNR* 21. GP 31.

<sup>861</sup> *Elwyn (Cottons) Ltd./Pearle Designs Ltd.* [1989] IR 9.

<sup>862</sup> In *Elwyn* the Court was guided by the ECJ case of *Cappelloni and Aquilini./Pelkmans* (Case C-119/84) and stated that there was no provision for an appeal against a refusal to grant protective measures

- 605 In England, the freezing injunction is a measure applicable under Article 47 JR. It is criticised that Article 47 JR leaves no room for discretion of the national court whether to grant or deny such measures because, as Article 47 no. 2 provides, such registration “shall carry with it the power to proceed to any protective measures.” However, in a recent decision, the Court of Appeal held that a post judgment worldwide freezing order was not permitted under Article 47 JR.<sup>863</sup>
- 606 In Malta, precautionary warrants can be issued in order to secure a claim. The proceeding is easily accessible for the creditor. Only in case of a prohibitory injunction the court orders a hearing. Usually, a affidavit of the creditor is sufficient for obtaining protective relief.
- 607 In addition to this, the main shortcoming of Article 47 (2) JR is that the provision does not empower the judicial authority giving the decision on enforceability to grant provisional relief. Yet, in many Member States, provisional relief is granted by the enforcement organs (or the courts of general jurisdiction) while the declaration of enforceability is given by the competent authorities designated in Annex II JR. In these Member States, the provisional protection of the creditor is not fully assured and the proceedings are time consuming and costly.
- 608 In Cyprus, Estonia, Finland, Malta, Poland, Scotland, Slovenia and Spain the judge competent for the declaration of enforceability also has the competence for provisional measures regarding Article 47 JR.
- 609 In England certain types of orders (including search orders and, most importantly, freezing injunctions) may only be issued by a judge and not by a master (see Practice Direction – Allocation of Cases to Levels of Judiciary, para. 2.1(a) and see also paras. 2.2–2.4 limiting the power of a Master to grant injunctions generally).
- 610 In Austria the jurisdiction for such measures depends on sec. 387 EO. According to this provision, an interim relief depends on a pro-

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<sup>863</sup> *Banco Nacional De Comercio Exterior SNC v. Empresa De Telecomunicaciones De Cuba SA*, 7/4/2007, CA, [2007] EWCA Civ. 662.

cedure for enforcement. Under this condition, the competent enforcement court may order provisional measures.

611 Conclusion: It seems advisable to adjust Article 47 (2) JR in order to overcome the shortcomings of this provision: The provision should clearly state that the official granting the declaration of enforceability is empowered to give provisional relief. In addition, the provision should clearly state that provisional relief is available from the moment the declaration of enforceability is given.

## 6. Free Movement of Injunctions<sup>864</sup>

612 Under Article 49 JR judgments ordering payments by way of penalties are enforceable once the amount of the penalty has finally been determined by the court in the Member State of origin. The underlying policy is to guarantee the free movement of injunctions in the European Judicial Area. In practice, the application of Article 49 JR proves difficult; the *ECJ* has not yet dealt with Article 49 JR and the national reports did not mention much case law.<sup>865</sup> However, interim injunctions enjoining the defendant from continuing any unlawful activity in the Internal Market are of paramount importance for the efficient protection of creditors – especially in the field of intellectual property rights.<sup>866</sup>

613 In Belgium, the courts normally combine the injunction with an order to pay a daily penalty fine in case of breach of the order. In that constellation, the issue of enforcing the injunction abroad does not arise, as the judgment creditor will first seek enforcement of the daily fine. Belgian courts ordering a defendant to do something or to refrain from doing something abroad, will in most cases add an order for the payment of a daily penalty fine in case

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<sup>864</sup> See also the part of this evaluation relating to provisional measures and there in particular to English freezing orders section D.VI.3. para. 724.

<sup>865</sup> Cf. the answers to 3<sup>rd</sup> questionnaire, question 4.1.10. Most of the reported cases relate to the recognition of Benelux *astreintes* in the neighbouring Member States.

<sup>866</sup> Cf. D.VII.4, paras. 836 et seq.

of violation of the primary order to the primary order.<sup>867</sup> Therefore, the Belgian reporter submitted that Belgian courts would not see any difficulty of principle in giving effect to a reverse foreign order (ordering a party to do or to refrain from doing something and adding a daily penalty fine to the main order).<sup>868</sup>

614 The only limitation could arise if the court considers that the main order issued by the foreign court, goes beyond the limitations of what a court should be allowed to do (e.g. if a foreign court has issued an in personam injunction ordering a litigant to disclose information that would be covered under a legal privilege of non-disclosure under Belgian law).<sup>869</sup>

615 The following problems concerning Article 49 JR have been ascertained: Firstly, the English wording of the provision is ambiguous, because it restrains the scope of the provision to “periodic payments”.<sup>870</sup> This restriction is not found in the other versions of Article 49 JR and should be deleted. Secondly, the national systems of the Member States provide for different kinds of injunctions. The first type is found in the Benelux and in France where the creditor receives the penalty. In these Member States, “*astreintes*” or contempt fines have become very efficient means of enforcement (also of pecuniary claims).<sup>871</sup> Other Member States equally enforce injunctions by penalties (or contempt fines); however, these are paid to the

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<sup>867</sup> President of the Commercial Court of Kortrijk, 12/10/2003 and President of the Commercial Court of Brussels, 12/31/2002; President of the Court of First Instance of Brussels, 3/1/2001, JT 2001, 25 - a case concerning the famous Formula 1 pilot Michael Schumacher.

<sup>868</sup> Belgian Report, 3<sup>rd</sup> questionnaire, 4.1.11.

<sup>869</sup> The Belgian report refers to *De Leval*, “Rapport belge”, in *L’effectivité des décisions de justice*, Travaux de l’Association H. Capitant, tome 36 (1985) pg.49, 59-65.

<sup>870</sup> According to the Irish report, his issue has not arisen in any case. In practice, the interpretation of Article 49 is difficult. In Irish practice is it possible to obtain an “instalment order” for the payment of a judgment debt in instalments. However, the Irish reporter is not certain as to whether Irish courts would necessarily regard a payment characterised as an “administrative fine” as falling within the scope of the Judgment Regulation as an “administrative fine” might be regarded as being of the nature of a tax or penalty.

<sup>871</sup> The Dutch system and a possible harmonisation at the European level are described by *Jongbloed*, in: *Procedural Laws in Europe*, p. 193; *Kerameus*, in: *Liber amicorum van Mehren*, pp. 107, 109 et seq.



court, not to the creditor. It seems doubtful whether the second type of penalties is covered by Article 49 JR as the payment of a penalty to the State might not be qualified as a “civil and commercial” matter.<sup>872</sup> However, as the Dutch reporter correctly stated, this kind of obligation should not be regarded as a “penalty” but primarily as a method of enforcement. Even if one accepts this perception, cross-border recognition and enforcement of (administrative or judicial) fines remains difficult: According to Article 49 JR, the creditor may seek a declaration of enforceability of the decision ordering the penalty. However, if the penalty is to be paid to fiscal authorities of the Member State of origin and not to the judgment creditor, the creditor is not formally entitled to collect the money abroad.<sup>873</sup>

616 In addition, there are also Member States (e. g. Italy) which not generally grant injunctions and limit enforcement measures to obligations which can also be performed by third parties. In a cross-border context it is difficult to enforce injunctions by penalties which are not available in the Member State where the decision was given.<sup>874</sup> On the other hand, the idea of “lending remedies” in cross-border cases might be promising for an efficient administration of justice.<sup>875</sup> However, the lending of enforcements measures might be problematic if the content of the remedies (e. g. the payment of additional amounts of money) are closely related to the substance of the judgment.<sup>876</sup>

617 Finally, the cross-border enforcement of injunctions under Article 49 JR presupposes that the amount of payment has been fixed by the

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<sup>872</sup> UK report, 3<sup>rd</sup> questionnaire, question 4.1.10.

<sup>873</sup> This is the case in Austria, England, Germany.

<sup>874</sup> This problem was referred to the *ECJ*, 06/06/2002, C-80/00 *Italian Leather ./Weco*, ECR 2002 I-4995 by the *Bundesgerichtshof*. The Court draw the *ECJ*'s attention to the fact that the legal situation in Italy did not provide for any direct enforcement of restraining orders and that the enforcement of such orders by penalties in Germany would entail more powerful effects of the judgment than in its Member State of origin, *Italian Leather ./Weco*, paras. 30–33. The *ECJ* did not address this issue.

<sup>875</sup> *Schlosser*, RdC 284 (2000), 210, 408.

<sup>876</sup> In addition, the judge who decides on the substance of the claim will regularly not be able to consider the consequences of the judgment which may derive from its enforcement by additional means (i. e. payments).

courts of the Member State of origin.<sup>877</sup> Yet, in the procedural laws of many Member States, the amount is fixed during the enforcement proceedings.<sup>878</sup> Accordingly, the application of Article 49 JR is problematic as it presupposes that the amount is fixed in the decision to be recognised. Article 49 JR seems to follow the model of the Benelux too closely.<sup>879</sup>

618 In some Member States, the courts held that ordering a sanction for the non-compliance with a judgment rendered in another Member State could infringe the sovereignty of that State.<sup>880</sup> Yet, in the European Judicial Area, legal arguments based on the sovereignty of the Member States should at least be treated with caution. In order to facilitate the effective cross-border enforcement of judgments, it seems advisable to provide for an additional competence in the Member State of enforcement: The judicial organs generally competent for imposing sanctions for the non-compliance with the judgment should also be empowered to fix the amount money to be paid. As an alternative, the judicial authority rendering the declaration of enforceability under Article 39 JR could also be competent for the assessment of the amount of the sanction.<sup>881</sup>

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<sup>877</sup> This is only the case in the Benelux, see *Bruns*, ZZP 118 (2005), 1, 13. However, German case law shows that even Dutch courts do not always specify the amount of the fine, see *OLG Oldenburg*, 07/22/2003, IPRspr. 2003, 594; *OLG Köln* 3/17/2004, RIW 2004, 868. A present, the issue of whether a German court is empowered to assess the amount is pending in the *Bundesgerichtshof* (file no. IX ZR 89/06), cf. D.VII.4, para. 802, fn. 1040. Belgian courts have accepted that they have jurisdiction in order to determine the amount of the penalty ordered by a court in order to make the penalty enforceable in other Member States (see e.g. President of the CFI Liege, 17 September 2003, JLMB 2003/36, 1595 - in that case the judgment creditor sought to have the amount of the penalty determined before seeking to enforce it in England).

<sup>878</sup> In France, the *astreinte* is only pronounced as "conditional" (pronunciation: *astreinte provisoire*). The definite amount of the „*astreinte*“ is fixed by the court during the enforcement proceedings (liquidation: *astreinte définitive*), *Bruns*, 118 ZZP (2005), 1, 9-10.

<sup>879</sup> Jenard Report, OJ 1979 C 59/1, 53; *Bruns*, ZZP 118 (2005), 1, 13.

<sup>880</sup> This is the case in Austria where the *Oberste Gerichtshof* held that a cross-border injunction would infringe the sovereignty of the Member State of enforcement, Austrian report, question III 10.8; different opinion: *OLG Köln*, 6/3/2002, IPRax 2003, 446.

<sup>881</sup> Germany adopted a similar solution in the context of the enforcement of judgments ordering access to or the return of a child under Articles 41 and 42 Regulation (EC) No. 2201/2003. According to sec. 44 of the German Implementation Act (*Gesetz zum internationalen Familienrecht*) of January 26, 2005, the judge competent for the declara-

619 At present, Article 49 JR does not sufficiently guarantee the free movement of injunctions. Accordingly, it seems advisable to clarify and extend the provision. The following amendments should be envisaged: (1) A clarification that a judgment ordering the debtor to do or to refrain from doing a specific act in another Member State is generally permitted. (2) A clarification that the judicial authority rendering the declaration of enforceability or the competent organ according to the internal law of the Member State of enforcement is empowered to assess the amount of the payment. (3) A clarification that payments to the fiscal authorities of the Member State of origin (as contempt fines) shall be collected by the judicial authorities of the Member State of enforcement. The transfer of the money shall be effected between the judicial authorities of the Member States concerned. (4) Finally, the wording of the 2<sup>nd</sup> paragraph should be clarified by deleting the reference to a “final” determination. German courts interpreted this reference as a requirement that the judgement ordering the amount of the payment must have become *res judicata*.<sup>882</sup> However, it follows from Article 32 JR that provisionally enforceable judgements must be recognised.<sup>883</sup> Yet, on application of the debtor, the court in the Member State of enforcement may order a security under Article 46 JR.

620 Accordingly, Article 49 JR should be changed. The text could be re-drafted as follows:

*“(1) A foreign judgment which orders a payment by way of a penalty shall be enforceable in the Member State in which enforcement is sought.*

*(2) The court or competent authority for the declaration of enforceability shall determine the amount of the payment if that amount has not been determined by the courts of the Member State of origin.”*

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tion of enforceability is empowered to sanction any non-compliance of the parties with a decision ordering the return of the child or the right of access.

<sup>882</sup> *Oberlandesgericht Naumburg*, 8/3/2007, 6 W 74/07 – unpublished; a second appeal is pending in the Bundesgerichtshof, IX ZB 170/07.

<sup>883</sup> Magnus/Mankowski/*Palsson*, Article 49 JR (Commentary), para 5.

## 7. The Cross-border Enforcement of Court Settlements and Notarial Deeds

621 Articles 57 and 58 JR guarantee the free movement of court settlements and authentic instruments in all Member States. While court approved settlements are known in all Member States, notarial deeds (and similar authentic instruments) are unknown in England, Wales and Ireland. Nevertheless, such instruments must be recognised in all Member States.<sup>884</sup> The recognition operates automatically; the only permissible objection to recognition is a manifest violation of public policy.<sup>885</sup> In addition to this, the creditor applying for the recognition of a settlement or a deed must present the form prescribed by Article 59 JR and Annex IV. In some Member States notaries are the competent authorities for the declaration of enforceability,<sup>886</sup> while in most Member States the declaration of enforceability is effected by the competent judge or registrar under Article 38 JR. According to the national reports, only sparse case law exists in relation to notarial deeds and court settlements<sup>887</sup> – this result might be ex-

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<sup>884</sup> In Ireland, authentic instruments and court settlements are not a feature of Irish litigation practice and therefore they would be unusual when brought before the Irish courts. The Irish reporters suspect that Irish parties to proceedings in other Member States would be somewhat hesitant to involve themselves with authentic instruments or Court settlements which might be recognised in Ireland. Additionally, no reported Irish cases involving either authentic instruments or court settlements have been found, Irish report, 2<sup>nd</sup> questionnaire.

<sup>885</sup> *De Leval*, liber amicorum Paul Delnoy (2005), p. 663, 664 et seq., qualifies the recognition of notarial deeds as a simplified administrative procedure.

<sup>886</sup> This is the case in Germany for notarial deeds, cf. sec. 55 (3) AVAG, Rauscher/*Staudinger*, Article 57 JR (Commentary), para 13.

<sup>887</sup> In Germany, declarations of enforceability of authentic instruments and court settlements do not arise very often. According to a presiding judge at the Regional Court Kleve, applications related to article 57 and 58 appear once a year or even less frequently. In the published case law (from 2002 to 2006) the reporters discovered only 3 decisions dealing with articles 57 and 58 of Reg. 44/01: The Higher Regional Court Cologne held on 17 November 2004 (16 W 31/04) that an Italian “decreto ingiuntivo” does not constitute an authentic instrument in terms of Art. 57, but must be qualified as a judgment in terms of Art. 32. A decision of the Higher Regional Court Koblenz of 5 April 2004 (11 UF 43/04) addressed the enforcement of a foreign court settlement. Further, the Higher Regional Court Frankfurt/Main dealt in its decision of 7 December 2004 (20 W 369/04) with the requirements of Art. 58 JR. Comprehensive research of the files of the Regional Courts Passau and Traunstein did not show any applications for a declaration of enforceability of authentic instruments or court settlements.

plained by the fact that a consensual termination of litigation does not regularly entail any need to enforce the agreed instrument.<sup>888</sup>

a) *Court Settlements, Article 58 JR*

622 Only sparse case law exists in relation to settlements. The ECJ elaborated the nature of a court settlement in the case C-414/92, *Solo Kleinmotoren v. Boch*.<sup>889</sup> According to this judgment, a settlement derives its authority from the parties' agreement, brings judicial proceedings to an end and is approved and registered by the court. A court settlement does not enjoy the authority of *res judicata*.<sup>890</sup> Accordingly, consent judgments are not settlements in the sense of Article 58 JR, but must be qualified as judicial decisions which are recognised under Article 32 JR.<sup>891</sup>

623 The following (sparse) case law from the Member States has been reported: In Germany, the *Oberlandesgericht Koblenz*<sup>892</sup> allowed the declaration of enforceability of an Austrian settlement which had been approved by a court. The debtor contested the jurisdiction of the Austrian court under the JC and maintained that the debt had been paid. The Court of Appeal correctly stated that the review of the foreign title under Article 58 was limited to the question whether the recognition of the settlement would manifestly violate German public policy. Correctly, the jurisdiction of the Austrian Court under the JR was not reviewed. In addition, the court did not allow any review of the question whether the debt had been paid.

624 In France, the *Cour de Cassation* held that the recognition of a deed on maintenance was permitted under Article 58 JR.<sup>893</sup> In Italy and in

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<sup>888</sup> With the exception of maintenance claims.

<sup>889</sup> ECJ, case C-414/92, *Solo Kleinmotoren v. Boch* ECR 1994 I-2237.

<sup>890</sup> *Briggs & Rees*, Civil Jurisdiction and Judgments, para 7.24.

<sup>891</sup> *Landhurst Leasing plc v. Marq* [1998] ILPr 822; *Frische*, *Verfahrenswirkungen gerichtlicher Vergleiche* (2006), p. 130 et seq.

<sup>892</sup> Judgment of 04/05/2004 – 11 UF 43/04.

<sup>893</sup> *Tonon v. Office Cantonal de la Jeunesse de Tuttlingen*, [1995] ILPr 23 (C.Cass. 1991).

Spain the application of Article 58 has not encountered any difficulties.<sup>894</sup> Most national reports were unable to indicate specific case law, but stressed the practical importance of Article 58 JR.<sup>895</sup> The Polish reporters counted 10 decisions granting enforceability to settlements in 2004/2005.<sup>896</sup>

Though it does not seem to be necessary to propose substantial amendments to article 58 JR, it should nevertheless be noted that the English text of this article is misleading. While the French text presupposes that the settlement had been agreed in the presence of the judge in the course of the proceedings (“les transactions conclues devant un juge au cours d’un procès”), the English wording states that the settlement must have been approved by the court in the course of the proceedings. The German text equally corresponds to the French wording („Vergleiche, die vor einem Gericht im Verlauf des Verfahrens geschlossen wurden“). Thus, the English text of Article 58 JR should be adapted to the other textual versions, since Article 58 JR does not require any approval of the settlement by the court. In addition to this, it seems advisable to adapt the wording of Article 58 JR to Articles 3 (1) (a) and 24 (1) of Reg. (EC) 805/04. According to these Articles, the definition includes “a settlement which has been approved by a court or concluded before a court in the course of proceedings”. This adaptation would include out of court settlements which are concluded in out-of-court proceedings (i.e. mediation), but at a later stage formally approved by a competent court.<sup>897</sup>

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<sup>894</sup> See Italian and Spanish Reports 3<sup>rd</sup> questionnaire, 4.1.3.

<sup>895</sup> National Reports, 2<sup>nd</sup> questionnaire, 2.11.

<sup>896</sup> Polish Report, 2<sup>nd</sup> questionnaire, 2.11.

<sup>897</sup> The wording of Articles 3 (1)(a) and 24 Reg. (EC) 805/04 was intended as a clarification, not as an amendment of Article 58 JR, see *Frische*, *Verfahrenswirkungen gerichtlicher Vergleiche*, p. 155-156 (referring to COM(2004)90, no. 3.3.2.).

