The European Law of Civil Procedure

Peter GOTTWALD*

I. Introduction

1. In a very unprejudiced, literal sense the European law of civil procedure would consist of more than 40 divergent national laws with the aim to demonstrate common principles and rules. Those principles might be called common European law.
2. As nearly all European countries are party of the *European Convention on Human Rights,* one general principle is common to all European states which is fixed in Article 6 section 1 of the European Convention on Human Rights. According to this rule everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
3. If you are talking now on European civil procedure in most instances you would however refer to the *unified* or harmonized *law of procedure within the European Community* respective European Union.

This European Union started with the convention for the foundation of the European Economic Community in March 1957. In 1965 a common commission of the European Communities was installed. The original states of the Community were Belgium, France, Italy, Luxembourg, the Netherlands and the Federal Republic of Germany. In 1973, Great Britain, Denmark and Ireland joined the Community, in 1981 Greece, in 1986 Spain and Portugal.

1992 the Member States signed the convention establishing the European Union. In 1995, Austria, Sweden and Finland joined this union. The Amsterdam Treaty of October 1997 contained a comprehensive basis for the regulation of the judicial cooperation in civil matters and for the harmonization of procedural law with regard to remove obstacles for an efficient cooperation.

a) Within this community the first step to create a unified law was the Brussels Convention on Jurisdiction and Recognition Enforcement of Judicial Decisions in Civil and Commercial Matters of 27 September 1968. On a first glance this convention was a traditional treaty between states on recognition and enforcement of judgments. But only a short time after this treaty came into operation, it was realized that it contained not just

* Professor of Law, Regensburg University in Germany: Visiting Professor at the Ritsumeikan University 2004 4-5.

recognition rules but in the first part unified rules of jurisdiction which might prove as a core of a unified European civil procedure to come.[1] Only a few years later it became common to speak of a European civil procedure when dealing with the Brussels Convention and after 1988 with the parallel Lugano Convention which was concluded with the EFTA-States of that time.

b) Soon after the Amsterdam treaty entered into force, the council (now together with the European Parliament) published a number of *European regulations* which are directly binding law within the 25 Member States (Denmark excluded).

These regulations are

(1) the Council Regulation of 22 December 2000 on jurisdiction and recognition and the recognition and enforcement of judgments in civil and commercial matters (No 44/2001/EC), which replaced the Brussels Convention,

(2) the Council Regulation of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (No 1438/2000/EC),

(3) the Council Regulation of 28 May 2001 on cooperation between the courts of the Member States on the taking of evidence in civil and commercial matters (No 1206/2001/EC),

(4) the Council Regulation of 29 May 2000 on insolvency proceedings (No. 1346/2000/EC), and

(5) the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000.

Since 1 May 2004 the European Union has ten new members, being the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, the Slovakian Republic and Slovenia. All European regulations on civil procedure being in force are operating in the new Member States immediately when the accession is becoming effective.

c) That is not the end of the European civil procedure. In Tampere, Finland, the European Council in October 1999 agreed upon a *program* on the transformation of the principle of mutual recognition of judicial decisions in civil and commercial matters. This program was made concrete in 2001 and comprises common rules for simplified and accelerated cross-border judicial proceedings for claims of consumers or merchants with regard to small claims, to maintenance or to uncontested claims. A first step in this respect is the draft regulation on the European title for uncontested claims. Further steps of the program include regulations for claims regarding family property or claims in succession cases (“Brussels III”).

d) In addition to the regulations there are also *directives* with procedural content.

On 27 January 2003 the directive of the council to improve access to justice in

1) See *Spellenberg*, Das EuGVÜ als Kern eines europäischen Zivilprozessrechts, Europarecht 1980, 329.

cross-border disputes by establishing minimum common rules relating to *legal aid* or other financial aspects of civil proceedings was published.

Furthermore, many directives, for instance a directive on advertising, a directive on unfair contract clauses, a directive on injunctions for the protection of consumers' interests and a directive on financial services are based on the precondition that the so-called Verbandsklage or "*association's claim*" is available in all Member States of the European Union.

e) Finally, in December 2002 by decision of the council, the so-called *European judicial net in civil matters* was established. This is an administrative network to ease the exchange of informations between the Member States and to solve problems in the cooperation with regard to concrete cases.

f) The European civil procedure is not a settled matter but a dynamic one as there is the political intention to improve the judicial cooperation.

Possible next steps may be the introduction of a European dunning procedure and measures for a simplified speedy settlement of disputes with regard to small claims.

Another possibility would be the extension of the European title to maintenance claims.

In preparation is also a so-called Brussels III-Regulation on jurisdiction, applicable law and recognition and enforcement of judicial decisions in cases of matrimonial property and succession. The final step in this respect would be the complete abolishment of any procedure for the enforcement of titles from other Member States.

II. International jurisdiction

By creating a unified catalogue of international jurisdiction, the original Member States of the European Economic Community created a very successful order and the basis for the free movement of judgment in civil and commercial matters within the European Community. Within the scope of application these jurisdiction rules have priority over any other conflicting national rule.

Whereas the traditional conventions on recognition and enforcement of foreign decisions contained jurisdiction rules only as prerequisites for the recognition and enforcement of foreign judgments, the Brussels Convention comprises a system of directly applicable rules of jurisdiction.

Any rule of this system has to be applied strictly. The courts of all Member States do not have any discretion to decline jurisdiction for reasons of practicability and are not allowed to dismiss a claim by stating that another court would be a more appropriate available forum. To say it shorter: The forum non conveniens doctrine is not applicable within Europe.

This unified system of jurisdiction also has consequences for the stage of recognition and enforcement. According to Article 35 section 3 Brussels I-Regulation the jurisdiction of the court of the Member State of origin may not be reviewed within the recognition procedure. Even the test of public policy may not be applied to the rules relating to jurisdiction.

There are only a few exceptions according to Article 35 section 1 with regard to the jurisdiction in matters relating to insurance, in matters of consumer contracts and in cases of exclusive jurisdiction according to Article 22. In all other cases the decision of the court of origin on his own jurisdiction is binding within the subsequent proceedings.

1. Scope of application

According to Article 1 the Brussels I-Regulation applies in *civil and commercial matters* whatever the nature of the court or tribunal. It does not extent to revenue, customs or administrative matters. It shall not apply to

(1) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
(2) bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
(3) problems of social security and
(4) arbitration.

2. Uniform interpretation

a) The terms of this rule and of all other rules of the Brussels I-Regulation are to be interpreted in a uniform way by so-called autonomous interpretation. If the national courts were allowed to interpret the European rules according to their national understanding, there would be no common application in the Member States. Therefore from the very beginning the European Court of Justice has adhered to the principle of an autonomous, comparative interpretation. There has been only one exception that is the interpretation of Article 5 No. 1 with regard to the place of performance of a contractual obligation. As the law of obligation is up to now quite diverging in the Member States, the European Court of Justice refused to comply with a uniform interpretation but referred to the applicable lex causae of the case.

b) The reference to a system of uniform interpretation alone would not guarantee that the interpretation is really uniform. Therefore already the drafters of the Brussels Convention gave the European Court of Justice the power to give binding rulings on the interpretation of the rules of the Brussels Convention by the Luxembourg Interpretation Protocol of 3 June 1971. According to Article 2 of this protocol only the supreme courts of any Member State and the courts of appeal have the right to present a question of interpretation to the European Court of Justice.

With regard to the new Brussels I-Regulation No. 44/2001 the competence to give rulings on the interpretation does no longer follow from this protocol, but directly from Article 68 and 234 of the European Community Treaty. Article 68 restricts the competence to ask the European Court of Justice for a ruling to courts of final appeal.

