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Cross-border Civil Proceedings in the EU
(Conference Papers)

Contents

Foreword

This issue is the proceedings issue for the international scientific conference "Access to Civil Justice - Cross-border Civil Proceedings in the EU". The conference was held in Maribor from 17th to 18th November 2011 and was led by dedicated and experienced academics: prof. dr. Vesna Rijavec (Faculty of Law, University of Maribor, Slovenia), prof. dr. Wolfgang Jelinek (Faculty of Law, Karl Franzens University in Graz, Austria) and prof. dr. Jasnica Garašić (Faculty of Law, University of Zagreb, Croatia).

The conference provided a unique opportunity both to review the progress of national reporters on European project "Simplification of Debt Collection in the EU" and to allow all participants to meet and to discuss topics of common interest. The aim of the conference was discussion on new unifying tendencies in EU Civil procedure that will certainly impact the recovery of monetary debts.

The Conference included more than twenty lectures from over 10 different countries on a wide variety of topics in cross-border civil proceedings.

The conference reinforced high academic quality and gave participants (international participation of more than 150 participants) the opportunity to explore subjects in international jurisdiction, cross-border enforcement of debts (Brussels I, European enforcement order, European order for payment, small claims procedure), the proposal for a new Brussels I Regulation, cross-border service of documents, cross-border taking of evidence, use of electronic tools in the context of litigation, European Account Preservation Order, Comparative Issues of Civil Procedure in the EU, Legal Remedies in the Cross-Border Enforcement, the European Certificate of Inheritance.

Expectations among participants of the conference were high, and the conference organisers met those expectations. The organisation of the conference was excellent and carried through with efficiency and great hospitality.

The papers appearing in this proceedings issue represent most of the contributors presented in international scientific conference. The papers are carefully chosen and they reflect wide-ranging, constructive and lively debate on open issues.

Looking forward to future conferences, we are delighted to announce that arrangements are in progress for new international scientific conference Access to civil justice, expected to take place in Maribor in June 2012.

prof. dr. Vesna Rijavec

CROSS-BORDER CIVIL PROCEEDINGS IN THE EU
(NOVEMBER 17, 2011 - NOVEMBER 18, 2011)
pp. 1 - 17

Alternative Dispute Resolution (ADR) in Austrian and European Law

PETER G. MAYR

ABSTRACT Austria does not have a strong ADR culture, but mainly relies on its traditional dispute resolution in state courts, which can certainly be attributed to its well-functioning judiciary. Therefore ADR-institutions have so far not been relied on much in Austria. Nonetheless a Law on Mediation of Civil Disputes was enacted as early as 2003 and due to European incentives a few new conciliation bodies for solving certain consumer disputes have also been set up over the last years. Slowly, the measures of these bodies also begin to have a practical influence. The new proposals of the European Commission on consumer ADR published not long ago will – once enacted – also greatly affect the Austrian legal culture.

KEYWORDS: • Alternative Dispute Resolution • Austrian and European Law • Law on Mediation of Civil Disputes • Mediation • EU-Mediation Act

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I Introduction

I would like to begin my presentation with a definition of the term "Alternative Dispute Resolution" or "ADR". As there is no appropriate German synonym, this English term is also widely used among German speaking lawyers. Taking into account the European meaning of the term[1] I understand ADR as all forms of alternative dispute resolution other than traditional civil procedure with the participation of a third neutral party, but not including the "classical alternative" of arbitration, which nowadays has to be viewed as a separate field of law.

The structure of my presentation is simple: I will present a chronology of the legal development starting with the Austrian national situation before the respective European development to then sketch the European situation and finally analyse how the European development influenced Austrian national law. I will conclude my presentation with a short summary.

II Austrian Law

1 General Remarks

I believe it is widely known that the core of the Austrian civil procedure code goes back to 1895 and is based on the work of the legendary Austrian scholar *Franz Klein*[2]. I do not want to talk about the timeless concept of this "social civil procedure" in detail, but it has to be pointed out that the quality and practicability of this piece of legislation has survived decades and is still recognised in theory and practice today.[3] This also holds true internationally: A comparative study of the *European Commission for the Efficiency of Justice* (CEPEJ) on the judicial systems of 45 different countries of 2010[4] recently pointed out that the Austrian judiciary is characterised by efficiency and is well-functioning (see Stawa, pp. 2011: 510 ff).

The fact that the Austrian judiciary has been working well for many decades must always be borne in mind when analysing the existing alternatives. There are not as many such alternatives as the European and worldwide development of the matter would suggest. Nonetheless this presentation cannot possibly enumerate all existing mechanisms. I will only focus on the instruments which are subject to legislation. Other forms which merely exist without being expressly regulated will not be mentioned, as their continuing existence and their way of working is not predictable.

2 Conciliation Bodies of the Municipality (Gemeindevermittlungsämter)

I would like to start with the conciliation bodies of the municipality, not because these institutions are particularly important (quite the contrary being the case) but

because they are – historically seen – as the first institutions that emerged, based on two acts of the old Austrian monarchy of 1869 and 1907.[5] According to these Acts, which are formally still in force, and the corresponding Land legislation, the municipalities can set up conciliation bodies, which are staffed with elected ombudsmen and which – on a voluntary basis – are called to decide certain civil disputes by negotiating settlements which are then enforceable in law (also a quite peculiar competence of these conciliation bodies has to be briefly mentioned, namely regarding the criminal offence of defamation of honour, which can only be prosecuted in court, if the parties have tried to reach a "settlement" before the municipality before, i.e. the offender offering an excuse to the victim).

Despite being historically interesting this institution will not be dealt with further, as it practically constitutes "dead law" (see Mayr, 1999: pp. 4 ff).

3 Pre-trial Settlement in Court (*Prätorischer Vergleichsversuch*)

The concept of the pre-trial settlement in court according to s 433 of the Austrian civil procedure code (*prätorischer Vergleichsversuch*) has a long tradition: According to this provision every party has the right to apply for a subpoena of the other party in order to reach a settlement before bringing proceedings to a regional court (*Bezirksgericht*). The opponent cannot, however, be forced to appear in court, even an unexcused absence is not sanctioned. On the other hand, if a settlement is reached, it is enforceable in law (for more details see Mayr, 2002).

Over the last years this particularly Austrian institution has not had a significant role in practice as a (real) tool for dispute settlement. This could, however, change in the near future as a consequence of planned amendments of the relevant laws (see Chapter II.8 und IV.2).

Other out-of-court settlements need a notarial Act in order to become enforceable (ss 3 ff *Notariatsordnung, NO*). This is, however, the subject of another contribution of this conference (Bittner, L. "Merits of the Notarial Act for the Simplification of the Debt Collection in the EU") and shall not be addressed here.

4 Rules Relating to Liberal Professions

Regarding liberal professions two sets of cases have to be mentioned, namely:

a) Disputes between Members of the Profession

The rules regulating liberal professions, such as the Law regarding the legal profession of practising lawyers (*Rechtsanwaltsordnung, RAO*) and the Law regarding the legal profession of civil law notaries (*Notariatsordnung, NO*), the Law regarding the legal professions of Public Accountants and Tax Advisers (*Wirtschaftstreuhandberufsgesetz, WTBG*), the law regarding the chambers of civil

engineers (*Ziviltechnikerkammergesetz, ZTKG*) or the Law regarding the medical profession (*Ärztegesetz, ÄrzteG*) all contain rules which foresee that disputes between the members of the profession have to be referred to the respective conciliation body before legal steps can be taken in the state courts. In order not to worsen the legal position of the persons concerned the modern laws provide for a three months suspension of the prescription period and other time limits (for more details see Mayr, 1995: 269).

b) Disputes with Clients / Patients

According to s 19 para. 2 RAO both the lawyer as well as his client can call the committee of the Bar Association (*Ausschuss der Rechtsanwaltskammer*) for conciliation of disputes regarding the correctness and amount of lawyers' fees.

Similarly, s 134 para. 2 No 4 NO gives the Chamber of Notaries the power to conciliate in disputes between notaries and their clients about fees or conducting business.

Moreover, the Bar Association as well as the Chamber of Notaries have set up special conciliation centres (*Schlichtungszentren*) and enacted conciliation guidelines. These initiatives go back to the fact that both professional bodies are by law able to set up conciliations bodies for neighbour disputes (this will be explained later in chapter II.8). These bodies cannot only be called to conciliate in neighbour disputes but also in other disputes, if the parties agree on such a form of dispute resolution. They have, however, not reached great practical importance.

Let us now deal with the particularly delicate but very interesting area of medical liability: Here, several institutions for out-of-court settlement of disputes between doctors and patients have been in operation for a long time. They existed without an explicit legal basis and were organised regionally. The legislators reacted quite late to this development, namely in 2001 with an amendment of the law regarding medics (*2. Ärztegesetz-Novelle 2001*): The new s 58a ÄrzteG now regulates the controversial question of the prescription period. According to the new provision a conciliation procedure suspends the prescription period for up to 18 months. The new law, however, has neither established a medical conciliation body nor introduced an obligation to do so.