*b) Authentic Instruments*

- 625 The ECJ defined the term authentic instrument in its judgment *Uni-bank v. Christensen*.<sup>898</sup> In this case, the ECJ convincingly held that a document in which the debtor acknowledges his debt in a private deed cannot be qualified as an authentic instrument in the sense of Article 57 JR, since this Article presupposes that an officer entrusted with public authority draws up the instrument and registers it.
- 626 This definition has been taken up by Article 4 (3) of Reg. EC 804/2005 on Uncontested Claims. According to this definition, an authentic instrument is a document which has been formally drawn up or registered as an authentic instrument, and the authenticity of which: (i) relates to the signature and the content of the instrument; and (ii) has been established by a public authority or other authority empowered for that purpose by the Member State in which it originates. Alternatively, Article 4 (2) (b) of Reg. (EC) 805/2004 refers to arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them. The definition in Article 4 (2) of the Reg. (EC) 805/2004 reflects the general acceptance of the ECJ's judgment in the legal practice.
- 627 The reported case law in the Member States has equally adopted this definition.<sup>899</sup> As explained above, there are differences in the practice between the Member States belonging to the common law world and those belonging to continental law. While the recognition of such instruments seldom takes place in England,<sup>900</sup> Wales and Ireland, it occurs more often in the continental Member States. According to the Luxembourg report, about 10% of all decisions on enforceability relate to authentic instruments, equally the Dutch, the French

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<sup>898</sup> ECJ, 6/17/1999, Case C-260/97, ECR 1999 I-3715.

<sup>899</sup> National Reports, 2<sup>nd</sup> questionnaire, 2.11.

<sup>900</sup> See *Bautrading v. Nordling* [1997] 3 All ER 718 (CA) involving a German „Schuldanerkenntnis“.

and the Italian report<sup>901</sup> referred to considerable practice.<sup>902</sup> In Germany, the *Oberlandesgericht Karlsruhe* reported considerable practice with regard to the recognition of French notarial deeds. Equally, the reports from the new Member States stressed the practical importance of Article 57 JR, without mentioning specific case law.<sup>903</sup>

628 There is a difference between Article 57 JR on the one hand, and Article 46 of Regulation 2201/2003 (Brussels IIbis) on the other hand. While Article 57 JR only provides for a declaration of enforceability, Article 46 of the Brussels IIbis makes authentic instruments susceptible to both recognition and enforcement.<sup>904</sup> According to the *Borrás-Report*, the reference to recognition in Article 46 Reg. 2201/2003 was aimed at ensuring all grounds of non-recognition were applied to authentic instruments. The more comprehensive control of authentic instruments under the Regulation Brussels IIbis was justified by the crucial nature of those instruments dealing with family matters.<sup>905</sup> Therefore, the reference to recognition in Article 46 Reg. 2201/2003 should not be interpreted as an enlarged concept of “recognition” which deviates from the application of the pertinent private international law to authentic instruments.<sup>906</sup> Accordingly, the debtor may object to the enforcement of the notarial deed if it is invalid due to such factors as mistakes, misrepresentation, incapacity etc. However, these arguments cannot be put forward in the Member State of

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<sup>901</sup> See Italian Report 3<sup>rd</sup> questionnaire, 4.1.3: There is no case law available. From interviews to judges of the Court of Appeal of Milan it resulted that authentic notarial instruments (often concerning bank loan contracts) were commonly declared enforceable without any particular problem.

<sup>902</sup> Cf. the answers to the 2<sup>nd</sup> questionnaire, 2.1.; and to the third questionnaire, 4.3.3.

<sup>903</sup> The Hungarian report mentioned 2 decisions in 2004/2005 granting enforceability to authentic instruments.

<sup>904</sup> Prof. *de Leval* has suggested to add a provision in the Regulation to the effect that such settlements and deeds enjoy de plano recognition in other Member States (see G. de Leval, « Reconnaissance et exécution de l'acte notarié dans l'espace judiciaire européen » *Liber amicorum Paul Delnoy, Larcier*, 2005, 663). According to the Belgian report, the practical effect of such a revision would be limited. It could, however, constitute a welcome improvement to the Regulation's application, Belgian report, 3<sup>rd</sup> questionnaire, 4.3.1.

<sup>905</sup> Borrás Report, OJ 1998 C 221/ 49, at para 61.

<sup>906</sup> *Stone*, EU Private International Law , p. 212 – 213.



enforcement, but the debtor must institute proceedings for the annulment of the authentic instrument in the competent court under Chapter II of the Regulation.<sup>907</sup> In addition, the debtor may apply for a stay of execution under Article 46 JR.

629 Seen from this background, it is not necessary to align Article 57 JR to the wording of Article 46 Regulation (EC) 2201/2003.<sup>908</sup> Such alignment would restrict the free movement of authentic instruments deeds under the JR.<sup>909</sup> On the contrary, due to the information obtained from the national reports it does not seem necessary to propose any amendments to Articles 57 and 58 JR. In the future, the practical impact of these provisions will certainly be diminished by the new instruments in this field, as the cross-border enforcement of notarial deeds will mainly be effected on the basis of Reg. (EC) No. 805/2004.

## 8. Proposals for Further Improvements

630 In the present state of affairs, Articles 32–56 JR largely guarantee the free movement of judgments in the European Judicial Area. The efficiency of the procedures mainly depends on their implementation by the courts and national authorities in the Member States. Since the entry into force of the Judgment Regulation, the average duration for obtaining a declaration of enforceability is a matter of days. Almost 90 % of the decisions granting enforceability are not appealed. Nevertheless, as the practice in Member States demonstrates, a residual review by the appellate courts seems appropriate in order to avoid infringements of the debtors' procedural and substantive rights. The handling of the appeal procedures by the appellate courts shows that the courts speed up the proceedings in order to implement the

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<sup>907</sup> *Stone*, EU Private International Law, p. 213

<sup>908</sup> It seems more appropriate to align the wording of Article 46 Regulation (EC) No 2201/2003 to Article 57 JR, in order to simplify/facilitate the cross-border enforcement of authentic instruments.

<sup>909</sup> *Geimer*, in *Geimer/Schütze*, Art. 57 JR, para. 51.

rights of the creditors. However, practical problems exist in relation to the costs of exequatur proceedings: The remuneration of lawyers is regulated differently in the Member States and their reimbursement (as part of the costs of enforcement proceedings) is not always guaranteed. This situation may keep creditors from enforcing a judgment in another Member State.

631 At the procedural level, different avenues for improving the current situation seem to be feasible. However, two basic approaches can be distinguished. The first proposal would preserve the existing exequatur procedure and the basic structure of Articles 38 – 56 JR. Nevertheless, the existing system should be improved considerably; especially by further reducing the existing grounds of refusal of recognition. The second avenue is derived from the Tampere conclusions. It is aimed at a general abolition of exequatur proceedings in the framework of the Judgment Regulation. However, this proposal would not simply abolish exequatur proceedings, but replace them by procedural and substantive safeguards of the parties' legal position. In the following section, both avenues are explored in detail. In addition, an intermediary approach shall be developed as well.

*a) The First Alternative: Evolving the Existent System*

632 The first, more conservative avenue would preserve the basic structure of exequatur proceedings under Articles 32–56 JR. This proposal starts from the basic assumption that the present system seems well balanced. Nonetheless, the following, technical improvements of the existing system which have been addressed in this section should be envisaged:

- Extension of the standard form of Annex V. Adaptation to the forms of the parallel instruments (Regulations (EC) No. 805/2004, 1896/2006) as far as interest and taxes are concerned.
- Clarification of Article 55 (2) JR in the way that a translation of the judgment should be exceptional. Aligning of this

provision with Article 21 of Regulation (EC) No. 805/2004 and Article 22 of Regulation (EC) No. 1896/2006.

- Deletion of Article 40 (2) JR.
- Further reduction of the grounds for non-recognition
  - In particular abolition of Article 35 JR since it is not in line with the principle of mutual trust
  - Article 34 (3) JR should be aligned with Article 21 Regulation (EC) No. 805/04 and Articles 22 Regulation (EC) No. 1896/06 and Regulation (EC) No. 861/2007; the provision should not refer to the moment when the judgment was rendered, but rather to the moment of pendency
  - Amendment of Article 34 (4) JR: it should refer to the moment of pendency
- Improvement of the remedies
  - Amendment of Article 43 (3) JR
    - Further simplification of the exequatur proceedings in the first instance
    - Introduction of a written procedure in the second instance

633 In addition to these technical proposals, the following structural improvement seems feasible: Under Articles 38 and 53 – 56 JR, the recognition of the foreign judgment is mainly effected on the basis of standard forms. The judicial authorities in the Member States simply verify whether the Judgment Regulation is applicable and whether the forms are complete. In the first instance, any inquiries beyond the scope of the forms do not take place (because the judicial authorities do not dispose of any additional information). Accordingly, the declaration of enforceability is regularly granted on the basis of the forms.

634 Seen from this perspective, additional improvements seem possible. The proposal presented in the last paragraph implies a further simpli-

fication of exequatur proceedings under Articles 38 et seq. JR. In the present state of affairs, the control by the judicial authority competent for granting the declaration of enforceability is reduced to verifying whether the Judgment Regulation is applicable and whether the formal requirements prescribed by Articles 53–56 JR are fulfilled. The most important task of the judicial authority in the Member State of enforcement is the adaptation of the foreign title to the formal requirements of the enforcement law in that Member State. However, due to the proposed extension of the specifications provided for by the forms of Annex III–V JR<sup>910</sup>, this implementation of the foreign judgment will no longer be necessary. Accordingly, it seems appropriate to change Articles 53–56 JR in a way that the certificate provided for by Article 54 JR has binding force.

635 Accordingly, the judicial authority in the Member State of enforcement shall be bound by the certificate on all questions relating to the application of the Judgment Regulation, the enforceability of the foreign decision and the specifications of its content. As a result, the foreign title will be automatically recognised in the Member State of enforcement, unless the creditor does not file a complete application or there are discrepancies between the title and the accompanying form. The advantages of this simplification will be twofold: Firstly, the examination in the first instance will be carried out by a judicial officer who does not need to be qualified as a judge. Secondly, a translation of the foreign decision will not be necessary. Nevertheless, the debtor may appeal the decision granting exequatur under Article 42 JR relying on the grounds for non-recognition specified in Article 34 JR. Accordingly, the costly and time-consuming translation of the judgment will regularly be necessary for the appeal proceedings.

636 Yet, the more preferable proposal would be to go one step further and to prescribe a formal binding force of the form of Annex V JR (its

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<sup>910</sup> See *supra* at para. 511.

content must be extended).<sup>911</sup> The form would operate as a “judicial passport”. A creditor should immediately approach the enforcement organs in the other Member State (comparable to an enforcement clause) and present the title and the form. Accordingly, enforcement measures would be immediately available.<sup>912</sup> However, the basic structure of the Judgment Regulation should remain unchanged. Thus, the creditor could challenge the “recognition” of the foreign title in the (competent) courts of the Member States of enforcement. He could raise the objections of Article 34 JR and he could even declare that the title had become moot, because the debt had been paid or the parties had set off. The decision on the objections of the debtor could be reviewed by a second appeal, as prescribed by Article 44 JR.<sup>913</sup>

*b) The Second Proposal: Abolition of Exequatur Procedures*

637 The alternative approach starts from the political programme of the Tampere summit which envisaged the abolition of exequatur proceedings and their replacement by complementary procedural safeguards.<sup>914</sup> In this respect, at the Community level, several new legal instruments have abolished the public policy exception and have established instead minimum procedural standards in the Member State of origin.<sup>915</sup> Furthermore, these instruments require all Member States to make review proceedings available to the judgment debtor for the protection of his or her rights to be heard. Consequently, the debtor is entitled to a review of the judgment in the Member State of origin, if he was prevented to object to the claim without any fault of

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<sup>911</sup> See *supra* at para. 511. The following proposal describes the “intermediate approach” mentioned *supra* at para. 631

<sup>912</sup> The immediate effect of the foreign title can also be limited to provisional measures until the time for filing an appeal against the “recognition” has been elapsed.

<sup>913</sup> As a first step, this simplification might be reduced to pecuniary claims.

<sup>914</sup> Tampere Summit, 15-16 October 1999, Conclusions of the Finish Presidency, paras. 33 – 34, see *supra* at para. 543.

<sup>915</sup> Cf. Article 19 (2) of Regulation (EC) No 805/2004 and Article 20 (2) of Regulation (EC) No 1896/2006, Article 18 (1) (b) Regulation (EC) No 861/2007.

his part.<sup>916</sup> In addition, enforcement proceedings may be suspended in the Member State of enforcement when an application for review in the Member State of origin has been filed.<sup>917</sup> However, some of the new Community instruments do not only abolish interim measures (on the recognition of judgments coming from other Member States), but equally replace the uniform procedure of Articles 30 et seq. JR by a (simple) reference to the (not harmonised) review proceedings of the Member States.<sup>918</sup> While it seems appropriate to provide for such a reference in specific limited areas, a general instrument (as the Judgment Regulation) should not give up a harmonised procedure by introducing a (black box) reference to the procedural laws of the Member States. In this respect, additional harmonisation of the review procedures would be necessary.

638 In this respect, a possible way forward could be the introduction of coordinated review procedures in the Member State of origin and in the Member State of enforcement. One example of this mechanism can be found in Article 33 of the EC-Commission's proposal for a Regulation relating to maintenance claims where a (limited) control of the judgment in the Member State of enforcement is permitted.<sup>919</sup> According to the structure of this proposal, redress is mainly opened in the Member State of origin. However, if efficient redress in the Mem-

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<sup>916</sup> Cf. Article 18 (1) (b) of Regulation (EC) No 861/2007 – this provision includes fraudulent behaviour of the creditor.

<sup>917</sup> Cf. Article 23 of Regulation (EC) No 805/2004; Article 22 (1) and (2) of Regulation (EC) No 1896/2006; Article 23 of Regulation (EC) No 861/2007.

<sup>918</sup> Example: Article 21 of Regulation (EC) No.805/2004.

<sup>919</sup> Com(2005) 649 final of December 15, 2005. Article 33 (Refusal or suspension of enforcement) reads as follows:

“The partial or total refusal or suspension of the enforcement of the decision of the court of origin may at the request of the debtor be granted only in the following cases:

- a) the debtor asserts new circumstances or circumstances which were unknown to the court of origin when its decision was given;
- b) the debtor has applied for the review of the decision of the court of origin in accordance with Article 24 and no new decision has yet been given;
- c) the debtor has already satisfied his or her debt;
- d) the claim is totally or partially extinguished by the effect of prescription or the limitation of actions...”

ber State is not available, the debtor may request the refusal of enforcement in the Member State of enforcement.<sup>920</sup>

639 A possible avenue could follow the structure of Draft-Article 33. According to this model, redress against fraud and procedural irregularities is mainly available in the Member State of origin.<sup>921</sup> However, a residual control of the foreign title is provided if such means of redress do not exist or are not efficient. In addition, the residual control in the context of enforcement proceedings should include recourse to public policy in extreme cases.<sup>922</sup> Further, the uniform procedure under Articles 38 et seq. JR should not be replaced by a simple reference to the heterogeneous review procedures of the Member States. For the sake of legal certainty, some minimum harmonisation would be necessary. In this respect the Member States should communicate the competent courts for the review proceedings to the EC Commission; the information about the competent courts should be available at the European Judicial Atlas.<sup>923</sup> Further, it seems advisable to harmonise the review proceedings in a similar way as provided in Articles 43 – 45 JR. Accordingly, this possible way forward would entail a (partial) harmonisation of the procedural laws of the Member States.

### *c) Cross-border Injunctions*

640 As regards to injunctions, a separate regime for the recognition is still needed. As has been demonstrated, the national systems are too

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<sup>920</sup> Article 33 of the Draft Regulation mainly permits substantive objections against the foreign judgment, *Hess/Mack*, *Jugendamt* 2007, 229, 233.

<sup>921</sup> In this respect, the procedures for the review of minimum standards laid down in Article 18 of Regulation (EC) No. 861/2007 and Article 20 of Regulation (EC) No. 1896/2006 could serve as a model.

<sup>922</sup> In a general instrument on the free movement of judgments, it seems advisable to preserve a residual control of the title coming from other Member States. This corresponds to the legal situation in the national laws of the Member States where extraordinary redress against final judgments is available in order to prevent manifest injustice. However, the Community instrument should clearly state that this extraordinary control applies only to extreme cases.

<sup>923</sup> A similar obligation is prescribed by Article 25 (1) of Regulation (EC) no 861/2007.

different as to allow a free movement of injunctions without exequatur. In this respect, the implementation (and adaptation) of the foreign title to the legal requirements in the Member State of enforcement is still necessary. However, it seems advisable to clarify and to enlarge Article 49 JR as follows:

- Clarification that a judgment ordering the debtor to do or to refrain from doing a specific act in another Member State is generally permitted.
- Clarification that the judicial authority granting the declaration of enforceability (or the competent authority according to the national law of the Member State of enforcement) is also competent to assess the amount of the payment.
- Clarification that payments to the fiscal bodies of the Member State of origin shall be collected by the judicial authorities of the Member State of enforcement. The transfer of money should be effected between the judicial authorities of the Member States concerned.
- Thus, Article 49 JR should be amended; as a new version the following wording is suggested:
  - *(1) A foreign judgment which orders a payment by way of a penalty shall be enforceable in the Member State in which enforcement is sought.*
  - *(2) The court or competent authority for the declaration of enforceability shall determine the amount of the payment if that amount has not been finally determined by the courts of the Member State of origin.*

## **VI. Provisional Measures**

### **1. Introduction**

641 So far, it has not been possible to receive useful information from lawyers of any country involved in the study. Lawyers seem to have



made only limited experience with trans-border provisional measures. In contrast, there is some case law available. Therefore, in this Report a short overview of the available case law will be presented first (2.). Subsequently, some issues will be discussed which have arisen so far in the context of trans-border provisional measures and the enforcement of such measures abroad (3.). Finally, a few policy considerations shall be added (4.).

## 2. Case Law

### a) *The Case Law provided by the Court of Justice*

642 So far, the Court of Justice has dealt with provisional measures in nine rulings.

643 1. The *Denilauler./Couchet Frères* case (judgment of May, 21<sup>st</sup> 1980, 125/79, ECR 1980, 1553, 1555). Ruling:

„Judicial decisions authorizing provisional or protective measures, which are delivered without the party against which they are directed having been summoned to appear and which are intended to be enforced without prior service do not come within the system of recognition and enforcement [provided for by the Judgment Convention]“.

The case specifically concerned a French order such as in our days would be called *saisie conservatoire*.

644 2. *De Cavel./de Cavel I* (judgment of March, 27<sup>th</sup> 1979, C-143/78, ECR 1979, 1055). Ruling:

645 „Judicial decisions authorizing provisional protective measures... in the course of proceedings for divorce do not fall within the scope of the [Judgment Convention]... if those measures concern or are closely connected with either questions of the status of the persons involved in the divorce proceedings or proprietary legal relations resulting directly from the matrimonial relationship thereof“.

646 3. *De Cavel./de Cavel II* (judgment of March, 6<sup>th</sup> 1980, C-120/79, ECR 1980, 731). Ruling:

647 „[The Judgment Convention] is applicable, on the one hand, to the enforcement of an interlocutory order made by a French court in divorce proceedings whereby one of the parties to the proceedings is awarded a monthly maintenance allowance and, on the other hand, to an interim compensation payment, payable monthly, awarded to one of the parties by a French divorce judgment...“

648 4. *Brennero./Wendel* (judgment of November, 27<sup>th</sup> 1984, C-258/83, ECR 1984, 3971).

649 In this case, the focus was not on the fact that the decision to be enforced abroad was a *sequestro conservativo*. It was considered as self-evident that the act was a judgment to be recognised under [then] Article 25 JC [now Article 32 JR]. In all evidence, the *sequestro conservativo* had been granted during proceedings for the substance of the matter subsequent to an opportunity given to the defendant to submit his explanations.

650 5. *Van Uden Maritime BV./Kommanditgesellschaft in Firma Deco-Line and Another* (judgment of November, 17<sup>th</sup> 1998, C-391/95, ECR 1998 I-7091, 7122). Ruling (as far as provisional measures are concerned):

651 2. Where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, no provisional or protective measures may be ordered on the basis of Article 5 (1), of the [Judgment Convention].

652 3. Where the subject-matter of an application for provisional measures relates to a question falling within the scope *ratione materiae* of the [Judgment Convention], that Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application. Even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.

653 4. On a proper construction, the granting of provisional or protective measures on the basis of Article 24 of [the Judgment Convention] is conditional on, *inter alia*, the existence of a real connecting link between the subject matter of the measures sought and the territorial ju-

isdiction of the Contracting State of the court before which those measures are sought.