Irrespective of the concrete case according to Article 68 section 2 of the European Treaty the council, the commission and any Member State may apply to the European Court of Justice to give a ruling on the interpretation of the Brussels I-Regulation. So far, no authority entitled to do so has asked the court of such an interpretation.

3. General Jurisdiction

The Brussels Convention and likewise the Brussels I-Regulation follow the old basic rule of jurisdiction: *Actor sequitur forum rei.* To protect the defendant the plaintiff has to file his action in the Member State where the defendant is domiciled (Article 2 section 1). Neither the Brussels Convention nor the new regulation have changed this system and do not refer like other conventions to the place of the permanent residence. In order to determine whether a party is domiciled in the Member State whose courts are seized the court shall apply its internal law (Article 59 section 1). As a consequence the different concepts of domicile in civil law and common law countries are maintained.

With regard to *natural persons* these differences are at the end of minor importance. But with regard to *legal persons* and partnerships it is of great importance where such a person is domiciled. Ever since there have been two general systems:

(1) the system of the statutory seat and

(2) the system of the central administration or the principal place of business.

Neither within the negotiations on the Brussels I-Regulation nor on the insolvency regulation the Member States would come to a uniform solution. On the other side it was felt that the old rule of Article 53 section 1 Brussels Convention according to which a legal person or company had his seat according to the law applicable to the national rules of conflict of laws led to surprising results.

By way of compromise Article 60 Brussels I-Regulation now states that a company or a legal personal association is domiciled and may therefore be sued at the place

(a) of the statutory seat, or

(b) of the central administration, or

(c) of the principle place of business.

This compromise makes its superfluous to apply complicated conflict rules just to ascertain the domicile of a legal person.

4. Exclusion of unreasonable or exorbitant jurisdiction

Contrary to the law of the United States in Europe no need is felt to submit non resident defendants on general jurisdiction on the basis of *continuous and systematic*

business contacts. This kind of jurisdiction is not completely in line with the European system and was not adopted.

Article 3 of the Brussels I-Regulation expressly states that a person domiciled in a Member State may be sued in another Member State only by virtue of the rules set out in sections 2 till 7 of chapter 1 that is according to Articles 5 to 24 Brussels I-Regulation. To guarantee efficient litigation and for the protection of weaker parties these rules provide specific jurisdiction in favour of the plaintiff. According to the systematic those rules, however, shall be an exception of the general rule of Article 2.

a) As other basis for jurisdiction are excluded with regard to persons domiciled in a Member State, it would not be necessary to ban explicitly specific rules of national jurisdiction. However, to establish some kind of certainty, annex I of the Brussels I-Regulation now contains a list of jurisdictions which are excluded. This list contains
   (1) mainly for the countries of the German system *a jurisdiction based on assets* within the Member State,
   (2) for the countries of the French system the *jurisdiction based upon citizenship* of the plaintiff,
   (3) and for the United Kingdom in addition any *transient jurisdiction* based on *temporary presence* and any jurisdiction *based on the seizure* by the plaintiff *of property* situated in the United Kingdom.

b) All national rules which are excluded as a basis for jurisdiction against a person domiciled in a Member State are, however, applicable with regard to persons domiciled in a third country.

5. Specific jurisdiction

(1) *Place of performance of a contractual obligation*

According to Article 5 No. 1 Brussels Convention a person domiciled in a contracting state may be sued in another contracting state, in matters relating to contract, in the courts for the place of performance of the obligation in question.

(a) Without any doubt the term *matters relating to a contract* is to be interpreted in an autonomous way. As the European Court of Justice consequently held in 1983, the claim of an association against his members for the payment of membership fees is a contractual obligation.

(b) Much debate has arisen upon the question whether claims regarding the violation of *pre-contractual duties* are those relating to contract. Under substantive German law claims with regard to culpa in contrahendo cover divergent types of violation of duty. In German practice the most important type is the violation of a person with his personal integrity or with his property. As those claims are from their "true nature" claims in tort, most authors agree that this type is excluded from Article 5 No. 1. The

second type which could be included are the violation of the duty to discover or to give instructions within the negotiations before signing a contract. The third type which might be covered by Article 5 No. 1 are claims with regard to frustrated expenses due to an unexpected and unjustified breaking off of the contractual negotiation. The European Court of Justice, however, held on 17 September 2002 that in the absence of obligations freely negotiated between the parties any action founded on the precontractual Liabilitity of the defendant in a matter is tort within the meaning of Article 5 No. 3.[2)]

(c) For the same reason an action arising out of defects of a purchased product brought by the end user against the manufacture is not covered by Article 5 No. 1.[3)] The European Court of Justice also decided that a person may sue under Article 5 No. 1 *only contractual obligations not other claims*, for instance not claims for unjust enrichment, claims resulting from agency without authority, or from breach of a family contract including a claim for breach of promise of marriage. Actions concurring to contractual actions could not be sued under Article 5 No. 1 but only in the courts of general jurisdiction under Article 2. As under German law such a concurrence is quite often the case, German authors plead for the recognition of a supplementary or annex jurisdiction in such cases but the arguments in favour were rejected by the court of justice up to now.

(d) Under Article 5 No. 1 Brussels Convention the decisive place was the place of the performance of the *concrete main obligation in question* with the result that mutual obligations resulting from a contract had to be sued in divergent courts and states.

(e) Even more problematic was that the European Court of Justice constantly held that the place of performance should be established according to the substantive law which should be applied *according to the conflict rules* of the state of the court where the claim had been filed originally[4)]. As long as neither the conflict rules nor the substantive contract law of the Member State was unified, the establishment of the decisive place of performance was not only burdensome but led to unexpected results. Moreover it was felt that by this way the plaintiff was privileged and could regularly sue at home. After the ratification of the European Convention on the applicable law of contractual obligations of 19 June 1980 at least the applicable law was more calculable than before if the basis of performance would be within the Member States but the national law were still quite different.

To determine the place of performance is in addition not free of legal reasoning and considering on balance. To give an example: Under German law it was a long established practice that a lawyer could sue for his remuneration at the place of his

2) Tacconi V. Wagner, ECJ, Case C-334/00, ECR 2002, I-7357.

3) Jakob Handtke v. TMCS, ECJ, Case C-26/91, [1993] l. L. Pr. 5.

4) See *Lvenel v. Schwab*, ECJ, 133/01, ECR 1982, 1981.

law firm or his legal office. But only recently the German Federal Supreme Court held that this is not the case and the client can fulfil his payment duty at his own domicile. It is obvious that the decisive reason for this alteration was the idea that the client should be better protected than under the previous practice.

The reference to the respective conflict of law rules means that within the scope of international conventions, in particular the UN convention on international sale of goods of 11 April 1980 (CISG) the place of performance has to be ascertained according to the rules of this convention with the result that the seller could sue for the price at the place of his own establishment.

(f) This constant court practice was criticized in literature because it led in most cases to a jurisdiction at the domicile or seat of the plaintiff. The critics therefore pleaded for a new method to ascertain the place of performance. Indeed Article 5 No. 1 was revised within the new Brussels I-Regulation. The new rule is the result of a comprise and thus neither easy to understand nor really convincing in the end.

If you compare the wording of Article 5 No. 1 Brussels Convention and Article 5 No. 1 (a) Brussels I-Regulation there is no difference at a first glance.

The *essential amendment* derives, however, from Article 5 No. 1 (b) Brussels I-Regulation. According to this rule, the place of performance has been fixed for the most important types of business contracts, the *sale of goods* and the *performance of services* to a single place. That is in the case of sale of goods the place where the goods have been delivered or should have been delivered in reality. For the performance of services the place is relevant where the services have been performed in reality or should have been performed. In either case the *place* should be ascertained just *according to the real circumstances*, independent from legal rules as to ascertain the place of performance according to the applicable substantial law. This solution was taken from French practice and shall regularly apply.