The regulation of the suspension of the prescription period as well as its exact beginning and termination was copied by s 41 of the law regarding dentists (*Zahnärztegesetz, ZÄG*). Moreover (and different from the Law regarding medics) this provision obliges the Chamber of dentists to establish patient conciliation bodies as well as to enact rules of procedure (s 41 para. 5 ZÄG). This was realised by s 53 of the Law regarding the chamber of dentists (*Zahnärztekammergesetz, ZÄKG*) which contains the obligation to establish patient conciliation bodies in the Länder as well as a federal patient conciliation body to act as an appellate

instance. Both parties have a right to refer a dispute regarding dental treatment to the competent conciliation body before initiating legal proceedings. The rules of procedure enacted by the Austrian Chamber of Dentists contain detailed regulation on the composition of the conciliation bodies in the Länder, details on how and when to bring proceedings, how to conduct the proceedings, costs, as well as the clarification that the prescription period is suspended from the day the application for conciliation reaches the competent conciliation office (cf. Jahn, 2009).

In relation to medical malpractice two more institutions have to be mentioned: the ombudsmen (*Patientenanwaltschaften*) as well as the Patient Compensation Fund (*Patientenentschädigungsfonds*). Due to time restrictions I can, however, only mention that patient disputes are a growing field of dispute also in Austria.

5 Housing Law

Under the heading "decision of the municipality" s 39 of the Austrian Tenancy Act (*Mietrechtsgesetz, MRG*) foresees that certain disputes concerning tenancy and housing in certain municipalities (i.e. eleven) can only be brought to the state courts if the municipality was approached first. Otherwise the claim is not admissible. The municipality has to conduct the necessary investigation and - if an amicable agreement cannot be reached – decide after a proceeding that is partly governed by the rules on non-litigious procedure (*Außerstreitgesetz, AußStrG*) and partly by the general administrative procedure rules (*Allgemeines Verwaltungsverfahrensgesetz, AVG*). The decision of the municipality is immediately enforceable; there is no legal remedy against it. It is, however, automatically void as soon as a civil action is brought within four weeks after it is served on the parties. The civil courts can also be called if the proceedings are not brought to an end within three months (for further details see Heindl/Lenk, 2003).

The described procedure with the municipality was introduced to take a certain workload from the courts in that the competence for dispute resolution is temporarily shifted from the courts to an administrative authority. This so-called successive competence is considered acceptable under the Austrian constitutional principle of separation of powers. Even though the municipality is therefore also responsible to finally decide a dispute, it is still called a "conciliation body" because of s 39 para. 3.

6 Law Relating to Private Associations

According to s 3 para. 1 No 10 of the Law regarding private associations (*Vereinsgesetz 2002, VerG*) the statutes and articles of every private association shall oversee rules regarding the resolution of disputes resulting from the special legal relationship between the association and its members as well as between members of the association. s 8 VerG lays down further details: According to s 8 para. 1 VerG disputes resulting from the association relationship have to be

referred to a conciliation body. If the proceedings before that body do not end earlier, parties can initiate legal proceedings before the state courts after six months from the referral. The possibility to go to the state courts can only be excluded if a (real) arbitral tribunal is set up according to ss 577 ff of the general Austrian civil procedure rules (*Zivilprozessordnung, ZPO*). s 8 para. 2 VerG requires that the statutes and articles also have to regulate the setting up of the conciliation body as well as the election or appointment of its members particularly emphasising their impartiality. There is also a rule establishing that both parties must be heard (for more details see Mayr, 2009: pp. 539 ff).

7 Mediation

In 2003 Austrian legislators enacted a Civil Mediation Act (Zivilrechts-Mediationsgesetz – ZivMediatG)[6] which has been in force since May 1, 2004 and has not been amended since (see Hopf, 2004: pp. 41 ff and Roth & Markowetz, 2004: pp. 296 ff).

According to the legislative materials it is the primary goal of the new law to create a legal framework for mediation safeguarding the interests of both clients and qualified mediators.

The law does not attempt to comprehensively regulate mediation and its procedure but rather to create a framework and to guarantee a high quality standard. From the variety of rules the following deserve extra attention:

s 1 ZivMediatG defines mediation. Based on the parties' free will it is an activity where a specifically trained, unbiased mediator using recognised methods systematically fosters the communication between the parties in order to lead them to a self-responsible solution of their dispute. Mediation in civil matters means that the conflict would normally be solved in civil courts. This is at the same time the only scope of application of the Austrian Mediation Act.

Mediators under the ZivMediatG are only registered mediators, i.e. registered in the (public) list of mediators (s 3 para. 1 No 2 ZivMediatG). As a consequence of this definition by law the regulations of the ZivMediatG only apply to registered mediators. It does, however, not mean that other, i.e. not registered, mediators cannot exercise mediation, even though it is then outside the scope of the specially regulated and specially protected mediation in the meaning of the ZivMediatG.

One of the prerequisites for being registered in the list of mediators is the professional qualification and trustworthiness of the applicant as well as the existence of personal liability insurance (s 9 ZivMediatG). The professional qualification is described in s 10 ZivMediatG as having the knowledge and practical skills as well as the awareness of the legal and socio-psychological basis of mediation. s 29 ZivMediatG and the implementing regulation on the vocational

training of mediators in civil matters contain more details of the vocational training for (registered) mediators. A duty to attend a certain amount of continuing education courses shall guarantee the continuing expertise of the mediator (s 20 ZivMediatG).

Registered mediators have the right (and duty) to use the title "registered mediator" (s 15 para. 1 ZivMediatG), which at the same time constitutes a "public quality label".

It derives from the principle of voluntary participation that the mediator can only act upon agreement of the parties. He has the duty to inform the parties about the characteristics and legal consequences of mediation as well as the duty to personally, directly and impartially conduct the mediation according to good conscience (s 16 para. 2 ZivMediatG). The mediator has a strict duty of confidentiality about all information he gains in the line with the mediation (s 18 ZivMediatG). The latter duty is safeguarded by respective regulations in the civil and criminal procedure rules (s 320 No 4 Austrian civil procedure rules, *ZPO*, and s 157 para. 1 No 3 Austrian Penal Code, *StGB*).

It is also important to mention that a mediation which is properly initiated and conducted by a registered mediator suspends the prescription period as well as other time limits of claims that are subject to the mediation (s 22 para. 1 ZivMediatG). In order to exactly determine the relevant dates and time limits the mediator has certain documentation duties (s 17 ZivMediatG). The effects of European Law in this area will be mentioned later. (see Chapter IV.2).

8 Neighbour Law

The third Civil Law Amendment of 2004 (*Zivilrechtsänderungsgesetz, ZivRÄG 2004*)[7] introduced – from July 1, 2004 – a compulsory ADR mechanism for certain disputes between neighbours (see for more details *Mayr*, 2009: 258 ff). A neighbour is obliged to refer a dispute regarding the deprivation of natural light or air by trees or other plants to a conciliation body for an amicable solution (s 364 para. 3 of the Austrian General Civil Code, *ABGB*), or to submit an application according to s 433 para. 1 Austrian civil procedure rules (*prätorischer Vergleichsversuch*, chapter II.3 above) or – if the other party agrees – to refer the dispute to a mediator. A civil action is only admissible if a settlement is not achieved within three months of making the application under s 364 para. 3 ABGB or s 433 para. 1 ZPO , or, from the beginning of the mediation procedure. Consequently, the claimant has to produce a respective confirmation of the conciliation body, court or mediator that an amicable solution could not be reached. A civil action that is brought despite having fulfilled the described prerequisites is inadmissible and leads to an ex officio dismissal in any state of the proceedings.

Not every conciliation body is fit to oversee disputes according to the ZivRÄG 2004; it has to be a body that was established by the notaries' chamber or the Bar Association or any conciliation body affiliated with a corporation under public law (see chapter II.4.b above). Moreover, only a mediator that fulfils the requirements of the Civil Mediation Act can act as a mediator in neighbour disputes (see chapter II.7 above).

According to the legislative materials it was the express goal of the new regulation to primarily handle disputes arising in relation to the right to light out of court. One reason for the new rule was to avoid an even bigger workload for the courts; another reason was to profit from the means of alternative dispute resolution, as appropriate conciliation bodies have the advantage to not only focus on the legal issues but also try to investigate the underlying reasons of the dispute and to therefore go to the roots of the problem.

Unfortunately there is no reliable statistical data on the practical application of this rather new instrument, as there is no statistical research accompanying it. One therefore has to rely on anecdotal information and assumptions. It seems that the new rule is more of a general and not so much of a practical value.

9 Practical Application

Unfortunately, the statistical material available which would contain information on the mentioned ADR mechanisms in Austria is very poor. However, this seems to be the case in general.

Regarding the out-of-court settlements in the area of housing, which is to be conducted compulsorily (see chapter II.5) a private survey has shown the following numbers: The by far biggest conciliation body in the city of Vienna has dealt with 5.500 applications in the year 2010. In 562 cases (slightly above 10 %) a settlement before the conciliation body was reached, in 419 cases another out-of-court settlement was closed. 1.779 cases were decided by a formal decision of the authority (*Bescheid*). In 443 cases the parties did not accept the decision and filed an application with the court. In 376 other cases the three-months-period foreseen in s 40 para. 2 MRG expired, which also led to an application with the court. Smaller municipalities had to deal with a much smaller amount of cases, e.g. five cases in the municipality of Mürzzuschlag between 2006 and 2010, 29 cases in Neunkirchen and 42 cases in Stockerau.