654 5. Interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 [of the Judgment Convention] unless, first, re-payment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.“

655 6. *Mietz./Intership Yachting Sneek* (judgment of April, 27<sup>th</sup> 1999, C-99/96, ECR 1999 I-2277, 2299) Ruling:

656 “A judgment ordering interim payment of contractual consideration, delivered at the end of a procedure such as that provided for under Articles 289–297 of the Netherlands Code of Civil Procedure by a court not having jurisdiction under the Convention... as to the substance of the matter is not a provisional measure capable of being granted under Article 24 of that Convention unless, first, the repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure ordered relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.”

657 7. *Italian Leather./WECO* (judgment of June 2, 2002, C-80/00, ECR 2002 I-4995). Ruling:

658 “On a proper construction of Article 27 (3) of the Convention...a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought”.

659 8. *Turner./Grovit and Others* (judgment of April, 27<sup>th</sup> 2004, C-159/02, ECR 2004 I-3565).

660 In this judgment, the court disapproved of “anti-suit injunctions“. The particular focus was not on the issue of whether or not the respective English injunction was an interlocutory one or not.

661 9. *St. Paul Dairy Industries NV./Unibel Exser BVBA* (judgment of April, 28<sup>th</sup> 2005, C-104/03, ECR 2005 I-3481). Ruling:

662 „Article 24 of the Convention...must be interpreted as meaning that a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assessed the relevance of evidence which might be adduced in that regard is not covered by the notion of ‘provisional’, including protective, measures”.

*b) Case Law of National Courts (in alphabetical order)*

663 Most national reporters state that there are no traces of any experience with provisional measures affected by the Judgment Regulation or the Judgment Convention in their respective countries. There is not much case law regarding provisional measures in the remaining Member States either. This may be due to the fact that court decisions given in the context of provisional measures are seldom published. With respect to Germany, one must not overlook the fact that the *Bundesgerichtshof* in matters concerning provisional measures can never be seised. Furthermore, some decisions will only be discussed in the context of the impact of the regulation on matters relating to industrial property. Subject to the above mentioned reservations the following information can be given:

*aa) Austria*

664 The *Oberste Gerichtshof*<sup>924</sup> emphasised that a judgment given in Germany on the substance of the matter was not an obstacle to provisional measures issued by Austrian courts in respect of activities

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<sup>924</sup> Published in GRUR Int 2002, 936.

launched into Austria, provided, it related only to acts committed or to be performed in Germany.

*bb) Belgium*

665 The *Cour de Cassation*<sup>925</sup> first emphasised the rule that even when the proceedings concerned the substance of the matter, foreign courts had (exclusive) jurisdiction or proceedings for the subject of the matter were already pending abroad, there was no obstacle to provisional measures granted by national courts. Secondly, the court also applied Article 24 JC (now Article 31 JR) to a so-called *saisie description* available under Belgian domestic law in patent infringement cases. Thirdly, the court made it clear that the fact that the infringed patent was a foreign one was not an obstacle to granting a *saisie description* in Belgium, if there were traces left from the elements of the infringing activities in Belgium.

*cc) France*

666 Two cases of appellate courts and three cases decided by the *Cour de Cassation* could be discovered so far. Furthermore, the French reporter *Sinopoli* draws attention to an unpublished decision of the appellate court of Bourges.

667 a) *Cour d'Appel Paris*<sup>926</sup>: Within the framework of the discretionary considerations of the judge, some regard may be given to the prospect of whether or not a foreign court would be in a better position to grant provisional measures.

668 b) *Cour d'Appel Versailles*<sup>927</sup>: An order for the taking of evidence abroad (court appointed expert committed to travel to Madrid and to inspect immovables) was held to be covered by Article 24 JC [now Article 31 JR]. The order was made prior to the main proceedings be-

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<sup>925</sup> Judgment of 09/03/1999, T.B.H 2001, 28, *Rechtkundige Weekblad* 1999/2000, 876, published also in German language in *GRUR Int* 2001, 73. See also *infra* para. 846.

<sup>926</sup> *Journal du droit international* 1989, 96.

<sup>927</sup> *Rev. Crit.* 1995, 80.

coming pending in France. Therefore, Article 24 JC in reality was not needed to found jurisdiction.

669 c) In light of the Court of Justice's case law ("real connecting link") a later judgment of the *Cour de cassation*<sup>928</sup> made it clear, that Article 24 JC did not provide a proper basis for appointing an expert where no proceedings on the substance of the matter could be expected to take place in France.

670 d) Equally referring to that case law, the *Cour de cassation* ruled<sup>929</sup> that on the basis of Article 24 JC a *référé-provision* can only be granted if enforcement by means of execution was possible in France.

671 e) In the well-known and much discussed *Stolzenberg Case* the *Cour de Cassation*<sup>930</sup> confirmed the *Cour d'Appel* in declaring enforceable an English Mareva injunction (now: freezing order) without any additional specification. The court neither addressed the issue of whether a freezing order given in conjunction with the final judgment was still a "provisional measure" within the meaning of Article 31 JR or rather a measure of execution referred to in Article 22 (5) JR, nor did the court give any indications, how and against whom the freezing order should be enforced.

672 f) The *Cour d'Appel Bourges*<sup>931</sup> approved the enforcement of a foreign provisional measure granted in unilateral proceedings but served upon the respondent. The mere possibility of the latter to object was sufficient for the Court to qualify the proceedings to be controversial.

#### dd) Germany

673 We found eleven published decisions.

674 a) Four decisions have confirmed the rule that decisions ordering any kind of interim payment (paradigm case: *référé-provision* of French

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<sup>928</sup> *Virgin Atlantic Airways./GJE Airbus Industries*, 12/11/2001, Rev. crit. 2002, 371.

<sup>929</sup> 04/13/1999, Bulletin civil I 133, p. 86.

<sup>930</sup> 06/30/2004, Rev. crit. 2004, 815.

<sup>931</sup> 02/22/2005 unpublished, referred to by the French reporter *Sinopoli*, French report, 3<sup>rd</sup> questionnaire, question 4.1.3.

law) are to be enforced under the Convention. One of the judgments was even given by the *Bundesgerichtshof* which does not have jurisdiction to deal with provisional measures to be granted by German Courts, but does have jurisdiction in enforcement matters of any kind<sup>932</sup>:

675 b) Two decisions confirm that a provisional measure given by a foreign court is covered by Article 24 JC [now Article 31 JR] even if it was originally granted subsequent to unilateral proceedings complying only with the additional requirement that it was later confirmed after the respondent had been granted an opportunity to submit his defence. The first decision<sup>933</sup> concerned a Greek arrest. The essence of this remedy is that the creditor obtains a general permission to seize the debtor's assets wherever they are uncovered, either in the debtor's own country or abroad. This remedy is very similar to the German "Arrest". Cross-border enforcement of such a remedy amounts to a permission to seize the respondent's property located on the territory of the State of enforcement. The second case<sup>934</sup> concerned an English freezing order [then: *Mareva injunction*] by consent. Enforcement was sought at the level of the appellate jurisdiction only against the debtor himself. It should be added that in that case the freezing order was clearly only an interim measure of protection (as contrasted to enforcement of a judgment) and that the court did not make the slightest indication how enforcement of the order should take place in Germany.

676 c) One judgment<sup>935</sup> shows a particular sensitivity for inter-European legal relationships. A particularity of German law is the rule that any court seised with the substance of the matter, and regardless of its having jurisdiction therefore, has power to grant interim relief. How-

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<sup>932</sup> BGHZ 140, 395; *OLG Hamm*, RIW 1994, 243; *OLG Stuttgart*, RIW 1997, 684 (interim payment ordered by an Italian *giudice di istruttore*); *OLG Düsseldorf*, RIW 1985, 493 (relating to an interim order of a French *Tribunal de commerce*, in all probability a *référé-provision*).

<sup>933</sup> *OLG München*, RIW 2000, 446.

<sup>934</sup> *OLG Karlsruhe*, ZZPInt 1996, 91.

<sup>935</sup> *OLG Koblenz* RIW 1990, 316.

ever, it was held that this rule could not be applied against a foreign respondent.

677 d) Three decisions of minor importance might be added:

678 *Oberlandesgericht Hamm*<sup>936</sup>: An interim order given during divorce proceedings and ordering one of the spouses to pay for the common child's maintenance is not an obstacle for a subsequent lawsuit instituted by the child itself.

679 *Oberlandesgericht Hamburg*<sup>937</sup>: The direct issue of the decision was whether or not the costs of a provisional taking of evidence abroad could be taken into account by the cost decision to be given in conjunction with the judgments in the main proceedings. In this context, however, a side remark of the court should be mentioned: Provisional measures of taking evidence abroad are not covered by the concept of provisional measures within the meaning of Article 31 JR. The Hague Evidence Convention [or now also the European Evidence Regulation] is the only legal instrument to be used.

680 *Oberlandesgericht Hamburg*<sup>938</sup> proceedings for obtaining an attachment order or a freezing order abroad do not amount to having a *lis pendens* effect for the proceedings concerning the substance of the matter.

#### ee) Greece

681 No case law has been reported to the authors. It may, however, be emphasised again that Greek law knows a general form of seizure granting the permission to seize the respondent's assets of every kind and in every location (see Articles 707–724 Greek Code of Civil Procedure).

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<sup>936</sup> FamRZ 1993, S. 213.

<sup>937</sup> IPRax 2000, 530.

<sup>938</sup> IPRspr 1997, no. 197.



*ff) Ireland*

682 The Irish reporter states that Irish Courts, unlike English ones, do not grant world-wide freezing orders. However, he does not refer to any specific court decisions, let alone a published one.

*gg) Italy*

683 Two decisions of Italian courts have been published.

684 a) The first stems from the *Tribunale di Padova* of March, 21<sup>st</sup> 1985 in the case of *Simod s.p.a./Ditta Cypris*<sup>939</sup>. As far as provisional measures are concerned the judgment states that the pending of proceedings for the substance of the matter in one contracting State of the Judgment Convention and a request in France for ordering payments in the form of a *référé* provision do not fall under Article 21 JC [now Article 27 JR].

685 b) The decision of the *Tribunale of Latina* of April, 19<sup>th</sup> 1994 in the case of *Finaval s.p.a./Satila Limited*<sup>940</sup> gives the same interpretation of Article 21 JC and, in addition, states that even provisional measures issued by courts of different Member States can fall under Article 27 (3) JC (now Article 34 (3) JR). The judgment, however, was given prior to the rulings of the Court of Justice in *Van Uden* and *Mietz*. Therefore, the issue was not which are the territorial limits of measures taken on the basis of Article 31. Measures, whose effect is restricted to the territory of one State may of course not be in contradiction to measures (or the refusal of measures) whose effects are limited to the territory of another State.

*hh) The Netherlands*

686 The Dutch national reporter does not analyse any specific court decision. However, she describes the courts' practice in rather general

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<sup>939</sup> J03/21/1985 *Giurisprudenza Italiana* 1985, 375.

<sup>940</sup> *Giurisprudenza Italiana* 1994, 857.

terms. Some information will be provided in the context of intellectual property under the Regulation. The following can be said so far:

- 687 a) The famous Dutch *kort geding* is of current use. The courts are said to follow the *Van Uden* case of the Court of Justice (cf. *supra* paras. 650 et seq.). In practice, the *kort geding* is clearly covered by the concept of provisional measures within the understanding of the Regulation, subject, of course, to the restrictive preconditions developed by the Court of Justice being met.
- 688 b) Orders to do something abroad, or to refrain from doing something abroad, may well be issued<sup>941</sup>. It remains to be verified whether the territorial restrictions developed in the *Van Uden* and *Mietz* decisions of the Court of Justice are respected, where a *kort geding* is sought in a court which does not have jurisdiction for the substance of the matter.
- 689 c) Some details regarding the paradigm effectiveness of the *kort geding* will be reported elsewhere in this Report (see paras. 836 et seq.).

*ii) The United Kingdom (England and Wales)*

- 690 a) The existence of “freezing orders” (according to Civil Procedure Rules), rule 25.1 (1) (f) and (g) is a characteristic feature of provisional measures in England and Wales. Unlike freezing devices in civil law countries, an English freezing order operates only *in personam* and amounts neither to any seizure nor to any authorisation to request a seizure from enforcement authorities.
- 691 The basic legal provision is drafted as follows:

“The court may grant the following interim remedies...

(f) an order (referred to as a freezing injunction)

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<sup>941</sup> *Hoge Raad, Interlas./Lincoln*, 11/24/1989, BIE 1991, 23 = NJ 1992, 404 – trademark case. References to pertinent patent cases in *Tilman/von Falck*, GRUR 2000, 579, 581.

(i) restraining a party from removing from the jurisdiction, assets located there;

(ii) restraining a party from dealing with any assets whether located within the jurisdiction or not.

(g) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be subject to an application for a freezing injunction worldwide.”

692 The rules, and in particular the provision of rule 25.1 (1) (f) (ii), incorporate the case law regarding so-called “Mareva injunctions” developed by the English courts which have received their most distinctive shape in the well-known decisions of the Commercial Court *Derby & Co. Ltd./Weldon* (no. 1)<sup>942</sup> and of the Court of Appeal *Babanaft./Bassatne*<sup>943</sup>. The content of a worldwide freezing order (WFO) is to enjoin the respondent (debtor) from dealing with any assets even if they are located abroad. Since the order operates only *in personam* it does not confer on the applicant any priority rights regarding the affected assets. The particular effectiveness of the order, however, is due to the fact that in addition to its freezing element, the respondent is ordered to disclose any assets he may control worldwide.

693 The draconian character (“nuclear weapon of the judiciary”) is due to the fact that not only the respondent is exposed to contempt of court penalties but also all persons or commercial entities are affected, who may assist the respondent (debtor) in not complying with the order. This is in particular the case regarding banks that maintain directly or indirectly bank accounts of the debtor. This is traditional practice and regulated now under the Civil Procedure Rules based on the relevant Practice Direction which states that (no. 19 in conjunction with (2) (b) (ii, iii))

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<sup>942</sup> [1990] Ch. 48.

<sup>943</sup> [1990] 1 CA 13, at 33.

“the terms of this order will affect the following persons in a country or state outside the jurisdiction of this court...

(b) any person who –...

has been given written notice of this order at his residence or place of business within the jurisdiction of this court; and is able to prevent acts or omissions outside the jurisdiction of this court which constitute or assist in a breach of the terms of this order; and

(c) any other person, only to the extent that this order is declared enforceable by or is enforced by a court in that country or state.”

694 In the case of a WFO the English courts are mindful not to offend people in other jurisdictions. Therefore, they usually include such discretionary restrictions and limitations into the order.

695 Another bundle of restrictions stems from the requirement that the applicant must give serious undertakings. In the context of a WFO the most common undertaking is to abstain from any efforts to enforce the order abroad unless the English court has given its permission.

696 In the very recent judgment *Dadourian Group Int. Incorporated./Simms & Ors*<sup>944</sup> the Court of Appeal has issued guidelines for the discretionary power of the court to exercise or not to exercise this discretion. The guidelines have been developed in the context of an application to set aside the following order of the Queen’s Bench:

“The applicant has permission and is authorised to enforce the order [WFO] in Switzerland... and to seek in Switzerland an order of a similar nature, including orders conferring a charge or other security against the respondents or the respondent’s assets.”

697 The application failed on the basis of the following guidelines:

698 “Guideline 1: The principle applying to the grant of permission to enforce a WFO abroad is that the grant of that permission should be just

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<sup>944</sup> [2006] EWCA civ 399.

and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.

- 699 Guideline 2: All the relevant circumstances and options need to be considered. In particular, consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, and in addition to the form of any order.
- 700 Guideline 3: The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.
- 701 Guideline 4: Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.
- 702 Guideline 5: The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to make the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.
- 703 Guideline 6: The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign court is a real prospect, that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.
- 704 Guideline 7: There must be evidence of a risk of dissipation of the assets in question.

- 705 Guideline 8: Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.”
- 706 Guideline no. 4 is particularly conspicuous. It remains unclear, whether this guideline applies only in the case of a declaration of enforceability abroad of an English freezing order or whether it also applies if the applicant decides to seek independent provisional relief there. The Court of Appeal seems inclined to apply the guideline also to the latter situation.
- 707 In the context of worldwide freezing orders, English courts have very rarely discussed the Judgment Convention or, now, the Judgment Regulation. This is due to the fact that in most cases the respondent did not have his domicile or seat in a Member State of the European Community. In the *Cuoghi* case,<sup>945</sup> the respondent had his domicile in England. The WFO was requested in view of assets supposedly located in Switzerland. In that case the Court of Appeal stated:
- 708 “that the High Court has a power to grant interim relief in aid of substantive proceedings elsewhere of whatever kind and wherever taking place.”
- 709 The particular element of a WFO that for enforcement abroad a special judicial permission is required has in all probability only been developed in the last years. Such a requirement has no counterparts in other jurisdictions of the Community. It is highly questionable, whether the Judgment Regulation authorises the requirement of such a permission. The normal rule is rather that of Articles 32 and 33 JR providing for the enforcement of judgments given in another Member State without any special procedure.

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<sup>945</sup> *Crédit Suisse Trust./Cuoghi* [1997] 3 WLR 871, 876.

710 The only case, in which in the context of freezing orders the Judgment Convention has been considered is the *Babanaft* case<sup>946</sup> There it is stated that a freezing order issued subsequent to the giving of the final judgment was not made in disregard of the exclusive jurisdiction of Article 16 (5) JC (now Article 22 (5) JR). Some issues in the context of the cross-border enforcement of freezing orders, that so far have not been dealt with neither in case law nor in literature, will be discussed in the last section of this paragraph (see paras. 742 et seq.). Yet, at this place the following should be mentioned: In legal doctrine<sup>947</sup> a “question mark” is seen as to whether a post-judgment worldwide freezing order is covered by Article 22 (5) JR. Proposing the opposite, the author refers to a phrase in the *Tatry*-case of the Court of Justice<sup>948</sup> stating:

“...only if it [the action] is intended to obtain a decision in proceedings relating to recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments...”, hereby insinuating that an order in personam can never be “concerned with the enforcement of judgments.”

711 Other kinds of provisional or protective measures have rarely been discussed in the context of jurisdiction derived from the Judgment Regulation or the Judgment Convention. For comparative purposes however, a judgment of the English Court of Appeal regarding maintenance<sup>949</sup> is very conspicuous: An order for maintenance pending divorce proceedings is neither a provisional nor a protective measure.

712 b) In respect of the enforcement of foreign provisional measures, only one English decision became to be known: *Comet Group PLC./Unika Computer SA*<sup>950</sup>. The primary issue was an application

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<sup>946</sup> *Babanaft./Bassatne* [1990] CH 13, at 35 (Kerr LJ) 46 (Neill LJ).

<sup>947</sup> *Dickinson* in: *Enforcement Agency Practice in Europe*, pp. 287, 291.

<sup>948</sup> *ECJ*, 12/06/1994, C-406/92, *Tatry./Maciej Rataj*, ECR 1994, I-5439, para. 468.

<sup>949</sup> *Wermuth./Wermuth* [2003] EWCA Civ 50.

<sup>950</sup> [2003] ILPr 1 QB.

for a declaration of non-recognition of a French judgment (presumably a *référé* provision). The application was indeed successful since the French Court had no jurisdiction for the substance of the matter and no guarantee was ordered for the case that the applicant was unsuccessful in the proceedings for the substance of the matter to be instituted elsewhere.

713 In this respect sec. 25 (7) (b) Civil Jurisdiction and a Judgments Act should be mentioned. There it is clearly stated that measures for securing evidence are not covered by the concept of provisional measures within the meaning of the Judgment Convention (and now the Regulation).

714 In the *Motorola Credit Case*<sup>951</sup> the Court of Appeal has probably misunderstood the Court of Justice's real-connecting-link-doctrine. A worldwide freezing order was granted by a court, which did not have jurisdiction for the substance of the matter. The court granted the measure on the mere fact that there was such a connecting link to England. The link, however, was not to the territory of England but, rather, to English law and English jurisdiction in the statutes of the company the shares of which had been sold, and "under the circumstances of jurisdiction of this court by agreement of the parties". Should the latter reference mean that the parties had agreed on the jurisdiction of English Courts to provide for interim measures? The problem then, would not exist at all. Jurisdictional agreements, even if limited to interim relief, provide a jurisdiction based on the Convention and therefore outside the framework of extraordinary provisional measures such as referred to by Article 31 JR.