The new concept is, however, not easy to apply. Already according to the text of litera (b) the place of performance is *subject to* a differing *contractual stipulation*. As in most cases commercial parties use *standard business conditions*, the place of performance is still fixed by the contract and not by the factual situation. In most cases in trade a sale is stipulated by delivery to a place other than the place of performance at the request of the purchaser. Then, the new rule does not change anything from the result that the seller may claim for the price at his own domicile or seat.

In cases of a *direct delivery* to the customer of the buyer, the domicile of this customer cannot be the place of performance for the first contract. As there is no real place of delivery for such a contract, only the fictitious place agreed upon in the contract terms can be decisive. Moreover, there are cases that the place of delivery is fixed or changed during the transportation of the goods. Again only the contractual stipulation can be relevant.

Finally, Article 5 No. 1 (b) does only apply if the *place of delivery* is *within a Member State* (this derives from the text). If a German enterprise sells goods to a French enterprise being delivered elsewhere in Japan the new rule does not apply. Then, we have to apply Article 5 No. 1 (c) and according to this rule we have again to apply rule No. 1 (a). For such cases we come, therefore, back to the method of ascertaining the place of performance according to the applicable conflict rules and the finally decisive substantial law.

If the defendant has violated a contractual *duty to refrain from doing something worldwide* the plaintiff is not allowed to sue the defendant in any country. The European Court of Justice held that in such a case there is no concrete place of performance under Article 5 No. 1 and the defendant can be sued only in the court of the state of his domicile according to Article 2[5].

The parties may overcome the difficulties in applying the new rule by making a concrete agreement on the place of performance. There is only one limitation. According to a decision of the European Court of Justice of 20 February 1979, such agreements must correspond with the real execution of the contract. If this is not the case (so-called abstract agreement on the place of performance) the agreement must comply with the form requirements of a forum selection clause according to Article 23 Brussels I-Regulation.

(2) *Jurisdiction for tort cases*

Article 5 No. 3 provides special jurisdiction for cases resulting from tort in the courts for the place where the harmful event occurred or may occur. With regard to the availability of means of proof, this place is generally regarded to be the most appropriate place for litigating the case, in particular with regard to traffic accidents.

(a) In our modern world a tort or delict may happen on a *long distance*, the wrongdoer acting in country A and the victim being hurt in country B. For such cases the European Court of Justice held that the victim may choose where to file his action, at the courts of the place where the doer has acted or at the courts where the victim suffered the injury. The victim is however not entitled to choose the courts of a third country at a place where he suffered an additional financial damage. This rule has much importance with regard to trans-border cases of air- or waterpollution and with regard to tort by electronic means, via TV, the publication in newspapers or within the internet.

In case of an injuring publication by international publication Article 5 No. 3 provides jurisdiction at the place of the printing office or at the place of the branch of the editor (both for the total damage) or at any place where the publication was offered or sold, however limited to the damage suffered in the particular country[6].

5) *Besix v. WABAG*, ECJ, Case C-256/00, ECR 2002, I-1699.

6) *Fiona Shevill v. Press Alliance*, ECJ, Case C-68193, ECR 1995, I-415.

(b) Special problems arises when the tort has not already occurred but is imminent to happen. Article 5 No. 3 now explicitly comprises this possibility by the wording "courts for the place where the harmful event . . . may occur". As a consequence the tort jurisdiction may be used for a *claim for a preventive injunction*.

As in the case of the contract jurisdiction the jurisdiction for tort is likewise not available for concurring claims.

(3) *Agency jurisdiction*

Under Article 2 an internationally operating enterprise can be sued only in the state of its seat. To prevent prejudice to a plaintiff whose dispute with the enterprise arises out of the operations of the latter's branch or agency in another country according to Article 5 No. 5 the enterprise may be sued in the courts for the place in which the branch or agency is situated.

This rule is applicable to all disputes arising out of the operation of the branch, they may be of the contractual or non-contractual kind. The rule applies only against the enterprise, not in favour of it and it is also only applicable if the enterprise has its seat within a Member State of the union. If you want to sue, for example, the German branch of Mitsubishi Corporation, the jurisdiction does not follow from the Brussels I-Regulation, but from the autonomous law of Germany. In the case Somafer v. Saar Ferngas, the European Court of Justice discussed a number of factors necessary to identify a branch, agency or establishment. It said:

> "The concept of branch . . . implies a place of business which has the appearance of permanency, has a management and is materially equipped to negotiate business with third parties so that the latter also knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension."[7)]

An independent agent is not a branch within the meaning of this rule. Likewise independent enterprises within a group of enterprises are not regarded as branches or establishments unless they appear by having the same name and a common management to be one enterprise or just a dependant agency or branch of the other.

(4) *Jurisdiction in insurance, consumer and labour cases*

The Brussels I-Regulation contains special rules for either subjects. These special rules are drafted for the protection of policy holders, consumers and employees. At the end the "weaker party" has the choice to sue the more powerful party

---

7) ECJ, Case C-33/78 of 22 November 1978, ECR 1978, 2183.

(1) in the courts of the Member State where he is domiciled, or

(2) in another Member State where the plaintiff is domiciled.

In all cases the weaker party can be sued only at the courts of his own domicile. Forum selection clauses can be agreed upon only after the concrete dispute has arisen or in favour of the weaker party.

(5) *Exclusive jurisdiction over immovable property*

Article 22 No. 1 provides for exclusive jurisdiction with regard to actions concerning rights in rem or tenancies of immovable property to the courts of the Member State in which the property is situated. This rule applies regardless of the nationality or domiciles of the parties and neither submission to another jurisdiction by the entry of an appearance nor a jurisdiction agreement can found jurisdiction contrary to Article 22.

This rule led to much inconvenience with regard to the parties of a tenancy contract when both parties have their domicile in the same country but the object is situated in a third country. By way of a compromise Article 22 No. 1 was amended by a new sentence providing that proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months No. 1 does not apply but the courts of that Member State would have jurisdiction in which the defendant is domiciled, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State. If the tenancy was for business use the exclusive rule still applies.

(6) *Prorogation of jurisdiction*

By contractual stipulation the parties may agree to litigate specific disputes before a court or the courts of a specific Member State or they may agree that their dispute shall not be brought before specific courts who would have jurisdiction by law.

The importance of forum selection clauses in international business is great. Most contracts of transnational character contain a forum selection clause or an arbitration agreement. This is not only true for contracts between parties of unequal power. For the forum selection leads to some clarity and certainty with regard to the contractual relation. On the other side it is evident that the contracting party who is able to select the courts of the own country will have some advantage in receiving justice.

Under European law, forum selection clauses are valid if they refer to a *particular legal relationship* and include disputes which have already arisen or which may arise in connection with it.

Such jurisdiction shall be *exclusive* unless the parties have agreed otherwise.

Article 23 Brussels I-Regulation gives the possibility to agree upon a concrete court or alternate concrete courts in divergent Member States. Any relations between the dispute or the future dispute and the courts of the Member State are irrelevant. Thus it is possible

to agree upon a *neutral forum*.

Forum selection clauses come into the scope of Article 23 if the parties or at least *one of them is domiciled in a Member State*. If both parties live in the same Member State, for instance in Germany, and they agree upon a German court this agreement just falls under the autonomous German law.

If both parties have their domicile in a third party state the agreement has to be judged under the law of those states.

If both parties are seated in different Member States or if one party has its domicile in a Member State and the other party in a third state Article 23 is applicable. Only recently the European Court of Justice decided in favour of this wide interpretation.[8] As a consequence the European regulation is also relevant for parties domiciled in third countries.

Article 23 applies irrespective of whether the parties are merchants or consumers.

To conclude a valid agreement under Article 23 the parties have to comply with the *form requirements* of the rule.