Oberhammer/Domej have rightly pointed out that in creating the new Civil Mediation Act (see chapter II.7) the legislator tried to foster this "product" (Oberhammer/Domej, 2003: 148). This was successful in a way, as it led to the registration of more than 3.500 mediators in the official list of the Ministry of Justice. This large number, however, declined after the first time limit for registration (which was five years, s 13 ZivMediatG) had expired. According to an

information of the Ministry of Justice there were "only" 2.364 mediators registered in August 2011 (among these 1415 women and 949 men).

The new law has definitely led to an increase in the availability of mediation. Demand and practical need, on the other hand, however, are still behind. Despite various attempts of the legislator in various fields of law (e.g. in neighbour law, in the law regarding disabled persons, in the law regarding various vocational trainings) to introduce mediation it is still somewhat exotic to the Austrian legal order. It has to be taken into consideration, however, that such a development cannot be seen on a short term basis but rather needs some time to settle. At the moment legislators intensively contemplate an increase of mediation measures in the field of family law.

III European Law

1 Beginning

To start with I would like to draw your attention to an article which I wrote together with Martin Weber for the Austrian Journal of Comparative Law, Private International Law and European Law in 2007 (ZfRV 2007/26, pp. 163 ff). This comprehensive report covers most details on European development up to 2007 (see also Hess, 2010: pp. 582 ff). Therefore I want to only briefly sketch the early history in a few words and rather focus on the recent developments in this area.

The relevant developments started in the field of consumer protection: Under the heading "consumer access to justice" European consumer policy soon started to look for possibilities to guarantee effective legal remedies for consumers. The fact is that consumer disputes normally do not deal with a very high amount of money, which compared to the high costs of court proceedings, has always constituted a barrier for consumers to try to invoke their rights in court.

Being aware of this the European Commission produced a comprehensive Green Paper entitled „Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market" (COM[93] 576 final), which contained an assessment of the situation in the different Member States and discussed the European dimension of the topic. As well as consumer protection the completion of the single market gave rise to a new incentive for further action in the field of alternative dispute resolution: The lack of effective consumer remedies was seen as an obstacle to the effective operation of the single market; the problems of cross border disputes were even compared to obstacles in regard to taxation and technical prerequisites. The introduction of appropriate, cheap and fast proceedings was seen as inevitable.[8]

The „Action Plan on Consumer Access to Justice and the Settlement of Consumer Disputes in the Internal Market" (COM[96] 13 final] following the Green Paper in

February 1996 emphasised the importance to support the development of out-of-court procedures next to an easier access to the state courts in small claim cases and presented a concept for the further implementation of measures. The plan was, on the one hand, to strengthen consumer confidence in out-of-court proceedings by guaranteeing certain procedural principles, and on the other hand, to find a way of coordinating and communicating between the national systems in order to be able to also manage cross border disputes in this way. Subsequently, both plans could be realised.

2 Recommendations of 1998 and 2001

To further strengthen the confidence of consumers in ADR mechanisms, the European Commission presented recommendation 98/257/EC "on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes".[9]

Three years later, on April 4, 2001, the Commission additionally published recommendation 2001/310/EC "on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes".[10]

The contents of the two recommendations are similar: The minimal criteria to be observed by out-of-court conciliation bodies are set out as basic principles. These include the principles of independence and transparency, the adversarial principle, the principle of effectiveness, legality, liberty and representation and in the second recommendation also the principles of impartiality, transparency, effectiveness and fairness. For the time being reasons these principles cannot be dealt with in detail, a large part being self-explanatory anyway.

The difference between the two recommendations lies with their different scopes of application: The first recommendation regards procedures which are characterised by a third party intervention. The second recommendation deals with procedures which are led in order to bring the parties together and cooperatively find a solution. The recommendation of 1998 is therefore addressed to active conciliation, while the recommendation of 1991 has a form of conciliation in mind, where the „referee" has a rather passive role e.g. giving informal incentives or explaining different possibilities to settle the dispute.

3 Co-operation Networks

Also in the second area, namely the international network of national conciliation mechanisms, various measures were taken: Following a council resolution of May 25, 2000[11] a European wide net of national institutions for out-of-court settlement of consumer disputes (EEJ-Net) was set up. All institutions which fulfil the Commission's requirements can become members. In 2005 the EEJ-Net was

reorganised and now acts as the Net of European Consumer Centres helping consumers to find the right ADR mechanisms in other Member States.

According to the latest Annual Report of the consumer centres' network[12] the concerned institutions dealt with 71.000 cases in the year 2010, which is an increase of 15 % compared to the year before. Austria has registered 14 ADR institutions with the network. This compilation, however, is old and neither comprehensive nor representative: Among the 14 notified institutions one finds the "Internet Ombudsman" which operates nationwide, but also the "conciliation body for chimney sweeps, funeral businesses and sewer cleaners" situated with the local government of the Land Salzburg or four different regional conciliation bodies for dentists, although such bodies would exist in the other Länder, too (see chapter II.4.b).

Next to the consumer centres' network also the so-called FIN-Net needs to be mentioned. This is a net of national conciliation bodies operating in cross border disputes between consumers and providers of financial services.[13] In Austria these activities lie with the "Common conciliation body of the Austrian credit services sector" (*Gemeinsame Schlichtungsstelle der Österreichischen Kreditwirtschaft*).[14]

4 Green Paper 2002

In May 2000 the European Council invited the Commission to collect information regarding alternative forms of dispute resolution used in the Member States in civil and commercial matters with a cross border context and to draft a Green Paper describing the current situation and serving as a basis for discussing future actions. This Green Paper was presented in April 2002 (COM [2002] 196 final) stating that ADR was a political priority for the European Institutions and providing for an overview and discussion of the current situation, problems and questions regarding the enhancement of ADR.

Subsequently, European means of legislation generally placed more emphasis on „*Alternative Dispute Resolution*". An example is Art 10 of the EU-Legal Aid Directive,[15] which expressly sets forth that legal aid is to be granted also for ADR proceedings, if the law or a court requires the parties to use such a mechanism.

Moreover, a number of directives encouraged the Member States to introduce ADR mechanisms, such as the E-commerce Directive,[16] the Postal Services Directive[17] and the Markets in Financial Instruments Directive.[18] Other European legal instruments obliged the Member States to introduce appropriate and effective dispute resolution mechanisms, e.g. in the telecommunication sector, the energy sector, the Consumer Credit Directive[19] and the Payment Services Directive.[20]

5 Mediation Directive

Based on the comments following the Green Paper and a public hearing, the „*European Code of Conduct for Mediators*" was presented in spring 2004 and subsequently accepted on an expert meeting in July 2004. The code is directly addressed to mediators as well as respective organisations providing mediation services and regulates qualification, appointment, independence and impartiality, confidentiality, costs and promotion of services, and partly also the procedure itself. It has, however, no legally binding effect.

On the other hand, the Commission presented a proposal for a Mediation Directive in October 2004, which was finally enacted as Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters.[21] The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings (Art 1). As can be seen from the long title of the directive, it does not comprehensively regulate mediation but only defines the terms "mediation" and "mediator" (Art 3) and regulates certain fundamental aspects of mediation such as the confidentiality of mediation (Art 7), the effect of mediation on limitation and prescription periods (Art 8) and the enforceability of agreements resulting from mediation (Art 6). Given the existing competence restrictions in EU primary law the Directive only covers cross border disputes (Art 2).

The mediation directive had to be implemented by May 21, 2011. As a result of not reporting any implementation measures nine Member States – not including Slovenia – have already been warned by the European Commission. The Austrian implementation will be discussed in chapter IV.2 below.

6 Treaty of Lisbon

A clear sign for the increasing relevance of *Alternative Dispute Resolution* in European Law was Art 81 para 2 (g) of the Treaty on the Functioning of the European Union (TFEU), which entered into force on Dec 1, 2009 and now expressly mentions „the development of alternative methods of dispute settlement" as a goal of the European Union.

7 CJEU in *Alassini*

The Court of Justice of the European Union has also contributed to the field of ADR. In case C-317/08 (*Rosalba Alassini/Telecom Italia*) the court developed guidelines defining the circumstances under which compulsory ADR mechanisms adhere to the standards of effective judicial protection. In the context of claims for the payment of telecommunication fees the Court also stated that neither EU law nor the European Convention on Human Rights generally contradict a compulsory

pre-trail conciliation procedure, if that procedure does not lead to a binding decision. Moreover such a conciliation proceeding must not significantly delay the bringing of a claim and must be free from costs (minimal fees excluded).