### 3. Crucial Issues in the Context of Provisional Measures

715 In the light of the foregoing case law, six crucial issues may be identified:

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<sup>951</sup> *Motorola Credit Cooperation./Uzan* (no. 2) [2003] EWCA Civ. 752, [2004] 1 WLR 113.



- 716 1. In contrast to remedies available Europe-wide in proceedings for the substance of the matter, a great variety of devices exists in national law relating to the field of provisional measures.
- 717 2. The ordinary jurisdictions of the courts, which may be seised or are already seised also for the substance of the matter, and extraordinary jurisdiction based on Article 31 JR must be distinguished.
- 718 3. The provisional measures provided for in national law may by their very nature be limited to effectiveness only on the territory of the issuing State. Others are by their very nature “worldwide”. This diversity is at the basis of a variety of problems arisen in the context of recognition and enforcement of provisional measures.
- 719 4. Very little regard has been paid so far to the interaction of the court, in which substantive proceedings are pending, and the court that has issued a provisional measure.
- 720 5. A very special and isolated problem is the issue of interim anti-suit injunctions.
- 721 6. The final issue is the qualification of a measure, called provisional but given simultaneously with, or even subsequently to, the rendering of the final judgment.
- 722 7. Does an arbitration agreement really have an impact on the courts’ jurisdiction to order provisional or protective measures?

*a) The Diversity of Provisional Measures provided for in Domestic Legislation*

- 723 1. The national laws are sometimes very generous, however, they are sometimes very reluctant in granting orders for an interim payment or any other kind of interim performance. It is, however, now established that measures such as the French *référé provision* or the ones given in the Dutch *kort geding* are covered by the concept of provisional measures (with regard to the requirement of a “real connecting link” and of a guarantee to be provided for the case of the applicant’s failure see below paras. 730 et seq.).

- 724 2. The English freezing injunction has its very particular aspects and implications. “Freezing” assets by an order having “only” *in personam* effects is unknown to all civil law jurisdictions. The English device of “undertakings”, required from the parties to be given as a pre-condition for freezing orders to be issued, is also unusual in civil law countries. In principle, such “undertakings” may be enforced as court orders. It is, however, doubtful whether under the Judgment Regulation, the English Courts really have the power to request an undertaking not to enforce the freezing order abroad from the applicant unless they are so authorised by them.
- 725 3. Complex provisional measures have not been discussed so far. Complex provisional measures may be found in construction cases. The building contractor may be ordered not to leave the site and to continue the works against a certain amount of payment. Even the continuation of more complex commercial activities may be ordered. The enforcement of such a kind of order may be rather difficult already in a merely domestic context. It may become extremely burdensome and time-consuming, sometimes even unmanageable, in the case of a cross-border enforcement. The problems, however, are not different from those caused by final judgments ordering “specific performance” of mutual obligations stemming from complex commercial relationships.
- 726 4. Legal enactments, case law and legal doctrine<sup>952</sup> are split in respect to the issue whether orders given for the purpose of obtaining information and evidence are covered by the concept of provisional measures within the meaning of Article 31 JR. The ruling of the Court of Justice in the *St. Paul Dairy* case<sup>953</sup> is limited to a witness deposition sought for the purpose of verifying whether a claim existed. The problem is whether this decision can be generalised with the result that no order requesting to provide information is covered by Arti-

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<sup>952</sup> See *Mankowski*, JZ 2005, 1144 with further references.

<sup>953</sup> See *supra* para. 661.

cle 31 JR. If not, only the court having jurisdiction for the substance of the matter would be authorised to make such a kind of order. Very often, however, the ends of justice are much better served if the party interested in obtaining information has direct access to the courts, that means that he is vested with the right to address the court, where the information is located or which has jurisdiction over the respective persons. No harm would result from giving the national courts power, in conformity with their national rules, to order disclosure of information under Article 31 JR. Direct access of parties to information near to the court would thus fall outside the Hague Evidence Convention and, respectively, the European Evidence Regulation. It cannot be seen, how this could cause harm to anybody. Of course, trans-border enforcement of such orders becomes in itself obsolete. Once the information is legally acquired, it can be used everywhere subject only to restrictions made by the court which ordered the information to be provided.

727 An illuminating example for the usefulness of direct access to information by means of provisional measures is provided by the *Tribunale Civile di Genova* which made a reference to the ECJ (decision of 14 March 2006 – case *Tedesco./Tomasoni Fittings*). The Italian Judge had requested of the English authorities to execute an order to officially find and describe goods manufactured in infringement of the applicant's patent. The Senior Master of the Queen's Bench Division of the Supreme Court of England and Wales did not understand what he should do and responded literally: "...this is not a matter which we consider should fall to be dealt with by this office under the Letter of Request procedure". The respective remedy (provisional measure) of English law would have been the "search order" under 125.1 (h) Civil Procedure Rules to be directly applied for by the interested party<sup>954</sup>.

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<sup>954</sup> The case is pending in the ECJ under C-176/06, *Tedesco./Tomasoni Fittings Srl., RWO Maritime Equipment Ltd.*

728 Regarding the particularities of maritime matters, see the section on maritime matters (see paras. 304 et seq.).

*b) International Jurisdiction for Provisional Measures*

729 1. It is now taken for granted that any court vested with jurisdiction for the substance of the matter may also be addressed for ordering interim relief. The effects of this measure may be limited to the territory of the issuing court by the measure's nature or a special provision in the order. However, in contrast to the concept underlying the usual English restrictive proviso (*Babanaft-proviso*), provisional measures ordered by the court of a contracting State have worldwide effects – such as final judgments are intended to have worldwide effects. This rule is clearly not contrary to the requirement that enforcement by officials of a foreign State is dependent on a declaration of enforceability (see below paras. 742 et seq.). To give an example: The German “*Arrest*” and its Greek counterpart have the legal nature of permitting the successful applicant, to seize any assets of the debtor worldwide but only through the assistance of enforcement officials. Decisions ordering interim payments or other kinds of interim activities are also enforceable worldwide and may be declared enforceable. It is well known that in some jurisdictions such an order may be accompanied by an *astreinte* or comparable elements. Notwithstanding Article 49 JR, the trans-border enforcement of such an order gives rise to problems, because it is doubtful to achieve any “final assessments” of the *astreinte* in the country of origin. Orders for provisional payment or the performance of other activities issued by courts in countries in which the special remedy of *astreintes* is not available are also enforceable in other Member States, although enforcement may in practice become very cumbersome, time-consuming and sometimes even unmanageable. In France, under recent legislation, the *juge de l'exécution* may supplement any executory title with an *astreinte*. But these are problems not limited to the enforcement of provisional measures and will be discussed elsewhere (see paras. 615 et seq.).

- 730 2. Under the case law of the Court of Justice, provisional measures given in extra-ordinary jurisdictions provided for by Article 31 JR must be restricted in two characteristic respects. An experienced law firm made the point that in some legal systems proceedings are automatically continued after provisional measures have been adopted. It was, however, not specified that the respective courts disregarded the Regulation in respect of the confirmation of their jurisdiction.
- 731 a) First a “real connecting link between the subject matter of the measure sought and the territorial jurisdiction...” must exist. In theory, this restriction works well in the paradigm case where the purpose of the measure is to secure the subsequent payment of a money judgment by seizing assets. Only assets located within the territory of the court’s State may so be seized. For a German or a Greek general seizure order based on Article 31 JR it is inevitable that the order must be limited to assets located in Germany or Greece respectively. Reports of practitioners and case law do not reveal any traces of whether or not in such a context the real connecting link requirement has so far been respected in practice. It is hardly conceivable that in unilateral seizure proceedings, a German judge would be aware of such a requirement to which the applicant would certainly not draw his attention. Italian legal writer discuss the issue, whether an application for the seizure of assets must include the designation of the assets to be seized within Italy.<sup>955</sup>
- 732 In legal doctrine,<sup>956</sup> the point has been made that English courts not having jurisdiction for the substance of the matter may not be vested with jurisdiction for issuing world-wide freezing orders against residents of other Member States. An indication exists, however, that English courts adopt a more flexible approach (see below paras. 747 et seq.). The similarly, the Dutch reporter states that the application will be dismissed for lack of jurisdiction of the court, should no spe-

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<sup>955</sup> In favour of such a requirement *Merlin*, Riv. dir. proc. 2002, 759, 790 et seq. Contra *Consolo*, Int’Lis 2001, 73, 81.

<sup>956</sup> *Dickinson*, op. cit., p. 296.

cific assets or assets located abroad be specified in view of a possible seizure.

- 733 The requirement also works well in cases where the order enjoins a respondent from committing specific acts or, authorising him just to commit specific acts. The order must be limited to the territory of the State of the issuing court. If, for example, the respondent should be enjoined from using a trademark (whether European trademark or domestic trademarks) the order must be limited to the territory of the enjoining court.
- 734 This requirement cannot work well where only interim payments are ordered. Payments, by their very nature, do not have a real connecting link with the territorial jurisdiction of the State of the court before which the payment order is sought. In the *van Uden* case, the court developed a specification of the required real connecting link. The court stated:
- 735 “Interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 [Judgment Convention] unless... Second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which the application is made”.
- 736 Nobody could explain so far, how a payment order could ever be restricted to specific assets of the defendant located or to be located [within a certain territory]. It seems that adhering to this requirement has completely disregarded the context of payment orders given in *référé provision* proceedings or in *kort geding* proceedings. The French *Cour de Cassation* could not find any explanation other than requesting the applicant to show that the order could be enforced by means of execution applied on French territory.
- 737 b) In the *van Uden* case the Court of Justice developed a second requirement for the courts of the Member States to assume jurisdiction under Article 31 JR:

738 “Interim payment of a contractual consideration does not constitute a provisional measure..., unless, ...repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regard the substance of his claim”.

739 In one case, an English Court did indeed refuse to enforce a French interim payment order (*référé provision*) which was not accompanied by an order against the applicant to provide security.<sup>957</sup>

740 In this context, the crucial issue for practice is whether the applicant must provide security or whether it is sufficient that under national legislation a claim for compensation exists, a claim, however, for which the successful respondent must subsequently sue the applicant. In Germany, the latter view is sometimes supported in legal doctrine<sup>958</sup>. As far as information was available, this view is not shared by practice in other Member States<sup>959</sup>. In particular, the Dutch Courts request the applicant to provide a bank guarantee. Considering that bank guarantees may be costly, the evaluators were mindful to obtain information about the time period such bank guarantee must be provided for. Unfortunately, no such information was available. Furthermore, it could not be inquired, whether the applicant would be reimbursed for the costs of the guarantee should he ultimately be successful. Under domestic German law, the costs of a bank guarantee ordered by a court are reimbursable<sup>960</sup>. It is very likely that this solution will be applied also in the context of cross-border provisional measures. In this context it may be pointed out, that under German law the successful party is entitled to the compensation for all its expenses which he had properly spent for the *Rechtsverfolgung* (court proceedings). This includes costs arising abroad.

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<sup>957</sup> *Comet Group PCL./Unica Computers SA* [2003] ILPr 1.

<sup>958</sup> See for example *Stadler*, JZ 1999, 1089, 1097.

<sup>959</sup> Against this proposition in explicit terms *Merlin*, Riv. dir. proc. 2002, 759, 795; *ConsoIo*, Int’Lis 2001, 73, 84.

<sup>960</sup> *BGH*, NJW 1986, 2438.

741 c) Notwithstanding the safeguards set up by the Court of Justice, the point has been made that affirmative injunctions (as to be distinguished from interim refraining orders), including orders for provisional payment, would amount to circumventing the Judgment Regulation's system of jurisdiction if covered by Article 31 JR. It is, however, to be supposed that those remarks were made in view of *référé provisions* which were not accompanied by a pre-constituted guarantee of the applicant. A guarantee to be provided by the applicant is such a strong restriction of the court's normal powers that no circumvention of the jurisdictional system of the Judgment Regulation can reasonably be apprehended.

*c) Extraterritorial Effect of Measures (including Recognition and Enforcement abroad)*

742 1. The rule normally applied is given by Articles 32, 33, and 38 JR: A decision granting any provisional measure is to be recognised and enforced abroad like any other decision. This means that the issuing court of origin must not deal with whether its measure should or may be subject to enforcement abroad. Therefore, the initial reluctance of the courts to issue cross-border injunctions has been abandoned since the Dutch *Hoge Raad*<sup>961</sup> and the Benelux Court of Justice had decided to the contrary<sup>962</sup>. In a well known judgment of the *Gerechthof Den Haag*<sup>963</sup> the injunction affected patents granted for Austria, Belgium, France, Germany, Luxembourg, Liechtenstein, Netherlands, Sweden, Switzerland and the U. K. The court assumed that, due to the Munich Convention, the foreign jurisdiction had similar rules on refraining somebody from interfering into the right of a patent holder.

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<sup>961</sup> 11/24/1989, NJ 1992 No. 404,1597.

<sup>962</sup> 03/26/1996, A 92/3, Official Collection t. 14 p. 39.

<sup>963</sup> GRUR Int 1995, 253 (*Applied Research Systems NV./Organon*).



- 743 As shown before, the Court of Justice, however, set up three limitations to the concept of provisional measures in general, or to extraordinary provisional measures in particular.
- 744 2. Measures granted subsequently to unilateral proceedings (*ex parte*) and not afterwards confirmed in the light of the respondent's explanations are not "decisions" within the meaning of Article 32 JR. As case law of national courts demonstrates, cross-border enforcement of provisional measures becomes possible subsequent to its confirmation after the respondent has submitted his comments. Courts should also be encouraged to enforce foreign measures after the respondent had an opportunity (including sufficient time) to request a discharge of the measure. The *Cour d'Appel Bourges* has already adopted this view. The *Oberlandesgericht Kiel*<sup>964</sup> has even expressed the view that the *Denilauler* ruling of the Court of Justice has become obsolete since the Judgment Regulation is in force. The judgment, however, has been set aside by the *Bundesgerichtshof*,<sup>965</sup> which disapproved of the lower court's approach. The *Bundesgerichtshof* reported that the respondent in the underlying proceedings had lodged an appeal from the Swedish arrest decision. Unfortunately, the *Bundesgerichtshof* was not informed on whether that appeal had led to the confirmation of the measure.
- 745 3. Extraordinary provisional measures may only be given where "a real connecting link between the subject matter of a measure sought and the territorial jurisdiction..." exists. It is evident, that under such a purview, worldwide extraordinary provisional measures cannot be enforced abroad. Measures respecting the requirement of a "real connecting link" are by their very nature unsuitable for being enforced abroad. Hence, the only considerable exception to the territorial limitation of extraordinary provisional measures would be transferring of

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<sup>964</sup> 05/09/2005 – 15 W 48/05, Schleswig-Holsteinische Anzeigen 2006, 134.

<sup>965</sup> 12/21/2006 – IX ZB 150/05. See regarding this judgment also the section on free movement of judgments D.V.2.a), para. 527.

assets across the border subsequent to the issuing of a provisional measure.

- 746 4. In the case of interim payments, a guarantee for repayment must be provided by the finally unsuccessful applicant.
- 747 5. The practical problems of extraterritorial effects and enforcement abroad relates to the English “freezing order”.
- 748 a) Is it in conformity with the Judgment Regulation that English judges distinguish between merely domestic freezing orders and worldwide freezing orders, implying thereby that a “simple” domestic freezing order is by its very nature unsuitable for enforcement abroad? And, is it in conformity with the Regulation that in the context of worldwide freezing orders, the claimant may be requested to give an undertaking, not to enforce the measure abroad unless specifically authorised so by the court the authorisation of which may be limited to specific countries? The point has not been made so far in legal doctrine, but has only been concerned in case law. The reporters tend to suppose that this practice is not in conformity with the Judgment Regulation, which empowers each successful claimant or applicant to enforce any judicial decision obtained in a sister State.
- 749 b) What is the real impact of a worldwide freezing order the enforcement of which the issuing court may have permitted to the widest possible extent? In particular, what is the meaning of number 19 (2) (c) Practice Direction which states that “any other person [is affected] only to the extent that this order is declared enforceable by or is enforced by a court in that country or state”? Does this mean that only enforcement devices of the foreign jurisdiction (where the order has been declared enforceable) are available? Does it mean that under that condition recourse to contempt of court penalties of English Courts is imminent? It seems that the words “to the extent” makes sanctions by English Courts obsolete. But for what is then the purpose of the rule? The fact, that a decision is enforceable abroad to the extent that it has been declared enforceable there, is self evident and does not need to be incorporated into the domestic rule. In prac-

tice, the crucial issue is the following: The respondent not residing in England or Wales maintains bank accounts with a foreign bank having its seat outside England and Wales but running a branch in England. Assuming, the bank follows the instructions of its client to transfer money from the latter's non English bank account to somewhere else, is the bank then subject to contempt of court sanctions based on the "jurisdiction" of the English Courts over it due to the running of the branch in England? In practice, English Courts have made many efforts to balance the interests of the applicant and the interests of the bank not to be improperly affected in its normal business abroad and, in particular, in its compliance with local legislation abroad. There are, however, strong traces that, normally, English Courts will sanction foreign banks having a branch in England if they disregard a worldwide freezing order by executing orders of their clients even if not related to the accounts of the English branch. In the respective case *Baltic Shipping Comp./Translink Shipping Ltd.*<sup>966</sup> A worldwide freezing order was granted *ex parte*, against Translink Shipping. The French bank *Crédit Lyonnais* was duly informed of the issuance of the order. The focus of the applicant was an account of the respondent with the New Caledonian branch of the bank. The fact that *Crédit Lyonnais* maintained a branch in London made it subject to the jurisdiction of the Courts of England and Wales. Normally, the bank would have thereby exposed itself to contempt of court sanctions for following the instruction of its client relating to the account in New Caledonia. In order to better balance the mutual interests, at the application of *Crédit Lyonnais*, the English Court issued the following variation of the worldwide freezing order:

"...

750 In respect of assets located outside England and Wales (and in particular New Caledonia) [the order does not] prevent *Crédit Lyonnais* or its subsidiaries from complying with:

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<sup>966</sup> [1995] Lloyd's Rep. 673.

- 751 a) What it reasonably believes to be its obligations, contractual or otherwise, under the laws and regulations of the country or State in which those efforts are situated are under the proper law of the account in question.
- 752 b) Any orders of the courts of that country or state.”
- 753 c) As the *Stolzenberg* case<sup>967</sup> reveals the enforcement abroad of an English freezing order is very difficult, even impossible in most Member States. In France, and in a comparable case in Germany<sup>968</sup>, the order was rather declared “enforceable” without any reflection. But this order was of no direct use to the applicant because no means of enforcement were available in the “enforcing” Member State. In France, the Advocate General at the *Cour de Cassation* stated literally<sup>969</sup>:
- 754 *“S’agissant de l’injonction Mareva, il est permis de s’interroger sur l’intérêt d’une procédure destinée à la faire déclarer exécutoire en France dès lors qu’elle ne prescrit aucune mesure susceptible d’exécution forcée. Son effet en droit anglais ne consistant qu’en une interdiction morale adressée au débiteur, on discerne mal en quoi il peut être nécessaire de la déclarer exécutoire en France, compte tenu du principe selon lequel une décision étrangère ne saurait avoir dans l’État requis une portée plus grande que dans l’État d’origine. L’explication tient sans doute à notre pratique de l’exequatur à toutes fins utiles, la procédure ayant pour unique objet de faire déclarer régulier un jugement étranger sans viser en même temps des mesures d’exécution ou de coercition”.*

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<sup>967</sup> See herein above para. 671.

<sup>968</sup> See herein above para. 675.

<sup>969</sup> JCP Jurisprudence 2004 II 10198.

*d) Interaction of the Court seised or to be seised for the Substance of the Matter with the Court issuing Provisional Measures*

755 The attractiveness of the “draconian character” of a worldwide freezing order is certainly undisputable. Therefore, English courts had the idea that they had to “assist” courts in other jurisdictions by issuing such a measure should this not be available in the respective jurisdiction. This leads to the next point.

756 One may focus on the trans-border effectiveness of protective measures in two ways, which are certainly interlinked, but which, nonetheless, must be distinguished. One must direct the focus first on the interests of the applicant (to be balanced against the interests of his opponent). The applicant must be protected against the factual frustration of his rights. In this view the work of the issuing court is done once an effective measure of protection has been issued. The other focus is on cooperation between the two judiciaries. The court addressed by the applicant has the primary task to assist the court seised with the substance of the matter in finding a just and effective solution. The court of provisional measures may so “lend remedies” to the court of the main proceedings. The first view may occasionally amount to something like a jurisdiction by necessity for provisional measures (a). The second view must provide particular powers for the court seised, or to be seised, with the substance of the matter (b).