Under Article 23 section 1 sentence 3 an agreement shall be either

(a) *in writing* or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between them, or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contract of the type involved in the particular trade or commerce concerned.

Being *in writing* has caused much problems if both parties or one party has used *standard terms*. The European Court of Justice held that it is insufficient just to attach the text of the standard terms to a contractual offer or to the acceptance. Indispensible is at least a hint in the text covered by a signature to the standard terms; they are then deemed to be included without a special signature. With regard to commercial parties it is not even necessary to attach the text of the standard terms to the offer or the acceptance if the text of the standard terms is easily available.

The last alternative of an agreement according to trade usages refers to the German doctrine of the commercial letter of confirmation. If the parties have agreed upon a contract (may be in writing or orally) and one side sends a letter again confirming the content of the contract, this letter of confirmation may contain many details which have not been negotiated in reality provided that those clauses are not unfair and not added in bad faith. If the opponent receives such a letter of confirmation and does not object the contract will be binding as it is fixed by the letter of confirmation. By this way any side may be encouraged to

8) Group Josi v. Universal, ECJ, Case C-412/98 or 13 July 2000, ECR 2000, I-5925; Coreck Maritim v. Handelsveem, ECJ, Case C-387/98 of 9 November 2000, ECR 2000, I-9937.

add a choice of law clause and a forum selection clause in favour of his own country. The European Court of Justice held by judgment of 20 February 1997[9] that being silent after having received a commercial letter of confirmation may lead to a valid forum selection clause if such binding

(1) corresponds with a trade usage in international trade of the particular branch,

(2) the parties are acting within this branch and

(3) they know this trade usage or must be treated as if they had known it.

The latter shall be the case, if the trade usage is common in the particular branch.

The silence to a commercial letter of confirmation shall not be equated with a modified acceptance after having received an offer.

Finally Article 23 section 2 provides that any *communication by electronic means* which provides a durable record of the agreement shall be equivalent to writing.

Limitations to the freedom to agree upon a forum selection clause derives only from Article 23 section 5. National restrictions which go beyond this section 5 are invalid within the scope of the European law.

(7) *Jurisdiction by entering an appearance*

So far public policy of states is not concerned (as in the case of Article 22) any court shall have jurisdiction even if the requirements of the previous rules are not met, if a defendant enters an appearance without contesting the jurisdiction of the court. If the defendant enters an appearance the court has jurisdiction and is not allowed to decline his jurisdiction for reasons of forum non conveniens. Like Article 23, Article 24 is applicable only if one of the parties is domiciled in a Member State.

Article 24 is part of section 7 "prorogation of jurisdiction" but contrary to Article 23 the defendant must not have the will to establish jurisdiction. If he appears or opposes just to the substance of the claim, Article 24 applies in any case.

No unconditional appearance lies in the mere notification of a power of attorney or in the information that the defendant is going to object to the claim or in the application for legal aid for a defence.

The defendant does also not enter an appearance if he contests jurisdiction and puts forward at the same time objections against the substance of the claim.

(8) *Examination as to jurisdiction and lis pendens*

(i) *Examination as to jurisdiction*

To prevent parallel proceedings in different Member States Article 25 and 26 Brussels I-Regulation provide that any court has to examine his jurisdiction on his own motion. If there is no jurisdiction under the regulation it shall declare that it has no jurisdiction and

9) Mainschiffahrtsgenossenschaft v. Le Gravières Rhénanes, ECJ, Case C-106/95, ECR 1997, I-911.

dismiss the claim. In cases where the defendant could enter an appearance the court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the initiating documents.

(ii) *Lis pendens and conflicting proceedings*

According to the jurisdiction rules of the regulation, courts of different Member States can have jurisdiction. In such a case it is decisive what court is first seised with the case. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court (Article 27 section 2). Till the jurisdiction of the first court is established, all other courts shall stay their proceedings until such time (Article 27 section 1).

This lis pendens provision applies "where proceedings involving the same cause of action and between the same parties are brought in the court of different Member States".

But: What is the same cause of action ? The concepts of matter in dispute and cause of action are diverging between the Member States. To prevent conflicting judgments and avoid the application of Article 34 No. 3 the European Court of Justice held that the term "the same cause of action" must be interpreted in an autonomous way. It comprises all claims deriving from the same contract or the same tort. In Gubisch v. Palumbo (Judgment of 8 December 1987) the European Court of Justice held that a claim for the declaration of the voidness or dissolution of a contract and a claim to fulfil obligations arising out of the contract do have the same cause of action. And the same is valid if one party is suing for fulfilling duties arising out of the contract and the other party brings the claim for the recovery of performances or payments as unjust enrichment because of the invalidity of the contract. This theory has been called the so-called *common core theory*. The main consequence of the theory is, that a party may file a negative declaratory claim and in this way causing a bar for a subsequent action for performance in a different Member State. To prevent conflicting judgments the European Court of Justice held that the party claiming payment or delivery and so on is obliged to bring his action at the first court seised. In addition, the European Court of Justice held on 8 May 2003 that whether two claims have the same subject matters is to be decided upon the claims with exclusion of defence submissions raised by the defendant.[10)]

As even in Europe the courts of the Member States do not apply the same substantive law, a party has the possibility of some kind of *forum shopping*. Another problem has arisen by the fact that at least in some Member States justice has a big overload and proceedings do not proceed for a very long time. The party who files a negative declaratory claim may by this way block the action for performance arising out of the contract. On the proposition that justice has equal standards in each Member State the European Court of Justice only recently rejected the proposition that lis pendens must no

10) *Gantner v. Basch*, ECJ, Case C-111/01, ECR 2003, I-4207.

longer be respected if the case does not proceed let us say for five years after being filed in European cases[11].

As a practical consequence, conflicting judgments may not only arise from the same cause of action but also from *related actions* pending in different Member States. Article 28 of the Brussels I-Regulation, therefore, gives the second court the possibility to decline jurisdiction if the court first seised has jurisdiction of the actions in question and its law permits the consolidation of the respective claims (Article 28 section 2). This rule, however, gives the court only a discretion to do so and this possibility is restricted to cases when the claim is still pending in the first instance. Article 28 is no basis for jurisdiction but jurisdiction for the second related claim must derive from Article 2 to Article 24 of the Brussels I-Regulation.

III. Unified steps within procedure

1. Service of judicial documents

Under German law the claim is pending not before it is served upon the defendant. But irrespective of this construction it is necessary to serve the claim to the defendant to provide him a fair hearing within the procedure.

a) Whereas service within the same state is in general executed without problems, any cross-border service proved to be difficult, burdensome and time-consuming. Therefore already from the very beginning of the negotiations at the Hague Conference it was aimed to agree upon provisions easing international service. The Hague Conventions on Civil Procedure of 1905 and of 1954 therefore contain rules on transborder service of documents. In that time the transmission was made by consular channels, a method workable only if there are few letters to be served within a month and no longer practicable in our world of globalization where cross-border service is daily routine. The *Hague Service Convention of 1965* therefore maintained the diplomatic and consular general but stipulated that the *direct communication* between the courts (*via central authorities*) should be the ordinary way of transmission. It was stipulated already in the Hague Convention of 1954 that a direct communication would be possible by mutual agreement.

b) The Hague Service Convention of 1965 provides in Article 10 in addition, that there should be a *direct service* by post, that court offices should be able to ask court officers in the country of destination directly for service, and that parties from abroad should be able to serve directly in the requested state by authorizing the competent authority in the requested state. This solution was quite modern, but, unfortunately, subject to the objection of every ratifying country with the final effect that those methods could

11) *Gasser v. MISAT*, ECR C-116/02 (of 9 December 2003).

not be used in most instances.