8 Consultation Procedure und Proposals 2011

On January 18, 2011 the DG for Health and Consumers (GD SANCO) produced the so far penultimate Act of the European development: After having conducted some relevant studies[22] it presented a consultation paper „*On the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transaction and practices in the European Union*" which details the legal and factual situation in the European Union (e.g. that there are 750 different ADR mechanisms regarding consumer matters in Europe) and asks 16 questions. Along with the publication of the collected answers to these questions last summer, it was announced that relevant legislative proposals shall be presented by the end of the year. And indeed, soon after the conference in Maribor the Commission presented a Proposal for a directive "on alternative dispute resolution for consumer disputes" (Directive on consumer ADR; COM [2011] 793 final) and a proposal for a regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR; COM [2011] 794 final) next to a communication on „Alternative dispute resolution for consumer disputes in the Single Market" (COM [2011] 791 final).

These two new proposals constitute a significant step in the European development and will certainly have a great influence; they cannot, however, be presented in this contribution.

Let us now turn to the question, how the described development in Europe influenced the Austrian situation:

IV Influence of European Law in Austria

1 Regulatory Authorities as Conciliation Bodies

The European standards described either obliged the Member States to introduce ADR mechanisms or at least were an incentive to do so, also in Austria. A range of new conciliation bodies were introduced next to the already existing ones. Responsibility for conciliation prior to proceedings was mainly shifted to particular regulatory authorities such as the Broadcast and Telecom Regulation Ltd (*Rundfunk und Telecom Regulierungs-GmbH*) in the field of telecommunication and postal law, the *E-Control Austria* with regards to energy law and the Railway Control Ltd (*Schienen-Control GmbH*) in regard to transport law.

The relevant legal provisions, in particular s 122 Telecommunication Act (*Telekommunikationsgesetz*), s 53 Postal Market Act (*Postmarktgesetz*), s 26 Energy Control Act (*Energie-Control-Gesetz*) or s 78a Railway Act (*Eisenbahngesetz*), have more or less the same content.

According to the cited rules the affected parties can bring disputes or complaints to the regulatory authority "notwithstanding the jurisdiction of the state courts". The authority has to attempt to lead the parties to an amicable agreement and/or to suggest a solution. The enterprises are obliged to participate in the proceedings and to reveal all relevant information and material. Moreover, the regulatory authority has to enact and publish guidelines for the conciliation procedure.

It is important that the conciliation proceedings do not restrict the access to the state courts. If the parties do not find an amicable solution earlier, the proceedings end with a proposed solution of the authority. The acceptance of the proposal constitutes a settlement according to Austrian substantive law. If the proposal is not accepted, the parties are free to file a claim with the state courts. In order to enhance the speedy termination of the conciliation proceedings, the time limits provided are rather short.

The conciliation procedure itself is free from costs; each party, however, has to bear their own cost such as lawyers' fees or travelling costs. Representation by a lawyer or a consumer organisation is possible.

According to the annual reports, which the regulatory authorities regularly publish, these procedures are relatively successful. The RTR-GmbH e.g. deals with app. 4.300 cases per year. In 2010 35 % of these could be settled with an agreement between the parties.[23]

2 EU-Mediation Act

The Implementation of the Mediation Directive described above was effected in Austria by introducing the EU-Mediation Act which entered into force in May 1, 2011 (EU-MediatG)[24] In order to preserve the high Austrian standard in regard to the professional qualification of the mediators the directive was only implemented as far as was absolutely necessary (minimum implementation). This means that the new Austrian law – same as the directive (art 2) – only applies to civil and commercial matters with a cross border aspect. A tiny extension of the scope is contained in s 2 para. 1 No 5 EU-Mediation Act: The Austrian law also treats Denmark as a Member State of the European Union.

The contents of the EU-Mediation Act are consistent with the directive and therefore very restricted: Next to a definition of the scope of application (s 1) and the most important definitions of the terms used (s 2) the Act only contains rules regarding the confidentiality of mediation (s 3) and the effects of mediation on

prescription periods (s 4). In order to implement Art 6 of the Mediation Directive a new s 433a was inserted into the general Austrian procedure rules. According to the new provision every agreement reached in a mediation of a civil matter can lead to an enforceable judicial settlement following the example of the *prätorischer Vergleich* described above (chapter II.3). This rule is generally applicable to all forms of mediation, including those without a cross border element, and therefore constitutes a very general recognition of mediation as such (see Kloiber, 2011: pp 119 ff).

Outside the scope of application of the EU-Mediation Act the national rules of the ZivMediatG are decisive.

V Concluding Remark

In summary it can be said that Austria does not have a strong ADR tradition; on the contrary, it rather shows a long history of classical court procedure, which is mainly due to its well-functioning judiciary (see Mayr, 1995: 359). Moreover, it has to be pointed out that the Austrian legal situation concerning Alternative Dispute Resolution is not very clear and not homogeneous. Statistical data is hardly available, the same counts for supporting research as well as profound discussions among academics.

Given this background it is actually astonishing that Austria was a pioneer in the field of mediation enacting relevant law as recently as 2003. This early action, however, proved to be a disadvantage with the further European development, as the Austrian state of the law had to be brought in line with the European norms. Starting with consumer protection law in the 1990ies European legislators increasingly addressed the field of *Alternative Dispute Resolution* and fostered its existence through various means. This led to the introduction of new conciliation bodies in the field of consumer law also in Austria, which subsequently gained practical importance.

At least for the time being - European development has reached its peak with the enactment of the Mediation Directive in 2008 which had to be implemented by May 2011. Austria reacted by introducing the new EU-Mediation Act, which, however, only implemented the necessary minimum as the Austrian law already contains detailed national rules.

The recently enacted proposals of the Commission regarding a directive on consumer ADR as well as a regulation on consumer ODR have to be mentioned as a new milestone regarding the law of Alternative Dispute Resolution. These two new legislative means will definitely influence the development of ADR in Europe and also shape the up to now rather restrained Austrian attitude.

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Notes

[1] See the Green Paper on alternative dispute resolution in civil and commercial law, COM (2002) 196 final, 6.
[2] See *Forschungsband Franz Klein (1854-1926). Leben und Wirken* ed. Hofmeister, Herbert (Vienna: Verlag Manz, 1988).
[3] See the two festive papers, which were published around the 100th anniversary of the Austrian civil procedure laws: *100 Jahre österreichische Zivilprozessgesetze*, ed. Mayr, Peter G. (Vienna: Verlag Österreich, 1998) and *100 Jahre ZPO. Ökonomische Analyse des Zivilprozesses*, ed. Bundesministerium für Justiz and Lewisch, Peter and Rechberger, Walter H. (Vienna: Verlag Manz, 1998).
[4] See „European judicial systems. Edition 2010 (data 2008): Efficiency and quality of justice“ <coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp> (1.12.2011).
[5] Old Federal Gazette (Reichsgesetzblatt) No 150/1869 and No 59/1907.
[6] Federal Gazette I No 29/2003.
[7] Federal Gazette I No 91/2003.
[8] This wish was realised in the meantime with the introduction of a European order for payment procedure (OJ No L 399/1 of 30. 12. 2006) and a European Small Claims Procedure (OJ No L 199/1 of 31. 7. 2007).
[9] OJ No L 115/31 of 17. 4. 1998.
[10] OJ No L 109/56 of 19. 4. 2001.
[11] Council Resolution on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, OJ No C 155/1 of 6. 6. 2000.
[12] <ec.europa.eu/ecc-net> (1.12.2011).
[13] See <ec.europa.eu/internal_market/fin-net/index_en.htm> (1.12.2011).
[14] See § 3 No 9 Zahlungsdienstegesetz, Federal Gazette I No 66/2009.
[15] Council Directive 2003/8/EC to improve access to Justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, ABl L 26/41 of 31. 1.2003.
[16] Directive No 2000/31/EC; OJ L 178, 17.7.2000 p. 1.
[17] Directive No 2008/6/EC; OJ L 52, 27.2.2008 p. 3.
[18] Directive No 2004/39/EC; OJ L 145/1, 30.4.2004 p. 33.
[19] Directive No 2008/48/EC; OJ L 133, 22.5.2008 p. 66.
[20] Directive No 2007/64/EC; OJ L 319/1, 5.12.2007 p. 32.
[21] OJ No L 136/3 of 24. 5. 2008.
[22] See e.g. the “Study on the use of Alternative Dispute Resolution in the European Union“ of 16 October 2009 <ec.europa.eu/consumers/redress_cons/adr_study.pdf> (1.12.2011).
[23] See the Activity Report of the Conciliation Body 2010 <http://www.rtr.at/de/tk/SchlichtungsstelleRTR> (1.12.2011).
[24] Federal Gazette I No 21/2001

References

Heindl, P. & Lenk, F. (2003) *Das Verfahren vor der Schlichtungsstelle* (Vienna: Verlag Österreich).
Hess, B. (2010) *Europäisches Zivilprozessrecht* (Heidelberg: Verlag C.F. Müller).

Hopf, G. (2004) Das Zivilrechts-Mediations-Gesetz, Österreichische Juristen-Zeitung 2004/3, pp 41 ff - Hopf, 2004: pp. 41 ff

Hopf, G. (2010) Erfahrungen mit dem österreichischen Mediationsgesetz, *Rabels Zeitschrift für ausländisches und internationales Privatrecht Band*, 74 (2010) 759 ff.