757 1. The paradigm case for the first view is the *Duvalier* case<sup>970</sup> relating to the former dictator of Haiti. The subsequent government of Haiti had sued or was preparing to sue *Duvalier* in France for the restitution of more than \$ 100.000.000 *Duvalier* was alleged to have embezzled. *Duvalier* had his residence in France and no contacts to England other than to a solicitor he had consulted on how to administer his money without traces. The English Court granted the freezing order on the basis of very artificial constructions founding its jurisdic-

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<sup>970</sup> *Republic of Haiti./Duvalier* [1989]1 All ER 456 et seq. CA.

tion. The “real-connecting-link”-doctrine of the Court of Justice did not yet exist. Subsequently the decision was defended<sup>971</sup> by *Millet L. J.* who stated:

758 “The circumstances can be said to have been very exceptional, though to my mind the circumstances which justified this exercise of jurisdiction was that otherwise no effective protection could be given to the plaintiff anywhere”.

759 In the same decision, *Lord Bingham of Cornhill L. J.* said in respect of the worldwide freezing order under consideration that the remedy would not have been available for Swiss Courts and that no danger of contradicting decision existed either. He made the point that presumably the issuing of the measure would be very much welcomed by the Swiss Court seised with the substance of the matter.

760 2. If, however, the purpose of provisional measures given or to be given in an extraordinary jurisdiction or by a court of alternative jurisdiction, is to assist the court seised or to be seised with the substance of the matter the following inference is due: The court seised with the substance of the matter must always have power to lift or to modify the measure ordered by the foreign court or to substitute it by a measure available under its own laws. So far, the point whether national legislation may empower a court to directly set aside or modify a decision of a foreign court has never been contemplated in matters not referring to custody or maintenance<sup>972</sup>. Neither do any national reporters deal with this issue nor does any of the national reporters, except the Irish one, provide information on what occurs after a provisional measure has been ordered by a national court when a foreign court is the court of the main proceedings. Only the Irish Courts are said to have jurisdiction to discharge the protective measure in

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<sup>971</sup> In *Crédit Suisse Trust./Cuoghi* [1998] W.L.R. 871 (879).

<sup>972</sup> *Kurtz*, *Grenzüberschreitender Rechtsschutz*, p. 82 makes the point that the court seised with the substance of the matter may refuse recognition to foreign provisional measures.

view of the development (including the termination) of the foreign proceedings.

761 However, now time is ripe to approach the general problem. Why should the court seised with the substance of the matter – within the boundaries of the European Union – not have power to set aside or to modify a provisional measure that is given by the court of a sister State for the very purpose to assist the court seised, or to be seised, with the substance of the matter? In the *Motorola Credit Corporation* case<sup>973</sup> of the English Court of Appeal, such a consideration has already left traces. The German Courts were to be seised with the main proceedings. Therefore, the point was made, that the issuing of the injunctions would in no way interfere with the German Courts' decision making processes and would merely maintain the position until the German Court made their jurisdiction decisions. This statement clearly implies the assumption that after the German Court made their jurisdictional decisions they would be free to uphold, to set aside, or to vary the English freezing order.

762 Should this view be accepted and adopted it would no longer be reasonable to uphold the Court of Justice's doctrine that a court having only extraordinary jurisdiction under Article 31 JR is exclusively empowered to measures having a genuine link with the territory of its State. In a recent English case,<sup>974</sup> the judge upheld an interim restraining order, assuming hypothetically that it was granted under Article 31 JR only, by arguing that the German Court to be seised with the substance of the matter could discharge the order and, thus, must not be protected against the intrusion of the English judiciary.

#### e) *Anti-Suit Injunctions*

763 The decision of the Court of Justice disempowering the courts of the Member States to issue an injunction against instituting or maintain-

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<sup>973</sup> *Motorola Credit Corporation./Uzan (no. 2)* [2003] EWCA Civ. 752, [2004] 1 WLR 113.

<sup>974</sup> *Morgan./Primacom Ltd* [2005] EWHC (Comm).

ing proceedings in other courts of the Member States (“anti-suit injunction”) has been severely criticised in the United Kingdom. *Barbara Domann QC* and *Adrian Briggs* wrote an essay under the title: “Learning to learn from others in Europe in commercial litigation.”<sup>975</sup>.

Their criticism culminates in the following statement:

764 “One wonders whether the antisuit-injunction of Common law systems is not something which other systems should adopt rather than something which English law must forget”.

765 It is indeed worth considering that efficient protection against disregarding jurisdiction agreements or the Regulation’s system of heads of jurisdiction requires the means of anti-suit injunctions. This injunction, however, by its very nature can hardly qualify as provisional or interim.

*f) “Provisional” Measures given simultaneously, or even subsequent, to the Rendering of the Final Judgment.*

766 It has already been mentioned that a worldwide freezing order may be issued even in conjunction with the final order given in the substance of the matter. Very often the continuation of the injunction is not limited until the lapse of the deadline for lodging an appeal or, respectively, until the resolution of the main proceedings. In the *Stolzenberg* case of the *French Cour de Cassation* (see para. 671) the worldwide freezing order declared enforceable in France was made several years before enforcement proceedings under Article 38 JR et seq. had been instituted in France. The point therefore is, whether such a variant of a “provisional” freezing order is not a means of enforcement rather than a provisional measure within the framework of Article 31 JR. It is very little intelligible that the court of origin of the judgment on the substance of the matter would have power to direct enforcement proceedings, even if limited to measures ensuring the effectiveness of any subsequent seizures or attachments of any kind.

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<sup>975</sup> In: *Grenzüberschreitungen*, Festschrift Schlosser, pp. 161, 168.



The problem, however, is not restricted to extraordinary measures of protection such as dealt with in Article 31 JR. The problem is, rather, as the Spanish rapporteur *Delcasso* correctly pointed out,<sup>976</sup> to generally distinguish provisional measures from enforcement devices.

767 The question mark made by *Dickinson* (see para. 710) on the position of the English Courts regarding this distinction is even more justified, since in practice the particular value of a freezing order consists of its element ordering the debtor to immediately disclose the whereabouts of all of its assets worldwide. However, devices for uncovering the whereabouts of the debtor's assets are universally qualified as enforcement devices if they provide for discovery subsequently to the rendering of the final judgment. The main place for discussing "provisional enforcement" measures is the chapter on Free Movement of Judgments<sup>977</sup>.

*g) Measures for obtaining Information*

768 It is doubtful whether the Court of Justice's ruling given in the *St. Paul Dairy* case<sup>978</sup> covers all kinds of pre-action measures aiming at obtaining information. The particular accent of that case was that the purpose of the measure was to enable the applicant to inquire whether he had a claim against the respondent. In a normal case, however, the applicant is perfectly convinced that he has such a claim and he is only inquiring for sufficient evidence to prove it. As is to be developed in the context of the protection of intellectual property rights,<sup>979</sup> it is preferable to draw that distinction rather than to exclude measure relating to information completely from the scope of the Judgment Regulation. When pre-action measures for obtaining information should neither be covered by this Regulation, nor by the

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<sup>976</sup> He even said that for this ground Article 47 (2) JR is incomprehensible.

<sup>977</sup> See herein D.V.5, paras. 592 et seq.

<sup>978</sup> See herein above para. 661.

<sup>979</sup> See herein *infra* paras. 843 et seq.

European Evidence Regulation, they would fall short of any European legal instrument. This would entail the consequence that Member States are free to provide such measures worldwide, subject only to the sovereignty doctrine. It is, however, not self-explanatory that the distinction between preservation of evidence and investigation on whether a claim exists should become crucial at all. Why should a prospective claimant in proceedings for the substance of the matter not be able to take advantage of domestic provisions for such a relief whenever the information sought is clearly located on the territory of the court's State? Some jurisdictions may provide measures more efficient than others. Therefore, the doctrine of *St. Paul's Dairy* should be reconsidered. At least, it should be limited to inquiries whether a claim exists and not be extended to the preservation of evidence. Some consequences which may seem strange only at first glance could easily be accepted.

- 769 1. As far as jurisdiction is concerned Article 31 JR and the Court of Justice's doctrine relating thereto, problems do not arise. The existence of the information on the territory of the State of the court seised is justifying the exercise of jurisdiction.
- 770 2. Such measures may rarely be "enforced" under the Judgment Regulation. Often, no individual "respondent" is even named. If a person is named as the respondent then "enforcement" is still difficult, because in most Member States the device of *astreintes* is not available. Nevertheless, in most cases, the indirect sanction to be apprehended by the reluctant party results in "voluntary" compliance of all persons concerned with the measure. The indirect sanction consists of the fact that refusing to comply with the measure would shed unfavourable light on the respective person in the forthcoming proceedings on the substance of the matter.
- 771 3. If needed for enforcement purposes, the measure may be transformed into a request under the Evidence Regulation. For example, an expert's access to the site in dispute may thus be ordered by the

local court. It is common ground that the Evidence Regulation is also applicable where judicial proceedings are only contemplated<sup>980</sup>.

772 4. Furthermore, direct pre-action conservation of information located abroad should be contemplated as long as no direct means of coercion are needed. An example is a decision of the *Cour d'Appel Versailles*<sup>981</sup>. The French court ordered an expert to go to Madrid and to make findings as to the disorder created by the collapse of a building in construction, to give his opinion on the cause of the collapse, to make proposals for the solutions (probably the re-construction) and for the assessment of damages. Assuming that the main proceedings were to be instituted in France, it makes much sense that an expert familiar with the judicial practice in France is sent abroad. An expert report made by a Spanish expert would probably have been of little use for the French court – let alone all the problems connected with the translation.

773 5. A measure ordered and carried out by a foreign court may be “recognised” under the Judgment Regulation to the result that the information obtained may be used as if obtained by the domestic court itself<sup>982</sup>. A recent amendment to the German *ZPO* (sec. 411a) may provide a good example. According to the relevant provision, a court may take recourse to an expert report made at the request and for the purpose of another court. “Another court” may be the court of a Member State, which ordered the expert opinion. True, judicial measures granted without a previous chance for the respondent to explain his view may not be recognised under the Judgment Regulation<sup>983</sup>. However, as has been explained<sup>984</sup>, a measure maintained

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<sup>980</sup> Correctly emphasised by *Szychowska*, I.R.D.I. 2006, 111, 116. She also correctly defends the proposition that a rather irritating Council resolution excluding “pre-trial discovery” from the Regulation’s scope of application must be restricted to American style “fishing expeditions”.

<sup>981</sup> Rév. crit. 1995, 80.

<sup>982</sup> Very much in favour of such an approach also *Treichel* in a very thorough analysis of the French *saisie-contrefaçon*, GRUR Int 2001, 690, 698 et seq.

<sup>983</sup> *ECJ*, 05/21/1980, C-125/79, *Denilauler./Couchet Frères*, ECR 1553.

after the respondent had an opportunity to defend himself must be recognised.

*h) Does an Arbitration Agreement really have an Impact on the Courts' Jurisdiction to Order Provisional or Protective Measures?*

774 Contrary to the Court of Justice's holding, the existence of an arbitration agreement and even the pendency of arbitral proceedings is not a valid reason to restrict the jurisdiction of national courts to grant interim relief. The effectiveness of arbitration often depends on the interim protection granted by the courts, in particular until the arbitral tribunal is set up. Therefore, Article 9 of the UNCITRAL Model Law on international arbitration provides:

"It is not incompatible with an arbitration agreement for a party to request, before or during the arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure..."

775 This provision demonstrates that, contrary to the Court of Justice's view, in respect of provisional and protective measures, an arbitration agreement does in no way disempower the court which would otherwise have jurisdiction for the substance of the matter. The parties to the agreement cannot reasonably be supposed to have had such an intention.

*i) Protective trans-border attachment of bank accounts*

776 This evaluation does not deal with the idea of a European Protective Order for Cross-Border Garnishment. Such a proposal was made by one of the scholars entrusted with this evaluation (Professor Hess) in the Study JAI/A3/2002/02 at D 6 b: It has been taken up by the Commission's Green Paper of 24 October 2006 on Improving the Efficiency of the Enforcement of Judgments in the European Union; The Attachment of Bank Accounts (SEC (2006) 1341). At that time the national reporters had already completed their contributions and

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<sup>984</sup> See herein above paras. 742 et seq.

could not collect the reaction of interested persons and groups to the Green Paper.

#### 4. Policy Recommendations

777 1. The most deplorable shortcoming of the Regulation is the lack of any provision vesting the courts of the Member States, having jurisdiction for the substance of the matter and seised with the respective law suit, with the power to set aside or to modify in pursuance with their own law a provisional or protective order granted by a court of another Member State (see above paras. 756 et seq.). Such a provision should be added to Article 31 JR.

778 2. Should this be accepted, the Judgment Regulation could be rather liberal in upholding Article 31 JR.

779 3. Two of the requirements on the fulfilment of which the Court of Justice insists are reasonable:

780 a) For the purpose of enforcement abroad, the respondent must have had a previous or subsequent opportunity to comment the application for granting the provisional or protective order.

781 b) As a general rule, the applicant must be ordered to provide a guarantee for the “repayment” of the amount ordered to be paid in the interim measure. The mere existence of a substantive claim for compensation is not a sufficient guarantee.

782 4. But even in the latter context, it would be worthwhile to enact specifications in view of the fact that not only provisional “payment” may be ordered and that bank guarantees are not always available for the applicant. The issuing judge should have discretion to specify details of the guarantee. Under equitable considerations, it must not cover all the amounts later probably due under compensation concepts and the duration of the guarantee may be limited subject to later prolongation. Often it may be too hard (even impossible) for the respondent to provide a bank guarantee, let alone one with an indefinite duration.

“The best solution, however, would be to exclude interim payments from the field of application of Article 31. This proposition has already been made in the Study of Professor Hess JA/A3/2002)02 in chapter D paragraph 6 a. Thus, only the court vested with jurisdiction for the subject of the matter would be empowered to order interim payments. A need for extraordinary jurisdiction for interim performance does not exist”.

783 5. To require a genuine link between the subject matter of the measure sought and the territorial jurisdiction of the Member State of the court in which the measure is sought, would not be justified as a general rule. It should rather become an element of the court’s discretion. It is not appropriate in this context to consider only seizure of property. But even then world-wide “freezing” orders (under the respective legal order possibly enforceable into assets world-wide) are a very useful and equitable means of protecting rights even when issued by a court not vested with jurisdiction for the substance of the matter. Furthermore, even interim performance, be it partial performance, may reasonably be the content of a provisional measure. In complex cases interim performance against interim payment may be ordered. This may be done so in construction cases for safeguarding the continuation of the works. It is a matter of course that such a power should be exercised with great caution. No ground, however, exists to completely disempower the court of extraordinary jurisdiction under Article 31 JR to grant such a measure. After all, one should not close one’s eyes before the undisputable fact that in some Member States much more efficient provisional protection is available than in others. “Provisional” forum shopping is not systematically to be discouraged.

784 6. It should be made clear that an arbitration agreement does not affect the jurisdiction of a court to grant provisional or protective measures.

**785 In summary:**

786 Article 31 JR should be supplemented by two new paragraphs:

787 *(2) In the case of an order for interim performance the court shall make the enforcement of the order dependent on the providing of a bank guarantee (on conditions to be specified by the court) for repayment or damages due whenever the applicant should be finally unsuccessful in the proceedings for the substance of the matter. In order to avoid unusual hardship, however, the court may grant the applicant an exception.*

788 *(3) The court vested with jurisdiction for, and seised by either party with the substance of the matter, has power to discharge, to modify or to adapt to its own legal system any provisional measure granted by a court of another Member State.*

789 Article 1 should be supplemented as follows:

790 *...[arbitration] not including provisional measures not affected, under the law of the Member State, by an arbitration agreement*

**VII. Intellectual Property Rights<sup>985</sup>**

791 The only place where the Regulation refers to intellectual property rights is Article 22 (4) JR providing for an exclusive head of jurisdiction for “proceedings concerned with the registration or validity of patterns, trade marks, designs or other similar rights acquired to be deposited or registered”.<sup>986</sup> Nevertheless, intellectual property rights

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<sup>985</sup> The papers submitted to the Brussels Conference of the “Université Libre” on 02/03 March 2007 could not be taken into consideration any more. General subject: Le contentieux international de la propriété intellectuelle. Papers: *Jean-Sylvestre Bergé*, Le cadre communautaire des litiges transfrontiers en matière de propriété intellectuelle et de technologie d’information; *Paul L. C. Torremans*, The widening reach of exclusive jurisdiction: Where can you litigate IP rights after GAT?; *Christina Gonzáles-Beilfuss*, Is there any web for the spider jurisdiction over co-defendants after *Roche Nederlands?*; *Anna Cardella*, Les “torpilles italiennes”. Etat de la question; *Richard Fentman*, Parallel proceedings in intellectual property litigation; *Marta Pertegás*, The appropriate venue for cross border patent disputes heading (far) west?.

<sup>986</sup> In this context it must be mentioned that in the English drafting the word „concerned“ instead of „which have as their object“ is unexplainable. In all the other languages also in Article 22 (4), (5) the drafting is „which have as their object“. Only the English version

has developed as a special field within the Judgment Convention (and subsequently the Regulation) affecting a variety of its provisions. In Germany, the last three years have seen at least 5 voluminous treatises published on this subject<sup>987</sup>, let alone multiple broader publications providing (among other things) explanations of jurisdictional issues relating to intellectual property in the context of the Regulation or the Judgment Convention. Therefore, all the problems related to intellectual property rights should be dealt with in one place. The particularity of this field stems to a large degree from the particularity of the Munich Patent Convention of 1973.

792 To put it in a nutshell:

793 First: The Munich Patent Office issues a bundle of national patents rather than a uniform European or Community patent.

794 Second: Nonetheless, the domicile of the defendant vests the court with jurisdiction in infringement cases, even if the case is an infringement of a foreign patent, particularly of an element of the bundle constituting the patent protection for the territory of a State other than the one where the alleged infringer has his domicile or his seat.

795 A special focus of the work done in that field by the authors was demonstrated by two judgments given by the Court of Justice on July, 13<sup>th</sup> 2006<sup>988</sup> which will certainly give rise to much critical discussion<sup>989</sup>. The rulings of these judgments will be dealt with in the respective context. No particular regard will be given to a third pre-

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deviates from the formulation, „which have as their object“, such as used in the first three numbers and takes the term „concerned with“ in the last two numbers.

<sup>987</sup> *Ebner*, Markenschutz; *Hölder* Grenzüberschreitende Durchsetzung Europäischer Patente; *Hootz*, Durchsetzung von Persönlichkeits- und Immaterialgüterrechten; *Hye-Knudsen*, Marken-, Patent- und Urheberrechtsverletzungen; *Kurtz*, Immaterialgüterrecht. Two years before that period: *Zigann* Ausländische gewerbliche Schutzrechte und Urheberrechte.

<sup>988</sup> *ECJ*, 07/13/2006, C-4/03, *Gesellschaft für Antriebstechnik mbH & Co KG./Lamellen- und Kupplungsbaubeteiligungs KG*, OJ C 224 of 09/16/2006, 1; *ECJ*, 07/13/2006, C-539/03, *Roche Nederland BV and Others./Frederick Primus and Milton Goldenberg*, OJ C 224 of 09/16/2006, 1.

<sup>989</sup> See *infra* paras. 815 et seq. and 825 et seq.



liminary ruling of the Court<sup>990</sup>. There, the Court of Justice held what in the meantime has become self-evident: The terms used in Article 22 (4) JR have an autonomous meaning and do not refer to domestic legislation. Only the requirement of registration must necessarily be derived from domestic legislation unless community law itself provides for registered rights.

796 The authors have tried to collect every relevant case law available and to obtain comments from practitioners. Two presiding judges of two chambers of the *Landgericht Düsseldorf* and one presiding judge of a chamber of the *Landgericht München* specialised in the field were interviewed by correspondence and by telephone. Approximately 30 reputed law firms in the field were approached. They were taken from the indications given in the programme “Legal 500” where specialised law firms in all the EU-countries are designated. Furthermore, the authors addressed practicing lawyers they knew personally or who, due to their contacts with practice, were supposed to have practical experience. The national reporters, particularly Mrs. *Freudenthal* from the Netherlands, also had multiple interviews with judges and law firms.

Against this background six major issues can be addressed.