After cross-border litigation has become more popular within the European Union as a consequence of the Brussels Convention system it was felt that it was time to provide for more efficient channels of transmitting judicial documents between the Member States of the European Union.

c) The *European Service Regulation* widely follows the model of the Hague Service Convention of 1965. The content of the regulation was signed in 1997 as a convention between the Member States, but after the Amsterdam Treaty came into force the proposed convention was converted into a regulation. This regulation is valid within all Member States of the European Union without Denmark.

d) According to Article 4 section 1 judicial documents shall be *transmitted directly* and as soon as possible between the agencies designated according to Article 2 by each Member State.

e) The transmission of documents and so on between the transmitting agencies and the receiving agencies may be carried out *by any appropriate means*. This rule consequently also authorizes a transmission by email provided that transmitting and receiving agencies have the necessary technical equipment. The documents to be transmitted shall be accompanied by a *request* drawn up *on a standard form*. The documents shall be exempted from legalisation or other formalities (Article 4 section 4). After service a certificate of service is drawn up and returned to the transmitting agency (Article 4 section 5). To maintain that the transmission machinery is working efficiently, the European Council has established a judicial net by decision of 28 May 2001. This net consists of contact persons in any Member State who should try to find solutions for problems which arise in connection with the execution of a request of transmission.

f) Whereas Article 13 section 1 of the Hague Service Convention of 1965 provides that a request for service may be refused to be executed if the requested state holds that it could touch his souvereignty or his security, the European service regulation does *not* contain *any* such *reservation*. As a consequence the transmission of documents cannot be refused even for reasons of national public policy.

g) Another crucial point of any cross-border service is the *translation of the documents* to be served. Such translation causes great costs and delays the execution of the service essentially. Between commercial parties there is moreover a great likelihood that they have communicated before on the basis of a certain language, quite often English, and that it makes not much sense to also translate documents which the addressee easily understands into the official language of the requested state. According to Article 5 of the Hague Service Convention the addressee may accept voluntarily untranslated documents, but if he refuses to do so all documents must be translated before formal service can be executed. Article 8 of the European Service

Regulation now provides that the receiving agency shall inform the addressee that he may refuse to accept the document to be served if it is in the language other than either (1) the official language of Member State addressed or (2) a *language of the Member State of transmission which the addressee understands*. If for example in German-Italian trade the Italian seller sues the German buyer in Italy, the claim written in Italian and the trade documents written in Italian need not a translation into German if the German addressee understands Italian. This is of course a good first step of liberalization. The transmitting agency may however not examine whether the German addressee really understands Italian or not, but can rely only on his voluntary submission. If he understands Italian but denies to do so, service cannot be performed and the document must be sent back to Italy for producing translations and then starting a new formal service. Whether the addressee correctly refused the acceptance or with fraud decides the court where the claim has been filed.

Even my simple example with a German-Italian trade is not free of doubts. Article 8 section 1 of the European Service Regulation does not determine who must understand the foreign language if the addressee is a legal person or company. For practical reasons it cannot be decisive whether the president of the company speaks the foreign language but whether there is a responsible officer who is able to do so.

Moreover, there is no rule for the widespread case that the trade relation is executed in the language of a third country, e.g. in English or French notwithstanding that both parties are domiciled, let's say, in Spain and Germany.

h) The Service Regulation does not provide for uniform rules on the place of service, the possible authorized recipients and the possibilities of substitute service.

i) An important improvement as opposed to the Hague Service Convention of 1965 is, that Article 14 section 1 of the European Service Regulation provides that the foreign court may *serve a document directly by post* and that the receiving state cannot exclude this kind of service but only modify it. Accordingly Germany has requested that in the Federal Republic of Germany direct service by post is accepted only in the form of registered letter with advice of delivery and only on the further condition that the document to be served is either in German or in one of the official languages of the transmitting state if the addressee is a national of that state.

As the Hague Service Convention, the European Service Regulation also provides for direct service through judicial officers in the Member State addressed. But any Member State may object and Germany has objected to this kind of service.

j) As already the Hague Service Convention, the European Service Regulation does not deal with the question whether according to the national law service abroad is necessary or whether it is possible to avoid real service abroad by fictitious service at home.

k) The service regulation does also not deal with the question whether mistakes within the transmitting process make the service void or *whether formal defects are cured* after

the addressee has in fact received the document. As Article 34 no. 2 of the Brussels I-Regulation provides recognition of a judgment given in default of appearance when the defendant was not served with the document instituting the proceedings in sufficient time and in a way as to enable him to arrange for his defence, it can be concluded that formal mistakes which do not prevent the addressee from preparing his defence are now irrelevant.

2. Taking evidence abroad

The power of courts is part of the state power and can thus be exercised only within the territory of a respective state. A foreign state is consequently not allowed to take evidence within the boundaries of another state and may urge nobody to cooperate in favour of a proceeding pending in another state.

If cross-border taking of evidence is needed it must be executed by international legal assistance. In Germany there are even opinions that taking evidence by legal assistance is the only way to gain evidence from abroad. In real practice and according to my opinion in line with international standards is however any taking of evidence abroad if the witness, expert witness or opponent is cooperating freely without any exercise of power.

That means, that a state may not summon a person resident abroad to appear before the court by subpoena. If, therefore, a third party does not appear voluntarily before the court where the proceedings are pending the only possibility of proof taking is by way of international legal assistance.

a) On initiative of the Federal Republic of Germany on 28 May 2001 the Council Regulation on Cooperation between Courts of the Member States in the Taking of Evidence in civil or commercial matters was coming into force. Like the Service Regulation, the Evidence Regulation follows widely the Hague Evidence Convention of 1970. The intent is, however, to improve, simplify and accelerate *cross-border proof taking* which is needed for a proper functioning of the internal market in the European Union. As the Service Regulation, the Evidence Regulation is valid within all European Member States except Denmark.

b) As the Hague Evidence Convention, the European Evidence Regulation contains rules how to proceed in cases of transborder taking of evidence but does not touch the question whether and why taking of evidence abroad is necessary or whether the court may order so-called *extraterritorial orders of proof taking*. As the consequence the regulation does not prohibit such orders. A witness resident abroad may therefore be summoned to appear before the court, but if he is a foreigner only without any subpoena. According to Article 14 European Service Regulation the witness may be summoned by direct post. A possible alternative is also to put him questions in writing and ask for a freely written answer.

If a party is domiciled abroad he is not freed from the general procedural duties

with regard to parties, in particular the duties to discover and to present all material in his possession or in his disposal. Discovery orders with regard to third parties resident abroad may be made however only as an informal request to present the document.

c) According to Article 1 of the Evidence Regulation a court of a Member State may *request* the competent *court of another Member State to take evidence.*

(1) This request shall be *transmitted* by the court before the proceedings are commenced *directly* to the competent court of the other Member State for the performance of the taking of evidence (Article 2 section 1). Different from previous conventions and from the Service Regulation, the central authorities shall deal with the matter only if there are difficulties with regard to the direct transmission in exceptional cases at the special request of a requesting court (Article 3 section 1 (c) Evidence Regulation).

(2) To simplify and standardize the practical and administrative cooperation any request shall be made by *using a standard form* attached to the regulation. The details of this form are fixed in Article 4 of the regulation.

(3) Requests and communications pursuant to this regulation shall be transmitted by the *swiftest possible means* which the requested Member State has indicated it can accept (Article 6). If the requested state accepts it, even a transmission by email is possible, provided that the document received accurately reflects the content of the document forwarded and that all information in it is legible (Article 6 sentence 2). If there are difficulties with the handling of requests for taking of evidence, the contact persons appointed within the European judicial net in civil and commercial matters should try to solve the problem.

In the past the execution of requests under the Hague Evidence Convention quite often took a very long time. Article 10 of the Evidence Regulation therefore states that the requested court shall execute the request without delay and, at the latest, within 90 days of receipt of the request.