Jahn, B. (2009) *Außergerichtliche Konfliktlösung im Gesundheitswesen* (Vienna: Verlag Manz).

Kloiber, B. (2011) Die Mediations-Richtlinie und ihre Umsetzung in Österreich, Zeitschrift für Europarecht, *Internationales Privatrecht und Rechtsvergleichung* 2011/16, pp. 119 ff.

Mayr, P.G. (1995) *Rechtsschutzalternativen in der österreichischen Rechtsentwicklung* (Vienna: Verlag Manz).

Mayr, P.G. (1995) Die Schlichtungstätigkeit der Kammern der freien Berufe, *Wirtschaftsrechtliche Blätter*, 1995, pp. 269 ff.

Mayr, P. G. (Ed. 1999) *Öffentliche Einrichtungen zur außergerichtlichen Vermittlung von Streitigkeiten* (Vienna: Verlag Manz).

Mayr, P.G. (2002) *Der gerichtliche Vergleichsversuch* (Vienna: Verlag Österreich).

Mayr, P.G. (2009) Neuigkeiten bei der außergerichtlichen Streitbeilegung in Österreich, in: Ganner, M. (Ed) *Die soziale Funktion des Privatrechts. Festschrift für Heinz Barta zum 65. Geburtstag* (Vienna: Linde Verlag) pp 245 ff.

Mayr, P.G. (2009) Vereinsstreitigkeiten zwischen Schlichtungseinrichtung, Gericht und Schiedsgericht, *Österreichische Juristen-Zeitung*, 2009/61, pp. 539 ff.

Mayr, P.G. & Weber, M. (2007) Europäische Initiativen zur Förderung der alternativen Streitbeilegung, Zeitschrift für Rechtsvergleichung, *Internationales Privatrecht und Europarecht*, 2007/26, pp. 163 ff

Oberhammer P. & Domej T. (2003) Ein rechtlicher Rahmen für die Mediation in Österreich, *Zeitschrift für Konfliktmanagement*, 6, pp. 144 ff.

Roth, M. & Markowetz, K. (2004) Bundesgesetz über Mediation in Zivilrechtssachen – Ein Überblick über die neuen Bestimmungen, *Juristische Blätter*, pp. 296 ff .

Stawa, G. (2011) Effizienz der Justiz im europäischen Vergleich, *Österreichisches Anwaltsblatt*, pp. 510 ff.

CROSS-BORDER CIVIL PROCEEDINGS IN THE EU
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pp. 19 - 30

The Macedonian Judiciary and the European Justice Area

SAŠO GEORGIEVSKI

ABSTRACT This article is primarily focused on examining the potential contribution of the Judiciary of the Republic of Macedonia (an EU membership candidate state) to the functioning of the "European Justice Area" with respects to the challenge of properly applying the domestically adopted EU Law. Whereas, the Constitutional court of the Republic of Macedonia has modestly proceeded towards granting persuasive force to the EU legal sources when applying domestic law, that practice leading towards building a true "European judicial culture" in the country could not be also attributed to the Macedonian ordinary courts. Continuous training of current Macedonian judges should be more focused towards stimulating teleological reasoning on their part when applying the law (imminent in the logic of international and EU law), and to raising awareness among the judges for assuming their future role of acting (also) as "European judges" - once the country accedes to the EU.

KEYWORDS: • Macedonian Judiciary • European Justice Area • Legislative Measures • Judicial Process in the Republic of Macedonia • International and EU law • Legal Culture of Macedonian Judges

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Introduction

Being the first among the Western Balkan states to sign the Stabilization and Association Agreement with the European Communities and their member states in April 2001 (in force as of 2004), the Republic of Macedonia enjoys the status of an EU accession candidate state as of December 2005. As such, throughout the last decade, it has been actively involved in the process of Europeanisation of its internal legal system along the lines of established EU legislation, standards, principles and practice, including those pertaining to providing access to civil justice and to the European Judicial Area (EJA). As in many other areas, that process includes gradual harmonization of Macedonian internal laws with the relevant EU legislation, which is a task for the legislator, but also an adequate preparation of its Judiciary for applying properly harmonized domestic laws in light of the adopted EU legislation, in order to enable Macedonian judges to assume fully their future role as "European judges" once the country accedes to the EU. In this paper we will turn more to the later broader aspect of the Europeanisation of the Macedonia's legal system - the preparedness of the Macedonian Judiciary to respond to the challenge of properly applying the adopted EU Law. Given the proximity of their legal systems and the common difficulties shared by all states of the Balkan region, the conclusions thus derived on Macedonia may be easily applicable to the other Western Balkan states as well.

Understandably, the link between the need to maintain a high quality of the member states' Judiciaries in the administration of (civil) justice and the establishment of a well functioning European Judicial Area has been recognized by many EU institutions' documents, and it also relates to the EU accession aspiring states. Just to recall, the Hague Programme envisaged that "[j]udicial cooperation both in criminal and civil matters could be further enhanced by strengthening mutual trust and by progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law" (Council, "The Hague Programme ...", para.3.2. at pp.11). In an enlarged European Union, mutual confidence should be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality" (*ibid.*). In its Communication to the EP and the Council of 29 June 2006, the European Commission further qualified judicial training as "... a vital issue for the establishment of the European Judicial Area", and that "common judicial training has to focus knowledge of the legal instruments of the Union and the judicial systems of the member states and on improving language training for better communication" (Communication from the Commission, COM (2006) 356 final.). Building on that, the latest Stockholm Programme *inter alia* "... stresses the need to enhance mutual trust between all the professionals concerned at national and Union level", and to develop "... [a] genuine European law enforcement culture ... through [the] exchange of experiences and good practice as well as the organisation of joint training courses and exercises", for which "... systematic European Training Schemes offered to all persons involved should be pursued,

and "... [s]olutions at European level [should] be sought, with a view to strengthening European Training Schemes" (European Council, "The Stockholm Programme ...": paras.4.2.1. at pp.18 and 1.2.6. at pp.6; also See para. 3.2.1. at pp.13).

The emphasis on the need to develop a "European judicial culture" throughout the Union and to provide for well trained national judiciaries for the proper functioning of the European Judicial Area is hardly surprising, given the special character of the EU policies related to EJA. Mainly relying on "minimum standards" and on "mutual recognition" as leading principles of the "decentralized form of integration" typical for this field, the EU policies in civil matters, as indeed in the whole "area of freedom, security and justice" are largely based on mutual trust between the member states' judicial systems (See Coutts, 2011: pp.14-17). Decentralization however also entails "... a risk of diversity in the application of relevant law due to amongst other diverging levels of resources and ability of the relevant actors", and a risk of "different treatment in cross border cases despite the aim of a level playing field" (Storskrubb, pp.10). The later in turn necessitates an increased and much leveled professional quality of the national judiciaries in the administration of civil justice in cross-border cases, and in ensuring proper respect for the citizens' fundamental rights.

Legislative Measures Aimed at Increasing the Quality of the Judiciary and Speeding up of the Judicial Process in the Republic of Macedonia

To what extent has the Macedonian legal system Europeanised itself in preparing its Judiciary to contribute to the proper functioning of the European Judicial Area on the above lines?

At the legislative level of judicial and other related reform, including in the field of approximation of laws with relevant regulations and other EU instruments related to civil justice, there have been many improvements introduced in the current Macedonian legislation in the recent years, including with the latest changes in the civil procedural law aimed at speeding up judicial process and amendments providing for greater accountability of judges. A broader judicial reform package was recently enacted, consisting *inter alia* of amendments to the Law on courts, the Law on the Judicial Council, the Law on administrative disputes, the Law on the court budget and the Law on the court service, including to the Law on Civil Procedure (See Commission Staff Working Paper, SEC (2011) 1203, pp.11-13). The amendments to the Act on Courts and the Act on the Judicial Council, refined or introduced professional requirements, psychological and ethics testing and annual evaluation criteria (*ibid.*). The complaints mechanisms available to parties to court proceedings, both under the competence of the Supreme Court (in the case of unreasonable length of proceedings) and the Judicial Council (in the case of judicial misconduct) were refined, and the amendments to the Law on Administrative Disputes provided for the

establishment of a High Administrative Court, with jurisdiction to decide on appeals against decisions of misdemeanor commissions in the administrative bodies, government second instance commissions and acts of local self-government bodies, that became operational in July 2011 (*ibid.*). As for the Law on Civil Procedure,[1] the amendments to that Law that entered into force in September 2011 aimed at improving the civil procedure in order to shorten the duration of court proceedings, as well as promoting alternative dispute resolution (See Јаневски А., Зороска-Камиловска Т., 2011: 15). It introduced *inter alias* electronic service of documents, tighter procedural deadlines, the use of a preparatory hearing and an obligation on courts to inform the parties of the possibility of mediation (Commission Staff Working Paper, SEC (2011) 1203, pp.11-13, pp.12; for a critical assessment of these amendments See Пепељуговски, 2011: 2). On the other hand, the Ministry of Justice, among others, processed 2 316 requests in civil matters (Commission Staff Working Paper, SEC (2011) 1203, pp.11-13, pp.66).