797 1. Proceedings for invalidation of a patent or another intellectual property right – and proceedings for a negative declaration of non-infringement – may be taken as a so-called “torpedo action” for the purpose of paralysing imminent infringement proceedings.

798 The recent decision of the Court of Justice in the *GAT* case may give rise even to a “super torpedo action”, to be instituted subsequently to the commencement of infringement proceedings.

799 2. In most patent infringement proceedings the defendant makes the point that the patent is invalid. According to one of the judgments of

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<sup>990</sup> ECJ, 11/15/1983, C-288/82, *Ferdinand Duijnste./Lodewik Godenbauer*, ECR 1983, 3663.

July, 13<sup>th</sup> <sup>991</sup> the Court of Justice held that this defense is for the exclusive jurisdiction of the State to which the patent is attributed. What legal inferences does this rule entail in respect of pending infringement proceedings?

800 3. In the case of strategically pursued large scale infringements of many segments of a Munich patent bundle, may proceedings be consolidated for achieving an efficient redress of the infringement?

801 4. Part of the legal protection of intellectual property rights is a permanent injunction enjoining the continuation of the incriminated activities. How are they to be enforced efficiently across the borders?

802 5. May the loss of efficiency of infringement proceedings as caused by the recent rulings of the Court of Justice be outweighed by efficient provisional measures?

803 6. In issue no. 6. some remaining points must be raised including the assessment of damages according to the “*Shevill*-doctrine” and compensation for using the official publication of patent applications.

### 1. The Problem of Preventive Torpedo Actions

804 The tactical device, called “torpedo action”, is in essence the following: The alleged infringer of an intellectual property right himself sues the alleged victim requesting a negative declaration either of non-infringement or, even, of the patent’s invalidity. Since, under the Court of Justice’s rulings, the objective of a request for negative declaration is the same as of an action for damages or for refraining from continuing the incriminated activity,<sup>992</sup> the consequent infringement proceedings are stayed under Article 27 JR. The torpedo action aims just at this effect. The risk that finally the torpedo action will fail is well calculated, because it is more than outweighed by the time to be gained. Indeed, in intellectual property matters, time gained is of a

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<sup>991</sup> Case C-4/03.

<sup>992</sup> ECJ, 12/08/1987, C-144/86, *Gubisch./Palumbo*, ECR 4905, 4917.

much higher value than in other kinds of litigation. Therefore, torpedo claims are sometimes deliberately instituted in jurisdiction known for their time-consuming proceedings. Hence, the term “Italian” or “Belgian” torpedo. The device is successful even if it is quite evident that the court seised is lacking jurisdiction. The German lawyers and a lawyer of a reputed English law firm responding to our inquiry complained of infringement proceedings often being paralysed by preventive torpedo actions. Cases were referred to by those lawyers, where courts of a State had been seised with patent annulment proceedings, for which State the patent had not even been issued. The only thing that counts for the claimant in torpedo actions is: the courts seised may need many months, even years, for deciding the jurisdictional issue.

- 805 The most striking case of torpedos was the *Boston Scientific versus Johnson & Johnson* litigation<sup>993</sup>. In order to block an apprehended application for a Dutch interim injunction not to use a patent for the manufacturing of stents, actions for declaratory relief were filed in the courts of Belgium, France, Germany, United Kingdom, Italy, Sweden, Spain and The Netherlands.
- 806 The most sophisticated case of a torpedo claim was a German one directed against imminent French infringement proceedings. The alleged infringer seised a German administrative tribunal in negative declaration proceedings (for non-infringement). He very realistically speculated on the outcome that after a while, the administrative court would discover its lack of subject matter jurisdiction and then would transfer the case to the court competent for civil matters. This court, in turn, was supposed to State, again after the lapse of considerable time, that it lacked international jurisdiction. Presuming that by this strategy, time of approximately one year may have been gained; this would be quite a lot in intellectual property proceedings.

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<sup>993</sup> Reported in all its details in *Zigann op. cit.*, pp. 13 et seq.

- 807 Some courts did their best to overcome such an abuse.<sup>994</sup> The *Rechtsbank Den Haag*<sup>995</sup>, the *Landgericht Düsseldorf*<sup>996</sup> and the *Tribunal de Grande Instance Paris*<sup>997</sup> as well as the *Tribunal de Bruxelles*<sup>998</sup> stated directly that they deliberately disregarded abusive torpedo actions. It was, however, told that the *Cour de Cassation* in Paris disapproved of such an approach. The Italian *Corte di Cassazione* made the point that in infringement proceedings instituted on the basis of Article 5 (3) JR and negative declaration or annulment proceedings have distinct objects<sup>999</sup>. The *Tribunal de grande instance* of Paris<sup>1000</sup> had adopted the same view. It is reported that the English courts disregarded an Italian torpedo where the Italian court was lacking jurisdiction.<sup>1001</sup>
- 808 All these approaches, however, do not comply with the case law of the Court of Justice. This is clear for the definition of the object of litigation such as referred to in Article 27 JR. It is less clear but presumably to be derived from the *Grovit./Turner* case<sup>1002</sup> where it was held that even oppressive and vexatious litigation abroad does not justify any anti-suit injunction. Furthermore, the ruling of the *Corte di Cassazione* does not affect Italian torpedos against infringement proceedings in other Member States.
- 809 Another disastrous consequence of a torpedo lawsuit should not be dissimulated: The court of the infringement proceedings will entirely be deprived of its jurisdiction. One must remember that in the Court

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<sup>994</sup> See the very detailed report of *Leitzen* in his essay in GRUR Int 2004, 1020.

<sup>995</sup> 09/29/1999, DSM./NOVO Nordisk, IER 2000, 39.

<sup>996</sup> 12/19/2002, InstGE 3, 8.

<sup>997</sup> 03/09/2001, *Schaerer, Schweiter./Fadis*, IIC 2002, 325.

<sup>998</sup> GRUR Int 2001, 170 – *Röhm-Enzyme*.

<sup>999</sup> 12/19/2003, *BL Machine Automatische Windmöller./Hölscher*, No. 19550, GRUR Int 2005, 264; *ibidem* Supreme Court of Sweden, GRUR Int 2001, 178 – *Flootek*.

<sup>1000</sup> 04/28/2001, GRUR Int 2001, 173. Similarly judgment of 11/18/2003, *Nikon Metal Gasket KK et Ebring Klinger./Meillor* PIBD No. 783 III 188 because, according to the court, the Italian judge cannot rule on an infringement committed on French territory.

<sup>1001</sup> *Pitz*, GRUR Int 2001, 33, 37.

<sup>1002</sup> 04/27/2004, C-159/02, ECR 2004 I-3565.

of Justice's case law, negative declaration proceedings and proceedings to enforce a right have the main object, i. e. main "heart" (*Kernpunkt* in the German version of the judgment)<sup>1003</sup>. Therefore, once the court seised in invalidation or negative declaration proceedings has assumed jurisdiction, due to the mandatory provision of Article 27 (2) JR the court seised in infringement proceedings must decline its jurisdiction for the entire case. Such has indeed been the ruling of the English courts referred to in fn. 1008 and 1009. Hence, subsequent infringement proceedings cannot be re-assumed. Consequently, the problem arises: Where to institute proceedings for the infringement claim? Very often the court having jurisdiction for invalidation of patents does not have subject matter jurisdiction for infringement actions.

810 It is doubtful whether the European Union can tolerate such a judicial blockade in the light of its own Directive on the Enforcement of Intellectual Property Rights<sup>1004</sup>. The European Union itself committed the Member States to provide for what follows (Article 3):

811 "1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays."<sup>1005</sup>

812 2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse".

813 The European Union risks becoming untrustworthy, if it commits its Member States to care for uncomplicated remedies and absence of

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<sup>1003</sup> See fn. 991.

<sup>1004</sup> [EC] 2004/48 of 04/28/2004, OJ L 157/45.

<sup>1005</sup> Emphasis added.

unwarranted delays and does in its own regulation enact provisions entailing just the contrary effect.

814 It should not be dissimulated that practicing lawyers report of a drop in torpedo actions, one of them even stating that the time of torpedo actions is over. Furthermore, the situation in Italy has improved. As of July 1<sup>st</sup> 2003, specialised chambers have been set up in 12 Italian courts resulting in more speedy proceedings. It is also reported, that Italian courts tend not to assume jurisdiction in infringement proceedings relating to non-Italian parts of a European bundle patent<sup>1006</sup>. Nonetheless, the situation has become worse due to the recent ruling of the Court of Justice in the *GAT* case which ruling gives rise to super torpedo actions. This shall now be explained in the remarks concerning the second issue to be discussed.

## **2. The Defence based on the Alleged Invalidity of a Patent the Issue of which is Claimed to be for the Exclusive Jurisdiction under Article 22 (4) JR**

815 In the case referred to<sup>1007</sup>, it was decided, that the reasons given by the Court of Justice supporting the proposition that the ruling should apply not only to patents but also to all the remaining intellectual property rights referred to in Article 22 (4) JR:

816 “The rule of exclusive jurisdiction laid down [in Article 22 (4) JR] concerns all proceedings relating to the registration of a patent, irrespective of whether the issue is raised by way of an action or a plea in objection.”

817 The same interpretation had previously been proposed in England by the *High Court, Chancery Division*<sup>1008</sup>, and the *Court of Appeal*<sup>1009</sup>.

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<sup>1006</sup> See report in GRUR Int 2003, 1045.

<sup>1007</sup> See fn. 988.

<sup>1008</sup> *Coin Controls Ltd./Suzo Int'l (UK) Ltd.* [1997] 3 All E.R. 45; *Sepracor Inc./Hoechst Marion Roussel Ltd* [1999] FSR 746 = [1999] F.S.R. 237.

The solution conforms well to the English patent legislation. The Patent Court (department of the *High Court*) has subject matter jurisdiction for infringement litigation as well as for patent revocation matters. In the first context, the court may hold the patent invalid, the binding effect of which, however, being restricted to the parties.

818 For jurisdictions where special courts are vested with subject matter jurisdiction in invalidation proceedings, the repercussions of the ruling of the Court of Justice on infringement litigation against infringers of foreign patents are dramatic, sometimes even disastrous<sup>1010</sup>. Thirteen of the world's leading academic experts in the field acting as "European Max-Planck Group for Conflict of Laws in Intellectual Property"<sup>1011</sup> adopted a resolution consisting of a lengthy and in depth analysis urgently requesting the Commission to propose amendments to the Judgment Regulation in view of radically correcting the recent rulings of the Court of Justice. Such a reaction of academics of a specialised legal field is unprecedented in the history of the Court of Justice. Unfortunately, the Court of Justice did not discuss the repercussions of its rulings on the efficiency of legal protection of intellectual property rights. In legal doctrine, those repercussions had been anticipated<sup>1012</sup>. There is no place anymore for the intelligent solution to stay the infringement proceedings not prior to the defendant having instituted negative declaration or invalidation proceedings in the respective jurisdiction. The mere fact that the defen-

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<sup>1009</sup> *Fort Dodge Animal Health Ltd./Akzo Nobel NV* [1997] EWCA Civ 3042 – reference to the European Court of Justice, which, however, has subsequently become obsolete. In legal doctrine *Arnold* EIPR 1990, 254, 259; contra *Floyd/Purvis*, EIPR 1995, 110 et seq.

<sup>1010</sup> See also the extremely critical comment of *Heinze/Roffael*, GRUR Int 2006, 787 and *Adolphsen*, IPRax 2007, 15 et seq.

<sup>1011</sup> Resolution of 20 December 2006, adopted by *Prof. Dr. Dr. h.c. Jürgen Basedow*, Hamburg, *Andrea Birkmann*, Munich, *Prof. Dr. Graeme Dinwoodie*, Chicago, *Prof. Dr. Josef Drexler*, Munich, *Dr. Mireille van Eechoud*, Amsterdam, *Prof. Dr. Jean-Christophe Gallous*, Paris, *Christian Heinze*, Hamburg, *Prof. Dr. Annette Kur*, Munich, *Dr. Axel Metzger*, Hamburg, *Dr. Alexander Peukert*, Munich, *Prof. Dr. Heiki Pisuke*, Tartu, *Prof. Dr. Paul Torremans*, Nottinham/Gent, *Clemens Traumann*, Hamburg (The authors of this evaluation were informed on the resolution and the fact that it had been submitted to the Commission).

<sup>1012</sup> *Hye-Knudsen*, op. cit., p. 42; *Hölder*, op. cit., pp. 170 et seq.; *Ebner*, op. cit., pp. 206 et seq.

dant objects by invoking the alleged invalidity of the patent amounts to paralysing the infringement proceedings. The defendant may delay in, or even abstain from, instituting a negative declaration or invalidation proceedings in the courts of the law governing the patent; however, the court of the infringement proceedings has no authority to continue the law suit. The victim of the infringement may be compelled to institute positive declaration proceedings himself for a declaration of the patent's validity – provided this remedy is available in the respective country (for example: In Germany it is not). In order to delay the infringement proceedings the infringer may even commence negative declaration proceedings in a country clearly lacking jurisdiction. Nonetheless, the infringement proceedings remain paralysed as long as a final decision on the jurisdictional issue is lacking. In summary, the ruling of the Court of Justice opens the floodgate for a “super torpedo” law suit. The classical torpedo has been the torpedo law suit in view of imminent infringement proceedings. As a result of the new ruling of the Court of Justice, even a subsequent torpedo is admitted in all cases where the defendant is sued for infringement of a “foreign” patent.

819 Possible solutions could be fourfold: One may limit the *res iudicata* effect of a judgment awarding damages for infringement of a patent. Continental Europe's legal systems do not know the concept of “issue estoppel”. Therefore, an element of the reason given by the court explaining why the patent is valid would not be covered by the *res iudicata* effect. If the court of the infringement proceedings would award damages in cases only, where in its mind there is little prospect of the patent subsequently to be invalidated, the risk of conflicting judgments would be very small. Probably, in most cases invalidation proceedings would not even be instituted, because they would not promote the only objective for which they were invented: to delay infringement proceedings.

820 The European Max Planck Group for Conflict of Laws in International Property (CLIP) makes the proposal to limit the *res iudicata* effect of



judgments rendered in infringement cases always to the result that the court's holding regarding the validity issue would not be binding in subsequent proceedings involving a third party<sup>1013</sup>.

821 The second solution would be to take a patent for valid as long as it has not been annulled by the competent court. This solution could be easily adopted in Germany, because a judgment invalidating a patent is a so-called "constitutive" judgment. It does not clear the pre-existing legal relationship; it rather modifies it to the result that the patent retroactively becomes invalid. On that basis, damages could be awarded, at least declaratory relief as to damages could be given, as long as a patent is not invalidated. In that case however it must be safeguarded, that the damages would be repaid, should invalidation proceedings subsequently be successful.

822 The third solution would be to vest the courts seised with infringement proceedings with proper power to monitor the interdependence of infringement proceedings and proceedings aimed at the declaration of invalidity of intellectual property rights. This power may be expressed in terms of discretion. It may also be expressed in terms of what in German legal terminology is called "*unbestimmte Rechtsbegriffe*". In substance the idea is the following:

- The court seised with infringement proceedings must not take into account objections based on invalidity attacks which in the court's mind have little prospect of success.
- Should they have substantial prospect of success the court may suspend its proceedings for a limited period of time for the defendant to obtain a judgment on the invalidity issue. The deadline may be extended on a showing of the defendant that he has done his utmost to accelerate the foreign proceedings.

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<sup>1013</sup> Text of the proposal: „(b) [to be inserted after the present text of Article 22(4) JR] The provisions under (a) do not apply where validity or registration arises in a context other than by principal claim or counterclaim. The decision resulting from such proceedings do not affect the validity or registration of those rights as against third parties”.

- 823 The proposal that the infringement proceedings will be reopened should the defendant not institute invalidation proceedings within the deadline fixed by the court, corresponds to the solution found by the *Handelsgericht Zürich* under the Judgment Convention (judgment of 13 October 2006, HG 050410 sic! 2006, 854).
- 824 The fourth solution could be taken in an isolated way or added to one of the other three ones. The courts could grant provisional relief independently of any invalidity objection (see *infra* paras. 834 et seq.)

### 3. Consolidation of Proceedings against Several Alleged Infringers of Segments of a Munich Patent Bundle

825 In the *Roche* case<sup>1014</sup> the Court of Justice gave the following ruling:

826 “Article 6 (1) of the [Judgment Convention]... must be interpreted as meaning that it does not apply in European patent infringement proceedings involving a number of companies established in various Contracting States in respect of acts committed in one or more of those states even where those companies, which belong to the same group, may have acted in an identical or similar manner in accordance with a common policy elaborated by one of them.”

827 This ruling is in line with the decisions of some courts of the Member States, for example *Landgericht Düsseldorf*<sup>1015</sup>. By contrast, the Court of Appeal in The Hague<sup>1016</sup> was mindful to limit its jurisdiction only under Article 6 (1) JR to cases, in which the primary defendant was the strategic head of activities allegedly infringing the patents. In legal doctrine, it has been almost a matter of course that proceedings may be consolidated on the basis of Article 6 (1)<sup>1017</sup>.

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<sup>1014</sup> See fn. 988.

<sup>1015</sup> InstGE 1, 146; *ibid.* 03/28/2002, 4 O 137 InstGE 2, 82, 2 F.

<sup>1016</sup> 04/23/1998, NJ kort 1998, 58 = NIPR 1998, Nr. 317.

<sup>1017</sup> See for example *Hölder*, *op. cit.* 149 et seq.; *Hootz*, *op. cit.*, p. 207; *Hye-Knudsen*, *op. cit.*, pp. 129 et seq. – provided that the infringements are consequent to a common strategy.

828 Also the *Roche* ruling of the Court of Justice has encountered passionate criticism.<sup>1018</sup> In anticipating the ruling of the Court of Justice in the light of its Advocate General's opinion, some lawyers to whom our inquiry had been directed reported that efficient protection of industrial property rights was considerably weakened where national courts had adhered to the view now adopted by the Court of Justice and which was to be taken over by the Court they were concerned in the light of the Advocate General's opinion. It is indeed easily intelligible that it would be particularly cumbersome and costly to institute proceedings for infringement of patents in several jurisdictions. In the case underlying the ruling of the Court of Justice, private persons were allegedly victims of patent infringements in no less than eight jurisdictions. All the infringements had been organised by the central administration of a group of companies. In such a situation, a victim of infringements must pay the fees of his own lawyers, of the lawyers representing him in other jurisdictions and, where due, the fees of the courts which may be rather high in some jurisdictions. Furthermore, it is more than doubtful that a single expert could be appointed for the purpose of making a report for every of the jurisdictions, where infringement proceedings were pending. Normally, the courts would only appoint experts residing within their jurisdiction and having the court's language for their native one. Hence, also expert fees, which may be very high, would be multiplied.

829 In this context, one must again draw the attention to the Directive on the Enforcement of Intellectual Property Rights. Giving to the victim of infringements of parallel patents no option other than to institute proceedings in each of the infringers' seats amounts to "unwarranted" complications which should be avoided to the same extent (and even more) in any regulation as they are disapproved in the Directive.

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<sup>1018</sup> Resolution of the CLIP see above; *Kur*, IIC 2006, 844, 849 et seq. Less passionate *Adolphsen*, op. cit., pp. 19 et seq.

830 In context of claims against multiple alleged infringers of rights of intellectual property, three further observations may be made:

831 First, so far national courts have not had any major difficulties in applying foreign patent law<sup>1019</sup> and thus awarding damages, or issuing injunctions, based on the infringement of foreign law.

832 Second, as far as the specifics of patent law are concerned, the problem would presumably disappear once either the European Patent Convention was ratified or, at least, a European system of patent matter jurisdiction set up. The purpose of this report is, however, not to deal with the relationship of the Regulation with any possible future development of European law.

833 Third, already now Article 69 of the Munich Patent Convention as well as the Protocol to this Convention provide for a uniform interpretation of all the patents forming the bundle<sup>1020</sup>. Therefore, the ECJ's analysis that the national segments of a European patent bundle are independent of each others is wrong in the light of the Munich Patent Convention.