(4) For practical reason, the requested court shall execute the request in accordance with the law of its own state (Article 10 section 2). This corresponds with the *lex fori principle* of international civil procedure. From a practical standpoint it is the only possible solution as judges live with their own procedure and cannot learn and apply a foreign procedure just for a single case.

(5) As in the Hague Evidence Convention the European Evidence Regulation also provides for the possibility that the requesting court may call for the request to be executed in accordance with a *special procedure* provided for by the law of its Member State (using form A for this request). The requested court shall comply with such a requirement unless his procedure is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties (Article 10 section 3). As far as I can see there are not so much divergencies

between the evidence rules of the European countries that this rule will lead to difficulties.

Just to illustrate such difficulties and to show that still many scholars and practitioners have a very national-minded view I would like to give you an example for the Hague Evidence Convention.

Supposed that a claim is pending before a U.S. court between a U.S. plaintiff and a German defendant and the main witness is resident in Germany. The U.S. court may then according to the Hague Evidence Convention request to execute the request according to a special form (Article 9 section 2 Hague Evidence Convention). Such a special form may be (1) the request to draw up a verbatim protocol, and (2) the request for hearing the witness by cross examination. Not only a few authors in Germany state that neither the verbatim protocol nor the cross-examination could be executed in Germany. But such a parochial attitude is not convincing. German courts use recorders with the result that a verbatim protocol can be made and I do not see why a cross-examination by the lawyers should conflict with the German ordre public.

(6) The European Evidence Regulation also deals with the *presence* and participation *of* the *parties*. In accordance with the law of the requesting court the parties and their representatives have the right to be present at the performance of the taking of evidence. Article 11 deals so with details so that this participation could really be executed.

(7) According to Article 12 even the members of the *requesting court* or a representative of this court may be present in the performance of the taking of evidence if the own law of the requesting court allows such a participation.

The request for the hearing of a person may be refused only in very limited circumstances according to Article 14.

d) *Direct taking of evidence abroad*. In addition to making the execution of requests for the taking of evidence between the Member States more efficient the European Evidence Regulation contains an essential improvement by way of the new regulation in Article 17.

(1) According to this rule any court of a Member State may request to take evidence directly in another Member State. To do so it shall submit a request to the central body of the requested state by using the form provided in the regulation. The requested state then shall inform the requesting court within 30 days under what conditions according to the law of the requested state such performance is to be carried out (Article 17 section 4). Whereas in the past a direct taking of evidence could take place only if the governments agreed by individual decision, Article 17 now contains a general consent to do so. The requested state has to provide for a meeting room, technical equipment and so on and, therefore, it can stipulate the

conditions for the performance. But it is not allowed to refuse the direct taking of evidence. In problematic cases it can only assign a court of its own state to take part in the performance of the taking of evidence to ensure the proper application of Article 17.

(2) The direct taking of evidence may only take place if it is performed on a *voluntary basis* without the need for coercive methods. Any witness to be heard by the court shall be informed before that the hearing shall take place on a voluntary basis. In any case where there may be some resistance and the witness must be subpoenaed or at the end taken under oath the direct taking of evidence is impossible. Despite of these restrictions Article 17 is a vivid testimony to the fact that the cooperation between the Member States of the European Union in judicial matters becomes closer and more efficient.

For these reasons it is not very likely that courts of European States will frequently travel abroad, in particular since the parties will have to pay the costs. The provision, however, may be useful for proof-taking in cases pending in courts seated near to state borders with parties and witnesses living on both sides of the border.

3. Minimum standards of legal aid

a) If you want to sue abroad, you are confronted with different procedure, different habits, different legal culture and in practical terms different levels of cost. For an enterprise this obstacle may be overcome but for a private person it may prove to be insurmountable, the possibility or even necessity to sue abroad thus becomes illusionary. Even between the Member States of the European Union there are great differences as to the cost level and as to the availability of legal aid. To mitigate those differences at least for cross-border disputes the European Council has adopted a directive for establishing minimum common rules regarding legal aid in cross-border disputes.

b) The directive is applicable for all cross-border disputes, irrespective of the type of court (Article 1). Legal aid means that there shall be provisions to cover the cost of litigation including the services of a lawyer and the costs of court proceedings (Article 2). All persons involved in a civil dispute shall be entitled to receive appropriate legal aid if they do not have sufficient resources (Article 3). As the living costs and the cost level of court proceedings is quite different in Member States, the directive does not provide for uniform levels or standards but refers to the law of the Member State where legal aid shall be granted (Article 4). Article 13 explicitly states that Member States may define the income thresholds above which legal aid applicants are presumed to be able to bear the costs associated with legal disputes. But as price level and living conditions are quite different, this rule does not exclude an applicant to

prove that he is even within this limit unable to pay the costs of the proceedings (Article 13 section 3).

c) As it may prove difficult for a poor litigant to address himself to a lawyer in a foreign country Article 9 of the Directive provides the possibility that the application is made to the authorities of the state in which the applicant habitually resides.

Article 14 states that Member States may reject an application if the action or the defence appears to be manifestly unfounded.

d) Article 17 finally provides that a Member State may not reimburse the costs of court from a loosing party who has received legal aid (Article 17 section 3). Yet the winning party is entitled to recover from the loosing party all the costs of the proceedings irrespective of having received legal aid. Member States may, however, provide for exceptions to these principles to ensure appropriate protection of weaker parties (Article 17 section 1, 2).

As the directive just intends to introduce minimum standards Article 19 provides that the Member States are not prevented from making provisions for a more favourable arrangement for legal aid.

4. Information on foreign law

Under the conflict rules of Member States it may happen and quite frequently happens that the court is obliged to decide the case according to substantive foreign law. It is true that in nearly all countries of the European Union foreign law is regarded as law but even if the court is obliged to ascertain foreign law on its own motion this is not easy and regularly necessitates calling an expert witness on foreign law. Such an expertise is costly and it takes time to make it available.

To facilitate gathering information on foreign law and to reduce the cost level for getting such information, the London European Convention on Information on Foreign Law of 7 June 1968 provides a simple system according to which the courts of a contracting state may request the courts of another contracting state to provide information necessary to decide the case in the application of the foreign law. To enable the requested office the request shall explain the case as far as it is necessary to understand the request (Article 4) and the answer should be given in an objective unpartial way on the law of the requested state. Depending on the circumstances of the case, part of the answer shall be the information on the exact wording of the applicable statute or regulation, as the case may be, also with reference to relevant court decisions, extracts from commentaries or textbooks or from the reasons of the draft of the statute. Unless the request touches sovereignty rights of the requested state, it is obliged to give an answer in time (Article 10, 11) but the answer does not bind the court requesting in deciding the case (Article 8).

Experience shows that this system is not completely perfect but works quite well with regard to relatively simple cases and ensures that a court will receive information even on

the law of a country where information is not easily available.

Regularly the answer is free of costs (Article 15), but is given in the official language of the requested state that at the end a translation may be necessary.

IV. Recognition and enforcement

1. The traditional scheme of recognition under the Brussels Convention

a) The Brussels Convention not only contains uniform law rules on direct jurisdiction but also those relating to recognition and enforcement. Those provisions together form a single scheme overriding national law wherever they apply. As I have already explained within the jurisdiction scheme the Brussels Convention provides that any *review of personal jurisdiction* at the state of recognition and enforcement is *obsolete*. By this abrogation the free movement of judgment within the European Union was facilitated. U.S. authors in particular have compared this part of the convention with the guarantee of full faith and credit incorporated in Article IV of the U.S. Constitution and, hence, have interpreted the Brussels Convention as a first step towards a federal legal system in the European Community.

The binding force of the court's judgment concerning its competence facilitates and simplifies enforcement proceedings considerably. Prohibiting the review of jurisdiction has been a major advance in international procedural law.