Yet, according to the European Commission's most recent findings, despite legislative improvements, the implementation of adopted legislation and the strengthening of the independence of the judiciary, among others, continue to represent significant challenges to the Republic of Macedonia. In its latest country's progress report, the Commission again successively detected "core problems relating to independence, competence and efficiency [of the judiciary] [that] still remain to be tackled in practice" (*ibid.*: pp.57). It reiterated that "considerable efforts are needed in order to strengthen the quality of justice, in particular through continuous training and merit-based recruitment procedures, and to safeguard the independence of judges in the context of evaluation and dismissal procedures" (*ibid.*: pp.13). As regards the efficiency of the judiciary, while noting the many newly adopted legislative measures aimed at enhancing efficiency, including the introduction of a minimum number of cases which should be processed per month by judges at different court instances, as well as a methodology for ranking the complexity of cases by subject matter, it didn't miss the opportunity to remind that all these measures might lead to an "over-formalistic application of targets at the expense of high-quality, independent decision-making" (*ibid.*: 58).

Macedonian Judiciary and its Preparedness to Apply International and EU law

Notwithstanding the above broad legislative changes, the factual preparedness of the Macedonian Judiciary to contribute appropriately to the functioning of the European Judicial Area also depends on its readiness to apply international and EU law in practice, including its readiness to give EU legal sources transposed in domestic legislation persuasive force even at the current country's EU pre-accession stage.[2] The later bears particular significance given that many provisions of the already harmonized Macedonian legislation with EU rules

(including in the civil justice area) are rather vague or abstract and require proper interpretation in judicial practice in light of their understanding in EU law. Whereas, on the one hand, the Constitutional Court of the Republic of Macedonia expressed some readiness to rely on EU legal sources and on EU member states' comparative practice in its recently dealt cases, there appears to be little (if any) such readiness on the part of the Macedonian ordinary courts.

In some of its decisions, the Constitutional Court relied on the persuasive force of EU secondary sources (i.e. EU directives) transposed in domestic legislation and on biding international agreements between Macedonia and the EU, however, mainly when rejecting initiatives for the review of the constitutionality of the challenged legislation and/or for the purpose of supporting its previous findings on the legal issues involved. In a way, the later approach of the Constitutional Court was illustrated by a Court's decision of 2004 (Decision of the Constitutional Court of the Republic of Macedonia of 12.05.2004, У.бр.203/2003-0-1), where a provision of the Macedonian Insurance Supervision Law had been challenged *inter alia* on the basis of its non-conformity with the EC Directive 2002/83. In its decision, the Court invoked *in passim* the later EC Directive, however, only to support its previous elaborated finding of the unconstitutionality of the challenged provision on grounds of its violation of the equality of market-participants guarantee provided by the Constitution of RM.[3] While doing that, the Court clearly defined the subsidiary role of the EU legal sources that would guide its practice in the country's EU pre-accession period:

> "Notwithstanding the fact that EU directives as supranational law are not part of the legal order and are not sources of law in the Republic of Macedonia .... the Court has nevertheless *taken into account* Directive 2002/83 ... *in support of its legal finding*" (*ibid*; translated from Macedonia by the author; the emphases are added).

Even that modest "Euro-friendly" approach of the Constitutional Court of granting mere supportive role to the EU directives transposed in Macedonian legislation, reminiscent of the pre-accession practice of the Constitutional and other courts of some of the new EU member states, is to be welcomed as it would certainly contribute to the gradual Europeanization of the Macedonian judicial practice and to the building of an "European legal/judicial culture" in RM. Unlike that pre-accession practice of some new member states' courts,[4] however, the Macedonian Constitutional Court has not yet clearly stated a general principle that the Macedonian harmonized legislation should be interpreted and properly applied in light of the already transposed EU law. On the other hand, somewhat more troubling is the still existent practice of the Court of refusing to review the constitutionality of the challenged Macedonian legislation as regards its conformity with the binding international agreements ratified by the Macedonian Parliament - including with the Stabilization and Association Agreement between Macedonia and the EU (the SAA), despite the clear monistic clause of Article 118

of the Macedonian Constitution providing direct applicability of these agreements in the domestic system and their supremacy over domestic laws. In a recent case, where a provision of the SAA had been directly invoked by the initiators of the proceedings along with a respective article of the Constitution in order to prove the unconstitutionality and illegality of a Regulation issued by the Minister of Finance, the Constitutional Court rested its finding of illegality of the later Regulation only on its non-conformity with the respective Constitutional provision (Decision of the Constitutional Court of the Republic of Macedonia of 17.02.2008, У.бр.134/2008-0-1).[5] In his Separate Opinion to that Court's decision, Judge Igor Spirkovski correctly noted that

> "the Constitutional Court has once again missed the opportunity to treat the SAA as an effective source of domestic law and as a criteria for its decisions on the legality of [Government] regulations and thus *the opportunity to strengthen its role as one of the key factors in the "Europeanization" of the legal order of the Republic of Macedonia*" (*ibid.*, translated from Macedonian by the author; the emphasis are added).[6]

So far the Macedonian ordinary courts are concerned, decisions in which these courts have given any effect to the EU sources of law when applying domestic legislation are almost non-existent, except for the *AD Makpetrol* case decided by the Supreme Court in 2004 (Judgment of the Supreme Court of the Republic of Macedonia under request for revision of 10.06.2004), where that Court (like the lower courts in the same case) directly relied on the Interim Agreement between Macedonia and the EC of 2001.[7] Indeed, in the wider context of applying International and European law, it seams that Macedonian ordinary courts have not yet demonstrated sufficient readiness to apply that law as provided by the respective provisions of the Constitution of RM, including its already mentioned monistic provision of Article 118 (as regards ratified international agreements) and Article 8 of the Constitution granting international law human rights guarantees and "the respect for general international law" a status of "fundamental values of the Macedonian constitutional order". A preliminary data collected from a recent pilot-inquiry performed by the author of this text involving 30-50 Macedonian ordinary judges may shed some light on the later point. Whereas, 73% of those judges had experienced in their practice cases in which the disputing parties invoked some source of International law (mainly the European Convention for Human Rights and its Protocols and/or bilateral agreements ratified by RM), only 7% of the judges (2 of 30) actually applied an international legal rule, and 24% of them just mentioned in their decisions such a rule - mainly - in support of their own interpretation of an applicable domestic legal source. Furthermore, a considerable number of 20% of judges consider that they couldn't apply an international agreement in absence of national implementing legislation, despite the monistic constitutional provision to the contrary effect. So far EU Law is concerned, 48% of the judges were of the opinion that the Stabilization and

Association Agreement between RM and the ECs and their member states is not directly applicable in RM without prior issuance of domestic implementing legislation. When asked on their readiness to apply EU Law should Macedonia become a member of the Union, 96% of the judges expressed a need for "someone's additional expert aid" that would assist them in applying properly that law in practice, including *via* the issuance of general opinions on relevant EU legal issues by the Macedonian Supreme Court, establishing separate departments specialized in EU Law within the courts, inviting expert witnesses in the judicial proceedings etc.

Judicial Training and Changing the Legal Culture of Macedonian Judges in Assuming their Future Role as "European judges"

To be sure, the lack of sufficient preparedness of national courts to properly apply international and EU law in practice and, in particular, to grant the later law persuasive force when interpreting applicable domestic legislation is not typical only for Macedonian courts. In fact, as it was recorded, such a practice have existed also - at least - among the vast majority of the courts of the new EU member states prior to and (even) following their accession to the EU. In particular, like their counterparts from the new EU member states, Macedonian ordinary courts (and to a large extent also the Constitutional Court) seem to suffer continuously from the syndrome of a prevalent "limited law" application based on "textual positivism without constraints", lacking any proper understanding of "the sophisticated concept of EU law's persuasive force" (Kühn: pp.565). These courts lack sufficient ability to apply teleological reasoning while deciding cases beyond written legal texts, including discussing policy concepts and rationales behind applicable legal provisions, consulting general principles of law and/or the ECJ practice - typical for the application of EU Law. The remark by the Czech Minister of Justice addressed to the Czech Judiciary in 2002, who noted that only "... few at the time were fully aware that the ordinary judges [were] responsible to deal with the bulk of international law and that, after joining the EU, it would be up to them to ensure the priority of EU law over national law" (*ibid.*), appears to be equally applicable to Macedonian judges. There is an obvious need for a profound change of the way the law have been practiced by the later judges along the lines of the basic logic of international and EU law, in order to ensure that, when applying that law, national judges would "... at the same time also act in their capacity as European judges ..." (*ibid.*), once the country accedes to the EU.