**4. Taking Point 4. (Enforcement of Cross-Border Interim Injunctions) and 5. (Efficient Provisional Relief to outweigh the Deficiencies of a Multitude of Litigation Proceedings?) together**

834 The point is, whether the apparent deficiencies in protecting intellectual property rights in proceedings for the substance of the matter are counterbalanced by a system of efficient provisional measures. The

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<sup>1019</sup> Examples: *OLG Düsseldorf*, 03/25/1966, GRUR Int 1968, 100; *OLG Wien*, 03/28/196, JMCO GRUR Int 1960, 447; *LG Düsseldorf*, 09/22/1998, GRUR Int 1999, 458; *Coin Controls Ltd./Suzo International (U.K.) Ltd. a.o.* [1997] F.S.R. 660, 671 reversing for matters covered by the Regulation (Judgment Convention) the former opposite case law. *Cour de Cassation* (France), 07/04/1995, PIBD 1996 III 10. *Rechtsbank Den Haag* underlying the judgment of *OLG Köln*, GRUR RR 2005, 34; *Rechtsbank Den Haag*, 11/15/2006, 250626/ HA ZA 05-3006, not yet published). Further, numerous Dutch judgments are referred to in fn. 1 of the CLIP resolution. An extensive overview is provided by *Zigann op. cit.*, pp. 51 et. seq.

<sup>1020</sup> Text: „The extent of the protection conferred by a European patent or a European patent application shall be determined by the terms of the claims. Nevertheless, the description and drawings shall be used to interpret the claims.”

issue must be discussed in the light of the *Denilauler* doctrine<sup>1021</sup> stating that measures granted subsequent to unilateral proceedings are not to be enforced abroad. The proposition has been made<sup>1022</sup> that Article 50 of TRIPS, thus as interpreted by the Court of Justice<sup>1023</sup>, has overruled *Denilauler* as far as intellectual property matters are concerned. It is, however, not foreseeable whether the courts will adopt this proposition. It remains for the legislator to decide whether in this respect an amendment of the Regulation is due.

835 One has to distinguish three categories of concerns: Restraining injunctions, provisional damages and search orders.

#### a) *Interim Restraining Injunctions*

836 Immediate interim injunctions enjoining the respondent from continuing any incriminated activity Europe-wide seem available everywhere in the Community<sup>1024</sup>. In some countries, the normal requirement of urgency has even been abandoned or mitigated for patent infringement cases<sup>1025</sup>. In German doctrine, the issue is highly controversial<sup>1026</sup> most courts insisting strongly on compliance with that requirement<sup>1027</sup>. The Dutch courts have become rather prudent when requested to issue trans-border interim refraining orders<sup>1028</sup>, in particular where the respondent had already instituted withdrawal pro-

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<sup>1021</sup> ECJ, 05/21/1980, C-125/79, *Denilauler./Couchet Frères*, ECR 1980, 15537.

<sup>1022</sup> Kurtz, op. cit., p. 214.

<sup>1023</sup> In the *Dior* and *Layher* cases C-300/98 and C-392/98.

<sup>1024</sup> See section Provisional Measures, paras. 742 et seq.

<sup>1025</sup> U. K.: *American Cyanamid Co./Ethicon Ltd* [1975] 1 All E.R. 504 (HL). France: For the case that the litigation for the substance of the matter is already pending and has a good prospect of success, see Article L 614-3 Code de la Propriété Intellectuelle.

<sup>1026</sup> Cf. Kurtz, op. cit., 34 et seq.

<sup>1027</sup> *LG Düsseldorf*, 07/08/1999 GRUR 2000, 692, 697; 09/24/2001, GRUR Int 2002, 157, 162.

<sup>1028</sup> *Gerechtshof s'Gravenhage*, 12/12/1996, *Hoffmann La Roche./Organon Technika* GRUR Int 1998, 58.

ceedings abroad<sup>1029</sup>. Pending torpedo claims and objections to the validity of a patent or of another intellectual property right are, in principle, not obstacles to such injunctions<sup>1030</sup>. Former occasional critical comments to trans-border injunctions<sup>1031</sup> do nowadays not find any more adherents. It is clear that the courts do not grant interim injunctions where the validity of the patent is really doubtful<sup>1032</sup>.

837 Such injunctions are not only available in the court having jurisdiction at the place of the respondent's domicile or seat<sup>1033</sup>, but the court having jurisdiction for the place, where the alleged infringement occurred, may also issue temporary restraining orders on a quasi-tortuous basis<sup>1034</sup>. The *Shevill* doctrine of the Court of Justice<sup>1035</sup> applies but does not even restrict them to activities to be performed at that place<sup>1036</sup>. In contrast to the place of tortuous events, under that doctrine the place of tortuous activities provides full jurisdiction for the substance of the matter. In legal doctrine various studies have been carried out on whether or not the *Shevill* rule also applies to infringements of intellectual property rights culminating in the proposition that in intellectual property matters generally not every place of a

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<sup>1029</sup> *Gerechtshof s'Gravenhage*, 11/26/1998, *Cordis./Boston Dientific*, referred to by *Tilman/v.Falck* GRUR Int 2000, 579, 582.

<sup>1030</sup> Examples: *OLG Düsseldorf*, InstGE 2, 237; *LG Hamburg*, GRUR Int 2002, 1025; *LG Düsseldorf*, GRUR Int 2002, 157. Since an interim injunction does not purport to acquire *res iudicata* effect, its "cause of action" is different from that of a permanent injunction (correctly emphasised by *Hölder*, op. cit. 201).

<sup>1031</sup> E. g. *Brinkhof*, GRUR Int 1997, 489.

<sup>1032</sup> *OLG Düsseldorf*, 11/22/2001 – 6 U 153/01, unpublished, referred to by *Hölder*, op. cit. 208; *BGH*, GRUR 1987, 284 – in a merely domestic case.

<sup>1033</sup> A particularity of German law is the fact that any court seised with the substance of the matter has power to grant interim relief regardless of whether vested or not with jurisdiction for the rest: *OLG Nürnberg*, GRUR 1957, 296 – undisputed for domestic matters. It is, however, doubtful whether this rule applies even in trans-border cases (contra: *OLG Koblenz*, RIW 1990, 316).

<sup>1034</sup> *BGH*, NJW 2005, 1325 – *Hotel Maritim*.

<sup>1035</sup> *ECJ*, 03/07/1995, C-68/93, *Shevill./Press Alliance*, ECR 1995 I-415.

<sup>1036</sup> Correctly emphasised by *Hye-Knudsen*, op. cit., pp. 68 et seq. with further references. *Kurtz*, op. cit., pp. 97 et seq. makes the point that the *Shevill* doctrine is limited to damages and does not apply to injunctions. See, however, the limitation under the "real connecting link doctrine" in fn. 45 and accompanying text.

tortuous effect vests the courts with jurisdiction<sup>1037</sup>. The proponents of such a rule point to Article 93 (5) of the Community Trademarks Regulation where indeed, a comparable rule has been enacted.

838 As a matter of fact, normally, injunctions granted under Article 5 (3) JR are restricted to activities performed within the State of the court seised. The courts are usually of the opinion that Article 5 (3) JR does not provide a basis for trans-border injunctions, particularly in patent infringement cases since a patent can only be infringed by activities performed within the boundaries of the State for which the patent was granted.<sup>1038</sup> It is a matter of course that under the real connecting link doctrine, interim injunctions based on Article 31 JR may never be trans-border ones<sup>1039</sup>.

839 In the files of the *Landgericht München I* we found a case, where a Dutch company had established at the Munich airport a sale's shop for tourist Articles. Advertising was made with the slogan "World Cup 2006". On the application of the FIFA, which claimed to be exclusively entitled to this "trademark", the Dutch defendant was enjoined from continuing using this slogan in his sale's shop in Munich. No enforcement was necessary, because the Dutch business complied with the order.

840 If, however, enforcement had become necessary, it would have been very time consuming and difficult. The German court did not have power to supplement the order with any kind of *astreinte*. As a sanction only fines could have been inflicted. It is, however, of little value for the creditor to enforce them, because the money would have to be paid into the State's treasury. It is doubtful, whether the Dutch

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<sup>1037</sup> *Fawcett/Torremans*, Intellectual Property and Private International Law (1998), p. 169; *Schack*, Internationales Zivilprozessrecht, para. 303.

<sup>1038</sup> *LG Düsseldorf*, GRUR Int 1999, 455.

<sup>1039</sup> *Gerechtshof s'Gravenhage*, 04/23/1998, *Expandable Graft Partnership./Boston Scientific*, NJ kort 1998, 58 = NJPR 1998 No. 317, English translation in [1999] FSR 3352 = [1998] EIPR No. 134.

courts would be willing to supplement it with any *astreinte*, in the context of declaring the foreign decision enforceable.

841 The other way round, the complication lies in the fact that the Dutch courts do not specify a fixed amount of *astreintes*. They leave it to the creditor to tell the enforcement authorities how often the debtor has acted in disregard of the injunction. Therefore, in such a case it is doubtful whether a Dutch order can be enforced in jurisdictions where *astreintes* are not available (for example in Germany)<sup>1040</sup>.

#### b) *Provisional Damages*

842 German courts are extremely reluctant in awarding provisional damages. For the system of provisional measures in Germany, the paradigm case is assets located in Germany and to be seized there in view of subsequent enforcement proceedings. Interim injunctions are in principle only provided for protecting claims not directed to a money payment. In some exceptional circumstances, however, the German courts have been inclined to award provisionally amounts of money to be paid, for example in maintenance cases or in cases where the creditor was absolutely dependent on immediate payment. We could not discover any single published decision where damages in money had been awarded as a provisional measure for the infringement of an industrial property right. In one case,<sup>1041</sup> provisional relief was indeed awarded in the form of ordering the debtor to refrain from delivery of goods to third parties. The decision was based on the German doctrine of compensation in kind in case of tortuous li-

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<sup>1040</sup> Pro: *OLG Oldenburg*, 07/22/2003, IPRspr 2003, 594. Contra: *OLG Köln* 03/17/2004, RIW 2004, 868. The *Bundesgerichtshof* is presently seised with a case (IX ZR 89/06) where the Dutch court had ordered (whether in normal proceedings or by a protective measure remains unclear) the respondent to provide a bank guarantee in the amount of hfl 730,000 – and to pay hfl. 5,000 – for each day of delay. The court of first instance had granted the requested declaration of enforceability without adding anything. The appellate court sat aside the decision because in its view the Judgment Convention did not apply. Should the *Bundesgerichtshof* disapprove of that view it would have to decide what to do in Germany with an order not specifying precisely the amount the enforcement of which is sought. For the general issue how to enforce injunctions abroad not supplemented by an “*astreinte*”, see the Chapter on Provisional Measures D.VI.3.c) of this report.

<sup>1041</sup> *OLG Düsseldorf*, GRUR Int 1984, 77.



ability. As it has been pointed out at several occasions, not even the device of *astreinte* exists in Germany. Judicially enforcing refraining orders would be cumbersome and costly for the creditor. Very often he is not even interested in enforcement proceedings, because he would not recover any money since fines for the breach of the injunction would be paid to the public treasury. Only if the creditor/claimant was successful to 100 %, the totality of his expenses spent for enforcement proceedings would be reimbursed. Other jurisdictions, in particular France by the means of *référé provision*, and the Netherlands by the means of *kort geding* are much more liberal in providing for provisional damages to be awarded. True, for none of the jurisdictions we could find any published judgment so far, in which provisional damage for infringement of industrial property rights had been awarded. But as the national reporters assured it is perfectly within the philosophies of the measures to include provisional damages to be awarded for the infringement of industrial property rights – subject to the limitations developed by the *ECJ* for the case that jurisdiction for the measure is based on Article 31 JR.

## 5. Measures for Obtaining Information

843 In the context of provisional measures it has already been pointed out that pre-action relief for obtaining information, such as foreseen in most of the jurisdictions of the Member States, is sometimes qualified as a “provisional measure” within the meaning of the Regulation (see para. 726).

844 Regarding intellectual property matters, mutual assistance of the courts by rendering pre-action orders aimed at obtaining information are all the more to be favoured by including them into the concept of provisional measures: As worked out recently by *Katarzyna Szychowska*<sup>1042</sup> the *St. Pauls Dairy* ruling does not affect measures like

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<sup>1042</sup> Taking of evidence in intellectual property matters under Regulation (EC) No. 44/2001 and Regulation (EC) No. 1206/2001, I.R.D.I. 2006, 111, 124 et seq.

search orders, *saisies contrefaçon* or *saisies description*. In that context, there is no risk of circumventing chapter II of the Judgment Regulation because “the main objective of the measure is to protect the evidence of the alleged infringement and [that] the evidence so obtained loses its value if the proceedings on the merits are not brought in a period of time determined by the law”<sup>1043</sup>. This difference between the measure object of the *St. Paul’s Dairy* ruling and a “protective measure” has also been emphasised by *Advocate General Colomer*<sup>1044</sup>.

845 Nonetheless, even if the proposal made here to reconsider the *St Paul’s Dairy* ruling<sup>1045</sup> will not be taken up, it would become advisable to say by explicit terms that “protective” measures include search and conservation of evidence.

846 A liberal approach to the granting of trans-border “search orders”, *saisies contrefaçon* or *saisies description* would not improperly harm anyone. The requirement that the respondent must have had an opportunity to defend himself is always met, because during the time lapsed until the recognition of the measure is needed in the main proceedings, he will have always had an opportunity to apply for the withdrawal of the order and the court will have dealt with such a request. Furthermore, the final defense of the respondent is not affected because in the main proceedings he may always dispute the reliability of the information obtained to the same degree as he may dispute the reliability of information obtained by the court itself. Thus the *Tribunal de grande instance* of Lille<sup>1046</sup> took recourse to the results of a *saisie description* ordered and carried out by a Belgian court. The Belgian *Cour de cassation* has corroborated this tendency

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<sup>1043</sup> Which content of the law of the Member States is provided by the Enforcement Directive EG/2004/48, Article 7(3).

<sup>1044</sup> Points 32–34 of his Opinion.

<sup>1045</sup> See text relating to Article 31 section D.VI.3.g), para. 768.

<sup>1046</sup> Judgment of 06/04/1980, *Armosing./Bernhardt*, Dossier brevet 1980 VI No. 6 reported by *Treichel*, GRUR Int 2001, 690, 697.

by stating that a *saisie description* may be ordered even if a patent of a foreign State is at issue<sup>1047</sup>. A unanimous legal doctrine has approved this ruling.<sup>1048</sup>

847 In this context, one should not disregard the fact that Article 50 TRIPS includes measures for obtaining evidence into the concept of provisional measures. Since the EU is a Member of WTO, due regard to Article 50 TRIPS has to be given, wherever the European Union has exercised its legislative prerogatives.

848 In summary: pre-action measures for obtaining information regarding industrial property rights should be included into the concept of provisional and protective measures, provided the *lex fori* shapes them as distinct from normal law suits for providing information. They could be “enforced” abroad only pursuant to the Evidence Regulation. Nevertheless, a court of a Member State could under the Judgment Regulation recognise the result of the taking of such a measure by taking recourse to the information in the same manner as if the court itself had ordered the measure.

## 6. Concluding Recommendations

849 In respect of intellectual property rights, judicial practice is in some respects unsatisfactory.

850 1. Most of the deficiencies show a rather general need for clarification.

851 a) The problem of torpedo actions should be approached in the general context of Article 27 JR.

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<sup>1047</sup> Rechtskundige Weekblad 1999/2000, 876; in German translation GRUR Int 2001, 73.

<sup>1048</sup> *Hye-Knudsen*, op. cit., p.A 206; *Szychowska*, op. cit. p. 122. In fn. 74, 76 she quotes in addition the following authorities: *O'Sullivan*, E.I.P.R 1996, 654, 658; *Pertegas-Sender*, Cross-border enforcement of patent rights, 142, 167; *Pertegas-Sender*, Rev. droit comm. Belge 2000, 132; contra: *Gonzalez Beilfuss*, Nulidad e infraccion de patentes en la Comunidad Europea, Madrid, 180 et seq.; *van Bunn*, Rev. Crit. de Jurspr. Belge, 2001, 407, 433 et seq.

852 b) For various reasons Article 6 (1) JR should be redrafted. The redrafting should take into favourable consideration the consolidated proceedings for alleged infringements of a multitude of similar intellectual property rights. The proposal of the CLIP is to adopt, by explicit terms, the Dutch “spider in the web” theory and to include into Article 6 JR a special provision relating to intellectual property matters:

853 *“1a where he is one of a number of defendants engaging in coordinated activities resulting, or threatening to result, in infringement of intellectual property rights whose contents are determined by the same rule of law enshrined in secondary Community legislation or in international conventions to which all EU Member States have adhered, in the courts of the country where the defendant coordinating the activities or otherwise having the closest connection with the infringement in its entirety is domiciled”*

854 However, due regard should be given to the alternative possibility to redraft no. 1 itself in a manner to safeguard that the seat of the primary responsible defendant becomes crucial.

855 c) Article 49 JR should be redrafted to the result that judgments ordering any conduct other than paying money could easily be enforced abroad.<sup>1049</sup>

856 d) Pre-action measures for obtaining information should, by express terms, be included into the text of Article 31 JR.

857 2. Article 22 (4) JR should be amended to the result that in infringement proceedings, a defence based on the alleged invalidity of the registered right vests the court only with the discretionary power to stay the proceedings for a limited period of time, which may be extended.

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<sup>1049</sup> See *supra* para. 620.

## **E. Overview Policy Recommendations**

### **I. Function and Scope of Application**

858 At the present state of affairs the Judgment Regulation is the basic instrument of European procedural law providing for a uniform and comprehensive set of rules on jurisdiction, lis pendens and recognition of judgments and other titles. An additional function of the Judgment Regulation is to provide for a fall back instrument which applies instead of the specific European instruments. Thus, the relation and the delineation to new parallel instruments, in particular Regulation (EC) No 1346/2000 and Regulation (EC) No 2201/2003 have become crucial issues.

859 With regard to Article 1 (1) JR it do not seem necessary to suggest any amendments. However, the recent developments, especially the proposals to implement public interests by private law litigation may impede the free movement of judgments in the European Judicial Area, especially when “public interests” are not mutually shared and protected in all Member States.

860 With regard to Article 1 (2) (a) JR the existing delimitation problems should be addressed in the (forthcoming) instruments in family matters.

861 With regard to insolvency proceedings (Article 1 (2) (b) JR), the delimitation between Regulation (EC) No 1346/2000 and the Judgment Regulation should be clarified to the effect that even collective proceedings and proceedings related to insolvency proceedings which are not explicitly listed in Annex A of the Insolvency Regulation are either dealt with by the Insolvency Regulation or the Judgment Regulation. However, it seems premature to propose a comprehensive delimitation between the two instruments. From a systematic point of view, it seems advisable to address the delimitation mainly in the Insolvency Regulation which – as the more

specific instrument – should clearly define its scope of application. Yet, any additional application of national laws in the scope of the Regulations must be excluded.

862 Article 1 (2) (d) JR - Arbitration

863 With regard to arbitration proceedings the Judgment Regulation should not address issues dealt with by the New York Convention. However, the prevalence of the New York Convention does not exclude supplemental and supporting provisions, especially provisions addressing the interfaces between the New York Convention and the Regulation.

864 Even though it seems not to be appropriate to propose far-reaching amendments of the Judgment Regulation in this field at the present state of affairs, two possible avenues should be advocated. The first is to delete Article 1 (2) (d) JR and to preserve the prevalence of the New York Convention by Article 71 JR. The second way forward is to address the interfaces between arbitration and the Judgment Regulation in a positive, comprehensive way and to include a specific provision on supportive proceedings to arbitration in the Judgment Regulation. Accordingly, the introduction of a new Article 22 (6) in the Judgment Regulation addressing annex proceedings to arbitration seems a possible avenue. This provision could read as follows:

865 *“The following courts shall have exclusive jurisdiction, regardless of domicile, (...)*

*(6) in ancillary proceedings concerned with the support of arbitration the courts of the Member State in which the arbitration takes place.”*

866 In addition, it seems advisable to address the situation of concurring litigation on the validity of the arbitration agreement in different Member States in the context of Article 28 JR. However, Article 28 JR only provides for a discretionary

stay. The stay of related proceedings in arbitration should be mandatory in order to avoid parallel litigation.

867 Thus, the following provision could be added as a new Article 27 A:

868 *“A court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to the existence and the scope of an arbitration agreement if the court of the Member State that is designated as the place of arbitration in the arbitration agreement is seised for declaratory relief in respect to the existence, the validity, and/or the scope of that arbitration agreement”.*

869 Finally, a new recital should be inserted in the Regulation addressing the issue of the place of arbitration and reading as follows:

870 *“The place of arbitration shall depend on the agreement of the parties or be determined by the arbitral tribunal. Otherwise, the court of the capital of the designated Member State shall be competent, lacking such a designation the court shall be competent that would have general jurisdiction over the dispute under the Regulation if there was no arbitration agreement.”*

871 With regard to Article 71 JR it seems well advisable to look closely at its scope and to reduce it as far as possible.