According to the autonomous law of most countries, a foreign judgment is not eligible for recognition if the foreign court lacks *international jurisdiction* in the eyes of the law at the place where recognition is sought. Under the so-called *mirror-image principle* a German court has to determine whether the foreign court has international competence by applying the German rules on jurisdiction analogously (§ 328 section 1 no. 1 German CCP). Such undertaking may prove difficult if connecting factors for determining international competence vary between or among the countries concerned. In such event the German court has to hypothetically establish whether the subject matter would have come within the jurisdiction of German courts. This question may be difficult to answer, since the foreign court has not established the facts necessary to determine whether German connecting factors for international competence apply or not. In complicated matters, the enforcement proceedings will therefore develop into extensive fact finding proceedings in which preliminary procedural questions play an important role. Hence, the autonomous German provisions for the action for a foreign judgment do not differ from ordinary proceedings. Under such circumstances the recognition and enforcement of a foreign judgment proves not easier than filing a completely new action with the German courts.

The Brussels Convention has marked a radical break with these difficulties.

There are only few exceptions to the general rule confirming the binding force of the first court's ruling on its competence, as for example in insurance matters, consumer disputes and in all cases of exclusive jurisdiction (Article 28). No objection can be raised, though, if the court has acknowledged its competence in disregard of a choice of jurisdiction or an arbitration clause. If a party wants to avoid an internationally binding ruling on the court's competence it has to appeal against the decision at the place where the judgment has been rendered.

The convention does not allow the revision of questions of jurisdiction by the judge of the place of recognition even in cases in which the convention lacks uniform rules and, hence, national autonomous rules apply, as is the case when the defendant is domiciled in a third country for example.

According to Article 28 section 3 the question of jurisdiction is in no circumstances part of the public policy of the state in which recognition and enforcement is sought. Attempts to circumvent this rule for the benefit of nationals of third states have not been upheld in practice. The enforcement court, however, may review whether a judgment falls within the scope of the convention itself.

b) The Brussels Convention differs considerably from traditional treaties on recognition and enforcement concerning the various kind of judgments eligible for recognition. According to Article 25, *every decision* rendered by a court of a contracting state must be recognized or declared enforceable independently from its form (judgment, court order, writ of execution, decision fixing costs) or the kind of procedure applied (ordinary, preliminary or summary proceedings) or whether the decision is final and definitely enforceable or not or whether the judgment is for payment or orders specific performance. Enforceable deeds and settlements in court are treated as court judgments by the convention (Article 50 and 51).

Considering the legal situation governing the negotiations on the Brussels Convention, the progress achieved by the convention was overwhelming, since recognition and enforcement of foreign judgments in the Member States of that time was a hazardous procedure. Dutch courts, for example, did not recognise foreign judgments at all and before joining the union the same was the case in Sweden. French judges were allowed to review the foreign judgment on all legal issues which is equivalent in practice to a refusal to recognise foreign judgments. Now, the convention stated expressly that a foreign judgment may not be re-examined as to its substance at the stage of recognition and enforcement (Article 29 and 34 section 3).

c) The grounds upon which recognition and enforcement may be refused are enumerated exhaustively in the convention.

(1) The convention attributed great importance to the *defendant's right to be heard* in court proceedings. Therefore, a judgment by default may not be recognised if the complaint has *not* been *duly served* on the defendant or if he was *not* given *sufficient*

time to prepare and to present his defence (Article 27 no. 2). The regularity of these formal requirements was judged according to autonomous provisions of the state in which the judgment was given or multilateral treaties, in particular the 1965 Hague Service Convention. The question of whether the service took place in due time, however, was determined by the judge of the state of recognition depending on the circumstances of the individual case. Both requirements were examined by the court in which enforcement was sought independently, even if the first court in which judgment was given has held that service was duly and timely effected.

The rules on service in most countries were so complex that even national courts sometimes have overlooked them. German legal literature especially has repeatedly claimed that irregularities in service should be regarded as rectified whenever the addressee has received the document in due time. The European Court of Justice has, however, rejected this idea and maintained that service must be in good time and in full compliance with the local provisions. These decisions were quite often criticized and led to a revision of this rule within the Brussels I-Regulation.

(2) Article 27 no. 3 Brussels Convention tried also to avoid *incompatible judgments*. Already the rules on lis pendens are aimed to avoid parallel proceedings. If, however, by negligence incompatible decisions by the courts are given, the domestic judgment has precedence if it is not set aside. The problem of incompatible decisions is not confined to conflicts of res iudicata in the German sense, but includes the conflict between judgments for the payment of a purchase price and a dismissal of a claim for counter performance, or conflicts between claims for divorce and separation, maintenance and so on. By judgment of 6 june 2002 the European Court of Justice held that 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.[12] To a large extent, problems of irreconcilability only arise if parties litigate without thinking.

(3) In the early stages of the convention some contracting states still considered their *national conflict rules* as an integral part of the public policy. Hence, under Article 27 no. 4 foreign judgments were reviewed as to a departure from national conflict rules, but only confined to the areas of personal status, legal capacity and capacity to act, matrimonial property regime and succession. In practice, this rule was hardly applied and removed within the Brussels I-Regulation.

(4) Even under the harmonized law of the Member States the major ground upon which enforcement and recognition may still be refused was that of *public policy*, a ground which must, however, be construed narrowly in the sense of an

12) *Italian Leather*, ECJ, Case C-80/02, ECR 2002, I-4995.

international, European ordre public.

d) The *procedure of recognition and enforcement*

(1) *Recognition* of foreign judgments is *automatic* and takes effect ipso iure in all contracting states everytime recognition is invoked as an incidental question or a main question (Article 26). The Brussels Convention does not provide for formal recognition proceedings. If the party only seeks recognition he may apply for a declaration by the same procedure as is provided for enforcement (Article 26 section 2).

(2) Enforcement follows from recognition and is largely a procedural, mere technical matter. The Brussels Convention contained detailed and effective provisions on the *enforcement proceedings* (Article 31 to 45).

(i) In the *first instance* the enforcement *procedure is ex parte* (Article 31 section 1 and 34 section1). In this way the debtor is denied the opportunity to delay the enforcement process by raising unfounded objections. The debtor can raise *objections* against the execution clause only *by appealing* against the first decision (Article 36 section 1 and 37 section 1). On the other hand, the creditor may enforce the judgment granting protective measures even before the execution order has not been served on the debtor (Article 39 section 2).

The documents needed in order to commence enforcement proceedings are limited to an absolute minimum: (1) an authentic copy of the judgment (in general with a certified translation), (2) supporting documents for enforceability in the judgment state and for service of the judgment.

The execution order or the registration is usually granted within a couple of days.

(ii) The convention did not limit the debtor's rights of defence. The debtor was free to *appeal and further appeal* against the order granting the enforcement (Article 36, 37). The debtor could object to the enforcement for any reason, but could not bring existing objections which were not raised within the time limit for the appeal in the original proceedings.

(iii) If registration was sought for a judgment which was not final but *subject to appeal in the state of origin*, the court of appeal of the enforcement state could stay the enforcement proceedings (Article 38 section 1) if it was likely that the decision was incorrect and would be reversed. Alternatively, the court would permit enforcement conditionally, on the provision of security, if the title itself was enforceable without security (Article 38 section 2).

2. The improved scheme within the Brussels I-Regulation

The Brussels I-Regulation contains an amended scheme for recognition and enforcement in Article 32 to 56.

Recognition itself could not be eased as it was already automatic.

a) However the grounds for refusing recognition have been reformed. The overprotection of a party not participating in proceedings has been abolished by *Article 34 no. 2 Brussels I-Regulation*. According to this provision a judgment shall not be recognized

"*if it was given in default of appearance, if the defendant was not served with a document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.*"

Already from the wording derives that a violation of service rules is no longer an obstacle for the recognition of a judgment if the claim was served in sufficient time.