Given the present absence of sufficient preparedness of the Macedonian Judiciary for applying international and EU law, there is a further need to increase the level of training of judges, in particular, in the later disciplines of law. In the Republic of Macedonia, the training of current and future judges has being performed in a more structured and much more improved fashion since the establishment of the Macedonian Academy for Judges and Public Prosecutors in November, 2006. Described as one of the first judicial training bodies in the Western Balkans -

which conforms to the international training standards (Dallara: pp.2-3), the Academy offers both initial training for future candidates for judges and continuous training for present judges. Three generations of some 71 candidates for future judges graduated at its initial training program (with 9 new candidates enrolled this year), which curriculum has been recently upgraded to include more international and European law items (See Annual Report of the Academy for Judges and Public Prosecutors for 2010). The continuous training for current judges in 2010, on the other hand, consisted of 39 trainings in International law and 16 trainings in EU law (out of the total of 242 trainings) attended by some 405 current judges from different Macedonian courts (*ibid.*). While the continuous trainings for judges is welcomed, however, there seems to be a greater need to include more international and - especially - EU law items at those trainings,[8] with much more emphasis on theoretical understanding of the inner logic of the later disciplines and their role in the current and future national legal context, their specific sources and particular methodology of interpreting and applying these sources in practice - quite different then the pure "textual positivist" approach in practicing law currently prevailing in the mind-set of judges.

At the same time, in the more general context, there is a broader need to increase enthusiasm among the judges for advancing their knowledge in international and European law disciplines and in comparative law in view of assuming their future role as true "European judges." In general, such enthusiasm on the part of Macedonian judges is currently lacking, which is due to various reasons, including the huge case-load they are facing on daily basis, the relatively low profile of the judicial profession in the society as compared to the great level of responsibility and ever-increasing professional demands put on judges, and - on a broader level - the rather vague prospect of the country's accession to the Union, stimulating Euro-skepticism in the minds of many Macedonian judges (the opening of Macedonia's accession negotiations with the EU has been already stalled for six years due to the unresolved "name-difference" with neighboring Greece).

A further factor that may also reflect negatively on the need to increase the overall quality of the Macedonian Judiciary is the rather disturbing fact that the level of attractiveness of the judicial profession for the best university law graduates has been in a constant decline in RM. The later requires specific government measures that would stimulate professional orientation of the best law students towards working in the Judiciary that would certainly add fresh air and new professional value to it in line with the need to build a true "European legal culture" among the judges, especially, given that the new generations of law students are offered a fairly comprehensive training in International, EU and comparative law at their university studies, which had been lacking at the time when most of the present judges acquired their university knowledge in law. The same also relates to the fresh graduates at the initial training course of the Academy for Judges and Public Prosecutors, a considerable number of which, as it appears, have not been recruited in the Judiciary as yet.[9]

Conclusion

This article has been premised on the assumption that the provision of effective access to civil justice for citizens and the proper functioning of the European Judicial Area are largely dependable on the quality performance of the national judiciaries in the EU member states, including in the EU membership aspiring states. As the EU policies in this area are largely "decentralized" and based on "mutual trust" between national judicial systems, there is an apparent necessity for maintaining a sufficiently high and much leveled professional quality of the national judiciaries in the administration of civil justice all across the Union, including with respect to the proper application of EU law and ensuring respect for the citizens' fundamental rights.

In the Republic of Macedonia, many legislative reforms pertaining to the Judiciary have already taken effect, including the latest package of amendments to the existing legislation aimed at speeding up the judicial process and increasing the accountability of judges along the EU requirements related to the cooperation in civil justice. Whether, some of the new legislative solutions have been substantially criticized and their potential contribution to the bettering of the judiciary's performance and of the overall judicial process is yet to be seen, some core chronic deficiencies that have been present throughout the years relating to the independence, competence and efficiency of the Macedonian judiciary still remain intact.

While the process of harmonization of Macedonian legislation with the Union's *acquis* has been intensively ongoing, including in the area of civil justice, there are only modest steps taken by the courts towards assuring a "Euro-friendly" application of that legislation, mainly related to the practice of the RM's Constitutional Court. Without developing any clear general principle to that effect, the later Court has nevertheless proceeded in some instances with granting persuasive force to the EU legal sources when dealing with domestic legislation, mainly for the purpose of argumentative support for its previous findings on unconstitutionality or illegality of relevant domestic laws. While the start of such practice by the Constitutional Court should be welcomed and more intensified in the future, as it contributes to the Europeanisation of the Judiciary and for building a true "European judicial culture" in RM, similar practice is almost non-existent on the part of ordinary courts, which also continue to suffer from the inherited habit of "limited" and "textual positivist" application of law typical for their counterparts in most of the new EU member states. In view of the later fact, the continuous training of current judges should be more focused towards fostering teleological reasoning on their part when practicing law, imminent in the logic of international and EU law, and to raising the awareness of the judges for their future role to act (also) in the capacity as "European judges", including in the framework of the common "European Judicial Area".

Notes

[1] The Law amending the Law on Civil Procedure, Off. gazette of RM no.116/2010 (Закон за измена и дополнување на Законот за парничната постапка, Службен весник на Република Македонија бр.116/2010), in force as of 09.09.2011. The Law of Civil Procedure was enacted in 2005 (Off. gazette of the Republic of Macedonia no.79/2005; 110/2008; 83/2009), which marked the beginning of the reform of the litigation law in RM.

[2] In the context of application of EU law in an EU membership aspiring country in the pre-accession period, unlike an EU binding source (which would be the case when it would have direct effect in an EU candidate country), a source of law that is merely persuasive relates to an interpretation of applicable biding source that is consistent with a source of European law (See Kühn: pp.567).

[3] Later cases in which the Constitutional Court invoked EU legal sources in support of its decisions on the constitutionality of the Macedonian harmonized legislation include its Decision of 18.11.2009 (У.бр.13/2009-0-0), in which it called upon the EC public procurement directive 2004/18 while upholding a challenged provision on the award procedures of the Macedonian Law on Concessions PPP Law, and the Decision of 15.04.2009 (У.бр.26/2009-0-0) in which it relied on the 2002 EC Framework directive on electronic telecommunication networks and services when upholding a challenged remedial protection provision of the Macedonian Telecommunications Law.

[4] I.e. the Polish Constitutional Court (*Gender Equality in the Civil Service Case.* In Polish decision K. 15/97, *Orzecznictwo Trybunalu Konstytucyjnego* [Collection of Decisions of the Constitutional Tribunal], nr. 19/1997, at 380; English translation 5 E.EUR. CASE REP. OF CONST. L. 271, at 284 (1998)); the Czech High and Constitutional Court (*Re Skoda Auto Sbírka nálezů* [Collection of Judgments and Rulings of the Constitutional Court], vol.8, pp.149 (in Czech), (cited in Kühn: pp.566-567).

[5] In this case, a provision of the SAA had been directly invoked by the initiators of the proceedings along with a respective article of the Constitution in order to prove the unconstitutionality and illegality of a Regulation issued by the Minister of Finance, which requested the insertion of a logo on fiscal receipts issued by salesmen including a picture of a sun and the words "By Macedonian products", "For our own good" and "Made in Macedonia" in it. As claimed by the initiators, the challenged Minister's Regulation was apparently contrary to *inter alia* Article 55 of the Macedonian Constitution and to Article 18(4) of the SAA banning quantitative restrictions to imports and measures having equivalent effect. In finding the illegality of the challenged Regulation, the Constitutional Court limited the review such illegality solely on the basis of its conformity with the Constitution of RM, and not with the SAA.

[6] In his Opinion, Judge Spirkovski explained that he voted against the Court's decision because its finding of unconstitutionality of the challenged provisions of the Minister's Regulation have not been also based on their non-conformity with the SAA, which is a "component part of the internal legal order of the Republic of Macedonia". In addition, he also referred to Article 28 of the EC Treaty and to the ECJ ruling in the "Bye-Irish-Case", in an obvious attempt to provide for these persuasive force in the practice of the Court.

[7] In the *AD Makpetrol* Case, the Supreme Court found the Interim Agreement (banning quantitative restrictions on imports from the EC and measures with equivalent effect) to have been breached by the Macedonian Customs Authorities while applying a Government decision imposing prior licensing requirements on any oil imports in RM against the injured party, awarding damages to *AD Makpetrol*.

[8] In the above mentioned pilot-inquiry of 30-50 Macedonian judges, almost all of the inquired judges - at least formally - confirmed the need of acquiring additional training in EU Law. Around 55% of judges expressed themselves that they would not be able to follow the ECJ jurisprudence in English should Macedonia become a member of the EU.

[9] In its progress report on Macedonia for 2011 (Commission Staff Working Paper, SEC (2011) 1203, at pp.11-13), the European Commission recorded that, of the 71 graduates of the Academy for Judges and Public Prosecutors from the last three years, only 49 have so far been recruited as judges and prosecutors. By contrast, judicial recruitments from outside the Academy continued to take place, under transitional provisions which have been extended to 2013. In the reporting period, out of a total of 26 available posts for first instance judges, only 6 were filled by graduates of the Academy, despite a healthy rate of applications by its candidates. The rest of the judges (considerably more than the 50% set out in the transitional provisions) were appointed by the Judicial Council from the ranks of other legal professions.