## **II. Jurisdiction**

872 1. The mechanism in provided for by Article 26 JR with Article 19 Regulation (EC) No. 1348/2000 is very difficult to understand for practitioners which are not, at the same time, experts for private international law. Finding a more simple solution may be advisable. However, Article 26 (2) cannot simply be abolished.

- 873 2. The mechanism for a determination of the domicile of natural persons is, in some cases, rather complex. It should be discussed whether an autonomous definition can be found acceptable.
- 874 3. The ramifications of Article 60 are not yet clear enough to render a final evaluation. The general reporters recommend observing closely the further development under Article 60.
- 875 4. Art. 4 (2) results into an unequal system of access to justice in third state cases. Given the political implications of the different avenues open to address this problem, the general reporters refrain from giving a comprehensive recommendation. It might however be advisable, in a first step, to extend Art. 5 and 6 to cases involving third state defendants and to allow a reference to national law only on the basis of a residual provision.
- 876 5. The general reporters recommend – in Article 5 – establishing a (non exclusive) forum based on the situs of movable property for cases where this property is the object of the controversy.
- 877 6. The issue of civil jurisdiction as an annex to criminal jurisdiction needs further observation, possibly in connection with issues of cooperation in criminal matters.
- 878 7. A provision according to which other bases of jurisdiction are sufficient for Article 6 (1) provided that the court has jurisdiction over a certain quorum of defendants should be considered further.
- 879 8. The general reporters share the doubts concerning the necessity of an exclusive jurisdiction in contracts relating to a rent of office space and recommend insofar further consideration of narrowing the scope of Article 22 (1) in favour of a more flexible approach.
- 880 9. The problems of an exclusive jurisdiction in cases concerning the rent of holiday homes need further consideration. A more flexible approach in order to avoid the need to litigate in a remote forum seems advisable.



- 881 10. A further harmonisation of the law relating to the formation of choice of forum agreements should be considered with regard to the future Common Frame of Reference for European Contract law and to the Hague Convention on Choice of Forum Agreements.
- 882 11. The same applies to the question of determining “usages” in paragraph 1 lit c of this provision in order to resolve several points of uncertainty in this respect.
- 883 12. The Hague Convention provides for rules on the formation and effect of exclusive choice of forum agreements. Regardless of whether the EU accedes to this convention, its rules could be considered as a possible source for a comparison if an amendment of Article 23 should be contemplated.
- 884 13. If the EU should accede to this convention, Article 23 needs to be coordinated with the rules of the convention. Appropriate steps could include a rule giving preference to the Hague Convention in conformity to this convention's Art. 26 (6) and/or a reservation in Art. 27 with regard to Art. 6 Hague Convention. Theoretically further steps could include either an extension of Art. 23 (3) JR stating that, in case of an exclusive choice of forum agreement, courts other than the chosen court have no jurisdiction unless the chosen court has determined its jurisdiction or additional measures in order to avoid different decisions on choice of forum agreements in the Member States, both possible avenues raise serious policy issues, discussed in detail in the *lis alibi pendens* section.
- 885 14. It seems advisable to amend Article 65 (1) JR as follows:

*The first sentence of para. 1 should be deleted. The second sentence of Article 65 should be framed as follows: “In Austria, Germany, Hungary, Estonia, Latvia, Poland and Slovenia resort to Articles 6 (2) and 11 is permitted by virtue of the respective procedural laws. Any person domiciled in another Member State may be sued in the courts of those Member States as prescribed by Annex IV to the JR.” Jurisdiction under this provision shall not be based on the grounds provided for by Article 4 (2).*

886 Accordingly, a new Annex IV to the JR should contain information on the proceedings of those Member States providing for the third party notice.

887 Two new sentences should be added to the first paragraph which can be drafted as follows:

*“The court of the main proceedings shall decide on the admissibility of the third party notice. The exclusive heads of jurisdiction prevail over the third party notice.”<sup>1050</sup>”*

### III. *Lis Pendens*

888 Principles of Community law and Article 6 (1) ECHR guarantee effective remedies including the conclusion of proceedings in due time. In case of excessively long proceedings Community law and Article 6 (1) ECHR warrant a – very narrow – exception from the rule of strict priority under Article 27 JR. The existence of this exception and its conformity with the decision of the European Court of Justice in *Gasser* should be expressly acknowledged in order to strengthen the acceptance of the Judgment Regulation.

889 It appears appropriate to release the court designated in an exclusive choice-of-forum agreement from its obligation to stay proceedings under Article 27 JR and to tolerate parallel proceedings if the risk of conflicting decisions on jurisdiction can be minimised. One possibility to reduce this risk is to introduce an additional mode to conclude an exclusive choice-of-forum agreement by way of a short and clearcut standard form. Any derogation from Article 27 JR in this revision of the Judgments Regulation could then be restricted to agreements concluded under this standard form. This

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<sup>1050</sup> As the third party notice is not considered as a distinct proceedings, the predominant opinion in Germany does not provide for its exclusions by exclusive heads of jurisdiction, especially by choice of court agreements. However, it seems to be appropriate to deal this issue equally under articles 6(2) and 65 JR and to provide for the prevalence of the exclusive heads of jurisdiction under the JR, *Kropholler*, Commentary on Article 6 JR, para 22.

modification appears more appropriate than any of the following two alternatives:

- 890 Theoretically, Article 27 JR could be modified to the effect that only the court designated in a standard form decides upon jurisdiction based on the agreement and that any other court seised in disregard of this designation stays its proceedings irrespective of whether it was seised prior or subsequently to the court designated or whether at all the court designated is seised (“competence-competence”). However, a major drawback would be that in case of the nullity of the agreement a party seeking to establish this nullity needs to seise first the court designated by the void agreement before proceedings can be instituted with other courts. Therefore, such a far reaching modification of Article 27 JR, i.e. the reversal of its priority rule in favour of the designated court, does not appear to balance the jurisdictional interests of the parties adequately. Merely releasing the designated court from the priority rule under Article 27 JR appears more appropriate.
- 891 A more conservative alternative might be seen in a limitation in time, e.g. of six months, of the priority of the court first seised under Article 27 JR, possibly coupled with the introduction of a standard form agreement that should help accelerating in particular the decision of the court first seised. A major drawback of this solution is, however, that a party may lose a perfectly legitimate forum due to circumstances outside its control. Therefore, releasing the designated court from the priority rule under Article 27 JR appears more appropriate.
- 892 None of the considered modifications of Article 27 JR should be extended to unilaterally exclusive choice-of-court agreements.
- 893 As opposed to Article 23 JR, there seems to be no practical need to frame a similar exception from Article 27 JR in respect of the exclusive grounds of jurisdiction under Article 22 JR.

- 894 Neither does it appear to be desirable to create a general public policy exception from Article 27 JR.
- 895 If the European Union considers the accession to the Hague Convention on Choice of Court Agreements, any modification of the Judgment Regulation should be mindful to avoid frictions between international choice-of-court agreements within and outside the internal market. This objective, however, is not an obstacle to maintaining the stronger effectiveness of intra-Community choice of court agreements.
- 896 The “information relevant for judicial cooperation in civil matters” provided by the European Judicial Atlas in Civil Matters should be extended to the issue whether the national procedural laws of the Member States allow, and if so, under what conditions, the consolidation of actions in the sense of Article 28(2) JR. In addition and in order to comply with the guarantee of access to justice under Community law and Article 6 (1) ECHR Article 28 JR should place the court second seised under the obligation to reopen the case after the court first seised declined jurisdiction irrespective of a potential *res iudicata* effect of the judgment under Article 28(2) JR by the court second seised.
- 897 A clarification of the wording of Article 30 (2) JR might help to both eliminate the uncertainty about the interpretation of the term “responsible authority” and motivate to correct a practice of national authorities violating Article 30 (2) JR.
- 898 At present, it does not appear desirable to empower the courts to refer with binding force the proceedings to the courts of another Member State if the court seised is prepared to decline its jurisdiction. One might, however, take into consideration a rule that specifically addresses the problem of prescription by providing that the proceedings of the court second seised upholds the stay or interruption of otherwise running time bars.

#### IV. Free Movement of Judgments

899 In the present state of affairs, Articles 32–56 JR largely guarantee the free movement of judgments in the European Judicial Area. Since the entry into force of the Judgment Regulation, the average duration for obtaining a declaration of enforceability is a matter of days. Almost 90 % of the decisions granting enforceability are not appealed. The handling of the appeal procedures by the appellate courts shows that the courts speed up the proceedings in order to implement the rights of the creditors. However, practical problems exist in relation to the costs of exequatur proceedings. This situation may keep creditors from enforcing a judgment in another Member State.

900 At the procedural level, two basic approaches for improving the current situation can be distinguished. The first proposal would preserve the existing exequatur procedure and the basic structure of Articles 38 – 56 JR. However, the existing system should be improved and further accelerated, especially by further reducing the existing grounds of refusal of recognition. The second avenue is derived from the Tampere conclusions. It is aimed at a general abolition of exequatur proceedings in the framework of the Judgment Regulation. However, this proposal would not simply abolish exequatur proceedings, but replace them by procedural and substantive safeguards of the parties' legal position.

##### *1. The First Alternative: Evolving the Existent System*

901 The first, more conservative avenue would start from the assumption that the present system seems well balanced. Nonetheless, the following, technical improvements of the existing system which have been addressed in this section should be envisaged:

- Extension of the standard form of Annex V. Adaptation to the forms of the parallel instruments (Regulations (EC))

No. 805/2004, 1896/2006) as far as interest and taxes are concerned.

- Clarification of Article 55 (2) JR in the way that a translation of the judgment should be exceptional. Aligning of this provision with Article 21 of Regulation (EC) No. 805/2004 and Article 22 of Regulation (EC) No. 1896/2006.
- Deletion of Article 40 (2) JR.
- Further reduction of the grounds for non-recognition
  - In particular abolition of Article 35 JR since it is not in line with the principle of mutual trust
  - Article 34 (3) JR should be aligned with Article 21 Regulation (EC) No. 805/04 and Articles 22 Regulation (EC) No. 1896/06 and Regulation (EC) No. 861/2007; the provision should not refer to the moment when the judgment was rendered, but rather to the moment of pendency
  - Amendment of Article 34 (4) JR: it should refer to the moment of pendency
- Improvement of the remedies
  - Amendment of Article 43 (3) JR
    - Further simplification of the exequatur proceedings in the first instance
    - Introduction of a written procedure in the second instance

902 In addition to these technical proposals, it seems appropriate to change Articles 53–56 JR in a way that the certificate provided for by Article 54 JR has binding force. Accordingly, the judicial authority in the Member State of enforcement shall be bound by the certificate on all questions relating to the application of the Judgment Regulation, the enforceability of the foreign decision and the speci-

fications of its content. The advantages of this simplification will be twofold: Firstly, the examination in the first instance will be carried out by a judicial officer who does not need to be qualified as a judge. Secondly, a translation of the foreign decision will not be necessary. Furthermore, the more preferable proposal would be to go one step further and to prescribe a formal binding force of the form of Annex V JR (its content must be extended). The form would operate as a “judicial passport”. A creditor should immediately approach the enforcement organs in the other Member State (comparable to an enforcement clause) and present the title and the form. Accordingly, enforcement measures would be immediately available.<sup>1051</sup> However, the basic structure of the Judgment Regulation should remain unchanged. Thus, the creditor could challenge the “recognition” of the foreign title in the (competent) courts of the Member States of enforcement. He could raise the objections of Article 34 JR and he could even declare that the title had become moot, because the debt had been paid or the parties had set off. The decision on the objections of the debtor could be reviewed by a second appeal, as prescribed by Article 44 JR.

## 2. *The Second Proposal: Abolition of Exequatur Procedures*

903 The alternative approach starts from the political programme of the Tampere summit which envisaged the abolition of exequatur proceedings and their replacement by complementary procedural safeguards. In this respect, at the Community level, several new legal instruments have abolished the public policy exception and have established instead minimum procedural standards in the Member State of origin.<sup>1052</sup> Furthermore, these instruments require all Member States to make review proceedings available to the

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<sup>1051</sup> The immediate effect of the foreign title can also be limited to provisional measures until the time for filing an appeal against the “recognition” has been elapsed.

<sup>1052</sup> Cf. Article 19 (2) of Regulation (EC) No 805/2004 and Article 20 (2) of Regulation (EC) No 1896/2006, Article 18 (1) (b) Regulation (EC) No 861/2007.

judgment debtor for the protection of his or her rights to be heard. Consequently, the debtor is entitled to a review of the judgment in the Member State of origin, if he was prevented from objecting to the claim without any fault of his part.<sup>1053</sup> In addition, enforcement proceedings may be suspended in the Member State of enforcement when an application for review in the Member State of origin has been filed.<sup>1054</sup>

904 In this respect, a possible way forward could be the introduction of coordinated review procedures in the Member State of origin and in the Member State of enforcement. One example of this mechanism can be found in Article 33 of the EC-Commission's proposal for a Regulation relating to maintenance claims where a (limited) control of the judgment in the Member State of enforcement is permitted. According to the structure of this proposal, redress is mainly opened in the Member State of origin. However, if efficient redress in the Member State is not available, the debtor may request the refusal of enforcement in the Member State of enforcement.

905 A possible avenue could follow the structure of Draft-Article 33. According to this model, redress against fraud and procedural irregularities is mainly available in the Member State of origin. However, a residual control of the foreign title should be provided if such means of redress do not exist or are not sufficiently efficient. In addition, the residual control in the context of enforcement proceedings should include (limited) recourse to public policy in extreme cases. Further, the uniform procedure under Articles 38 et seq. JR should not be replaced by a simple reference to the heterogeneous review procedures of the Member States. For the sake of legal certainty, some minimum harmonisation would be necessary. In this respect the Member States should communicate the

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<sup>1053</sup> Cf. Article 18 (1) (b) of Regulation (EC) No 861/2007 – this provision includes fraudulent behaviour of the creditor.

<sup>1054</sup> Cf. Article 23 of Regulation (EC) No 805/2004; Article 22 (1) and (2) of Regulation (EC) No 1896/2006; Article 23 of Regulation (EC) No 861/2007.



competent courts for the review proceedings to the EC Commission; the information about the competent courts should be available at the European Judicial Atlas. Further, it seems advisable to harmonise the review proceedings in a similar way as provided in Articles 43 – 45 JR. Accordingly, this possible way forward would entail a (partial) harmonisation of the procedural laws of the Member States.

### 3. *Cross-border Injunctions*

906 As regards to injunctions, a separate regime for the recognition is still needed. As has been demonstrated, the national systems are too different as to allow a free movement of injunctions without *exequatur*. In this respect, the implementation (and adaptation) of the foreign title to the legal requirements in the Member State of enforcement is still necessary. However, it seems advisable to clarify and to extend Article 49 JR as follows:

- Clarification that a judgment ordering the debtor to do or to refrain from doing a specific act in another Member State is generally permitted.
- Clarification that the judicial authority granting the declaration of enforceability (or the competent authority according to the national law of the Member State of enforcement) is also competent to assess the amount of the payment.
- Clarification that payments to the fiscal bodies of the Member State of origin shall be collected by the judicial authorities of the Member State of enforcement. The transfer of money should be effected between the judicial authorities of the Member States concerned.
- Thus, Article 49 JR should be amended; as a new version the following wording is suggested:

- (1) *A foreign judgment which orders a payment by way of a penalty shall be enforceable in the Member State in which enforcement is sought.*
- (2) *The court or competent authority for the declaration of enforceability shall fix the amount of the payment if that amount has not been determined by the courts of the Member State of origin.*

## V. Provisional Measures

907 1. The most deplorable shortcoming of the Regulation is the lack of any provision vesting the courts of the Member States, having jurisdiction for the substance of the matter and seised with the respective law suit, with the power to set aside or to modify in pursuance with their own law a provisional or protective order granted by a court of another Member State. Such a provision should be added to Article 31JR.

908 2. Should this be accepted, the Judgment Regulation could be rather liberal in upholding Article 31 JR.

909 3. Two of the requirements on the fulfilment of which the Court of Justice insists are reasonable:

910 a) For the purpose of enforcement abroad, the respondent must have had a previous opportunity to comment the application for granting the provisional or protective order.

911 b) As a general rule, the applicant must be ordered to provide a guarantee for the “repayment” of the amount ordered to be paid in the interim. The mere existence of a substantive claim for compensation is not a sufficient guarantee.

912 4. But even in the latter context, it would be worthwhile to enact specifications in view of the fact that not only provisional “payment” may be ordered and that bank guarantees are not always available for the applicant. The issuing judge should have discretion to specify details of the guarantee. Under equitable considerations, it must

not cover all the amounts later probably due under compensation concepts and the duration of the guarantee may be limited subject to later prolongation. Often it may be too hard (even impossible) for the respondent to provide a bank guarantee, let alone one with an indefinite duration.

913 5. To require a genuine link between the subject matter of the measure sought and the territorial jurisdiction of the Member State of the court in which the measure is sought, would not be justified. It is not appropriate in this context to consider only seizure of property. But even then world-wide “freezing” orders (under the respective legal order possibly enforceable into assets world-wide) are a very useful and equitable means of protecting rights even when issued by a court not vested with jurisdiction for the substance of the matter. Furthermore, even interim performance, be it partial performance, may reasonably be the content of a provisional measure. In complex cases interim performance against interim payment may be ordered. This may be done so in construction cases for safeguarding the continuation of the works. It is a matter of course that such a power should be exercised with great caution. No ground, however, exists to completely disempower the court of extraordinary jurisdiction under Article 31 JR to grant such a measure. After all, one should not close one’s eyes before the undisputable fact that in some Member States much more efficient provisional protection is available than in others. “Provisional” forum shopping is not systematically to be discouraged.

914 6. It should be made clear that an arbitration agreement does not affect the jurisdiction of a court to grant provisional or protective measures.

915 7. Article 31 JR should be supplemented by two new paragraphs:

*“(2) In the case of an order for interim performance the court shall make the enforcement of the order dependent on the providing of a bank guarantee (on conditions to be specified by the court) for repayment or damages due whenever the applicant should be finally unsuccessful in the*

*proceedings for the substance of the matter. In order to avoid unusual hardship, however, the court may grant the applicant an exception.*

*(3) The court vested with jurisdiction for, and seised by either party with the substance of the matter has power to discharge, to modify or to adapt to its own legal system any provisional measure granted by a court of another Member State.”*

916 Article 1 should be supplemented as follows:<sup>1055</sup>

*“...[arbitration] not including provisional measures not affected, under the law of the Member State, by an arbitration agreement.”*

## **VI. Intellectual Property**

917 In respect of intellectual property rights, judicial practice is in some respects unsatisfactory.

918 1. Most of the deficiencies show a rather general need for clarification.

919 a) The problem of torpedo actions should be approached in the general context of Article 27 JR.

920 b) For various reasons Article 6 (1) JR should be redrafted. The redrafting should take into favourable consideration the consolidated proceedings for alleged infringements of a multitude of similar intellectual property rights. The proposal of the CLIP is to adopt, by explicit terms, the Dutch “spider in the web” theory and to include into Article 6 JR a special provision relating to intellectual property matters:

921 *“1a where he is one of a number of defendants engaging in coordinated activities resulting, or threatening to result, in infringement of intellectual property rights whose contents are determined by the same rule of law enshrined in secondary Community legislation or in international conventions to which all EU Member States have adhered, in the courts of the country where the defendant coordi-*

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<sup>1055</sup> See also the proposals on arbitration, *supra* paras 862 et seq.

*nating the activities or otherwise having the closest connection with the infringement in its entirety is domiciled”*

- 922 However, due regard should be given to the alternative possibility to redraft no. 1 itself in a manner to safeguard that the seat of the primary responsible defendant becomes crucial.
- 923 c) Article 49 JR should be redrafted to the result that judgments ordering any conduct other than paying money could easily be enforced abroad.<sup>1056</sup>
- 924 d) Pre-action measures for obtaining information should, by express terms, be included into the text of Article 31 JR.
- 925 2. Article 22 (4) JR should be amended to the result that in infringement proceedings, a defense based on the alleged invalidity of the registered right vests the court only with the discretionary power to stay the proceedings for a limited period of time, which may be extended.

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<sup>1056</sup> See *supra* para 906 (in fine).