Even if there have been some mistakes in serving it is sufficient that the document was served in a way enabling the defendant to arrange for his defence. And even if this was impossible but the default judgment was served upon the defendant, he could no longer do nothing and object against enforcement proceedings but is now obliged to commence proceedings to challenge the judgment in the state of origin as long as this is possible for him to do so.

b) Moreover the old ground for *violation of conflict rules* with regard to personal status and so on was not reincorporated in the new European instrument.

c) And, finally, the *public policy* clause (Article 34 no. 1) was limited to cases where the foreign judgment is "manifestly contrary to public policy".

d) A substantial improvement is also to be found in the *proceedings for the enforcement* of title.

(i) According to Article 41 Brussels I-Regulation the judgment shall be declared enforceable immediately on *completion of the formalities* in Article 53 *without any review of objections* under Article 36 and 35. Under Article 53 the party seeking recognition shall produce (1) a copy of the judgment which satisfies the condition necessary to establish its authenticity, and to facilitate this evidence the party seeking recognition may produce the *standard form certificate* certifying all relevant data. At the end the party has to produce the judgment, a translation and this standard form declaration and then the enforcement order is given without any further review. Even possible conflicts with the national ordre public are not reviewed in first instance.

(ii) Under Article 43 section 1 either party may *appeal against the* decision for the *declaration of enforceability*. According to the new Article 45 the court with which an appeal is lodged shall refuse or revoke the declaration of enforceability only on one of the grounds specified in Article 34 and 35. That means that the court of appeal has to examine whether there are *grounds to refuse recognition*. But under the wording of Article 45 section 1 the court of appeal may *not* deal with *any other*

objections against the judgment, for instance not objections against the claim which have become res iudicata. According to the German Law Implementing the European Law, the defendant must raise all objections against the title within his appeal and is precluded from filing a separate action raising objections on fresh grounds to the judgment claim (in Germany according to § 767 CCP). If one takes the wording of Article 45 section 1 earnestly, thus such objections are no longer possible within appellate court proceedings for the declaration of enforcement. At least according to the wording of the European law those objections can be raised only by such an action in the state of origin. Up to now there is, however, no established case law with regard to this point.

e) A further improvement concerns the possibility for the *availing of provisional*, protective *measures of enforcement* in the enforcement state. Under Article 39 of the Brussels Convention the creditor could proceed to such protective measures after his title was declared enforceable in first instance but the time limit for appeal against this decision was not yet expired.

Under Article 47 section 1 Brussels I-Regulation the applicant may proceed to protective measures even before his title has been declared enforceable provided only that the judgment must be recognized in accordance with this regulation. As soon as the judgment has been declared enforceable this right to protective measures brings with it the absolute power to proceed to such protective measures (Article 47 section 2).

Article 47 section 1 empowers the creditor to apply for protective measures in several Member States wherever he knows about assets of his debtor and only after having successfully attached such assets he may apply for the declaration of enforceability.

Article 47 section 1 does not prevent the applicant from availing himself of provisional remedies according to the law of the Member State requested, but does not provide him with a harmonized or even unified power to apply for protective measures of enforcement.

After the declaration of enforceability the creditor has the power to proceed to such protective measures. That means that he no longer has to prove that there is any danger that otherwise his claim will not be realised.

f) According to Article 57 *authentic instruments* and according to Article 58 *court settlements* are enforceable in other Member States like judgments.

3. Proposal for a European enforcement order for uncontested claims

The simplification of the proceedings for the declaration of enforceability is only a first step. According to the program of the European Council of 15 January 2001 this procedure shall be abolished by the introduction of the European Enforcement Order for

Uncontested claims. The next steps should be the European Enforcement Order for Maintenance and the European Enforcement Order for Claims with Small Value. In the last step, this order should include all enforceable titles.

a) The European Regulation creating a European Enforcement Order for Uncontested Claims has finally been adopted on 30 March 2004. The regulation is aimed to completely *abolish the exequatur procedure* as a condition for the enforcement of decisions from another Member State. Uncontested claims are included in the first step as the council thought about that in such cases the debtor did not contest voluntarily either because he accepted the claim or because he wanted to ignore it.

b) Access to enforcement in another Member State should be accelerated and simplified. On the other side *fundamental rights of the defendant* should be respected. Therefore, the regulation has by way of compromise decided for a model that the competent court for the proceedings leading to the judgment should be entrusted with the task of scrutinizing full compliance with the minimum procedural standards before delivering a standardized *European enforcement order certificate*. This kind of examination is based on mutual trust in the administration of justice within the community. The application for the certification of a title as a European enforcement order is optional for the creditor; the creditor may instead choose the system of recognition and enforcement under the Brussels I-Regulation.

c) What are the *procedural requirements* for the certification ?

The *initial document must have been served* on the debtor by one of the methods listed in Article 11. A substitute service has to be executed according to Article 12 and this kind of service must be proven by a certificate according to Article 13. If the default judgment was not rendered in the first hearing, the debtor must have been served with the summons to that hearing according to Article 14 and in sufficient time to arrange for defence (Article 15). According to Article 16 the document in instituting the proceedings must contain due information about the claim and due information about the procedural steps necessary to contest the claim (Article 17) and steps necessary to avoid a default judgment (Article 18).

If these requirements are met, the creditor may apply for the certification of his judgment as European enforcement order (Article 4). In general there is no appeal against the granting of this certification.

d) To initiate *enforcement proceedings in another Member State* a creditor just has to present a copy of his judgment and a copy of the European enforcement order (Article 21), no additional fees, security, bond or deposit shall be required for enforcement (Article 21 section 3). In December 2002 the Committee for Economy and Social Questions of the European Parliament has welcomed the proposal for the European enforcement order. As the enforcement procedure in enforcement states becomes unnecessary, the creditor saves time and money. In addition, regularly he

does *not* need *translations* of his title as the standard form for the certificate as European enforcement order is covering all official languages.

The committee, however, underlines that this order is only a first step for the establishment of a real European legal space with harmonized proceedings including the law of enforcement.

The Regulation on the European Enforcement Order should become effective on 1. January 2004. This date could not be met. But the final text of the Regulation was adopted by the European Parliament on 30 March 2004 and it is, therefore, just a matter of time that the Regulation is published in the Official Journal and shall become effective.

V. Prospects of European Civil Procedure

The European law on civil procedure was growing rapidly in the last years.

1. Besides the subjects explained in these lectures the Council was active in *family matters*. By Regulation of 29 May 2000 jurisdiction and recognition and enforcement in matrimonial mattes and in matters of parental responsibility was regulated (No. 1347/2000/EC). This regulation was repealed and substituted by Regulation No. 2201/2003 of 27 November 2003 harmonizing the rules on parental responsibility with the relevant Hague Conventions and broadening it to all decisions on parental responsibility including measures for the protection of the child. You may wonder that the European Union which is intended to adopt measures necessary for the proper functioning of the internal market is dealing with divorce and parental responsibility. But in practical terms it was felt that conflicts between the courts of the Member States with regard to divorce and parental responsibility are an earnest hindrance with regard to the free movement of persons within the community.
2. According to the program of Tampere a lot of further projects for the unification of specific subjects of procedural law are in preparation.

Those preparations are mainly made within so-called Greenbooks. There are Greenbooks

- on Alternative Procedures for Dispute Resolution (as facultative procedure)
- on the European dunning procedure
- on measures to simplify and accelerate the resolution of disputes regarding small claims,
- on a European enforcement order for maintenance, and
- on measures to ease enforcement including
  - Measures of provisional remedies,
  - Attachment of bank accounts, and
  - as to the Transparency of property.

In only a few years the commission will develop concrete draft regulations on these matters and as long as the European Union will be politically successful, the unification of civil procedure will proceed step by step.