References

Coutts S., (2011) "The Lisbon Treaty and the Area of Freedom Security and Justice as an Area of Legal Integration", Advanced Issues of European Law - 9th Session Dubrovnik, April 2011 (at: http://www.pravo.unizg.hr/_download/repository/SCoutts_Paper.pdf) (accessed on 30.12.2011)

Dallara C., "Virtuous building of a training institution in the Balkans: the Academy for judges and public prosecutors in Macedonia (at: http://amsacta.cib.unibo.it/2811/1/A_Virtuous_Building_of...pdf)

Kühn Z., (2005) "The Application of European Law in the New Member States: Several (Early) Predictions", German Law Journal, vol.06, no.03, pp. 563

Јаневски А., Зороска-Камиловска Т., (2011) "Измените во Парничното, Вонпарничното и Извршното законодавство на Република Македонија во светлото на актуелните трендови и забрзување на постапките", Деловно право, Скопје, бр.24, 15

Пепељуговски В., (2011) "Измените на Законот за парничната постапка од 2010 година од аспект на адвокатурата во Република Македонија", Правник, бр.236, 2

Storskrubb E., "What Changes will Procedural Harmonization Bring?", available at: http://www.iapl2009.org/documents/5EvaStorskrubb.pdf (accessed on 30.12.2011)

Sources

Annual Report of the Academy for Judges and Public Prosecutors for 2010 ("Извештај за работата на Академијата за судии и јавни обвинители за 2010 година", Скопје, јануари 2011 година) (at:http://www.jpacademy.gov.mk/docs/Lektoriran%20izvestaj%20za%20rabota%20na%20Akademijata%20za%202010%20godina.pdf)

Council, "The Hague Programme: Strengthening Freedom, Security and Justice in the European Union", 03.03.2005, 2005/C 53/01.

Communication from the Commission to the European Parliament and the Council of 29 June 2006 on judicial training in the Union, COM (2006) 356 final.

Commission Staff Working Paper: "The former Yugoslav Republic of Macedonia 2011 Progress report", SEC (2011) 1203, accompanying the Communication from the

Commission to the European Parliament and the Council of 12.10.2011: "Enlargement Strategy and main Challenges 2011-2012", COM (2011) 666

Decision of the Constitutional Court of the Republic of Macedonia of 12.05.2004 (Одлука на Уставниот суд на Република Македонија од 12.05.2004 година, У.бр.203/2003-0-1); English translation at: http://www.ustavensud.mk/domino/WEBSUD.nsf)

Decision of the Constitutional Court of the Republic of Macedonia of 17.12.2008 (Одлука на Уставниот суд на РМ од 17.12.2008 година, У.бр.134/2008-0-1); English translation at: http://www.ustavensud.mk/domino/WEBSUD.nsf)

Decision of the Constitutional Court of the Republic of Macedonia of 18.11.2009 (Одлука на Уставниот суд на Република Македонија од 18.11.2009 година, У.бр.13/2009-0-0); English translation at: http://www.ustavensud.mk/domino/WEBSUD.nsf)

Decision of the Constitutional Court of the Republic of Macedonia 15.04.2009 (Одлука на Уставниот суд на РМ од 15.04.2009 година, У.бр.26/2009-0-0); English translation at: http://www.ustavensud.mk/domino/WEBSUD.nsf)

European Council, "The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens", 04.05.2010, 2010/C 115/01

Gender Equality in the Civil Service Case (in Polish), decision K. 15/97, *Orzecznictwo Trybunalu Konstytucyjnego* [Collection of Decisions of the Constitutional Tribunal], nr. 19/1997, at 380; English translation in 5 E.EUR. CASE REP. OF CONST. L. 271, at 284 (1998)

Re Skoda Auto, Sbírka nálezů [Collection of Judgments and Rulings of the Constitutional Court], vol.8, pp.149 (in Czech)

AD Makpetrol Skopje v. Republic of Macedonia - Ministry of Finance - Customs Office Skopje, Judgment of the Supreme Court of the Republic of Macedonia under request for revision of 10.06.2004 (Пресуда на Врховниот суд по барање за ревизија во случајот АД Макпетрол Скопје против Република Македонија - Министерство за финансии - Царинска управа Скопје, под. Рев.бр.23/04 од 10.06.2004) (in Macedonian).

CROSS-BORDER CIVIL PROCEEDINGS IN THE EU
(NOVEMBER 17, 2011 - NOVEMBER 18, 2011)
pp. 31 - 45

Notarial Deeds in International Legal Relations -with a Special Review of the Macedonian Legislature and Practice

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ABSTRACT This article aims to analyze the current position and effects of notarial deeds in international legal relations. The paper starts with the definition of the notarial deed as a core area of notarial activity, in legal theory and Macedonian legislature, followed by the elaboration of some effects of notarial deeds. The elaboration of the evidence effect of the notarial deeds in internal and international legal relations occupies a special place in the work, as well as the presentation of the notarial deed as an enforceable title. The opportunity for using the foreign notarial deed as the basis for compulsory enforcement is analyzed. The last part of the work addresses the question of composing notarial deeds in matters with international connections. Besides the principle lex loci actus which is fundamental in drawing up the notarial deed, the authors point out the principle of assignation of the notarial deed, as one of the mechanisms for providing the free circulation of notarial deeds.

KEYWORDS: • notary • notarial deed • evidence effect • enforceable title • international legal relations

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1 Introduction

The trend of globalization understood as "freedom of individuals and companies to initiate voluntary economic transactions with citizens of different countries", presupposes revocation or at least minimization of the obstacles that inhibit international legal relations. In the circumstances of intensive international legal relations, including the relations concerning public deeds, each bureaucratic obstacle that inhibits the free circulation of people, goods and services, instead of globalization, leads to particularism, an idea which is now being abandoned in international relations. This trend of globalization does leave behind the area of public notary, as an institution which, although is a part of the sovereign authorities of a particular state, has the mission amongst others to provide for efficient cross-border legal relations and legal certainty in international transactions[1].

In this contextual framework, the purpose of this article is to analyze the position of notarial deeds in international legal relations. The fundamental premise of our analysis is the need to recognize universal effects to the notarial deed, therefore an analysis of the current mechanisms for providing external efficiency of domestic notary deeds will be given, as well as the mechanisms for internal efficiency of foreign notarial deeds respectively. That should lead us to the answer of the question whether further liberalization of the legal regime for international relations with notarial deeds is necessary, in order to provide the notarial deed with *"fidem and auctoritatem"* not only within, but also outside the state borders of the native country.

2 About the Notion and the Effects of the Notarial Deeds

It is well known that the core of the notarial work is the regulation-certificatory function which comprises the official composition of public deeds for legal matters and statements with which certain rights are established (Triva - Dika, 2004: 239). The notarial deeds are deeds drawn up by the notary in the range of his legal public competence, in the legally prescribed form, which have effects provided by law.

In that sense, for example, in the legislature of the Republic of Macedonia[2] *notarial deeds are: deeds for legal matters and statements drawn up by the notary in the form of a notary act; minutes for legal matters composed by the notary or which have been composed in his presence, as well as certificates for facts which the notary has affirmed by direct observation or by means of documents.*

The notary act is mandatory for the following legal matters:

a) Agreements for regulation of property relations between spouses and between people living in non-marital partnership;

b) Gift contracts without handing of the object in possession of the receiver of the gift;
c) Each act on constitution, organization, termination, statute and changes of legal entities which perform economic actions, institutions, foundations and other bodies, except for companies;
d) all legal matters taken by visually and hearing impaired persons which can not read or mute people which can not write; and
e) agreements for disposal of property of minors and persons who have been deprived of legal capacity or have a limited legal capacity[3].

The legal significance and the effects of notarial deeds respectively, can only be explained and analyzed from the perspective of a particular legal system[4]. Within different legal systems, usually more legal effects of notarial deeds can be identified, but in this occasion, from the aspect of the international legal relations with notarial deeds, we shall confine to the review of the evidence effect of the notarial deeds and the notarial deeds as enforceable titles (instruments). In addition, the question of composition of notarial deeds in matters with international elements shall be reviewed as well.

3 Evidence Effects of the Notarial Deeds in Internal and International Legal Relations

The notary deeds (as well as their copies and transcripts), issued in accordance with law, *are public deeds* if in the course of their composition and issuance the necessary conditions specified in law have been complied with (art.4, para.2 of the LN). We shall recall the definition of a public deed: "*As a public deed will be considered every deed which, in the prescribed form, has been issued by a state body or a body of state government within its competence, as well as a deed which in such form has been issued by an organization or other institution exercising public authority which has been entrusted by law*"[5].

The deeds issued by a notary within his public legal authorities in the state in which he has been appointed are *domestic notarial deeds*, while every other notarial deed from the aspect of that country represents a *foreign notary deed*.

The public deeds, including the notarial deeds, are one of the most commonly used and particularly secure means of proof, in legal relations, both in judicial and administrative proceedings. Taking into consideration the fact that in the field of procedural (evidentiary) law, the principle of national procedural autonomy is still dominant, the evidence effects of the public deeds, including the notarial deeds, vary from one legal system to another.

In the Republic of Macedonia, similar to the other countries from the continental procedural area (for example Germany, Italy, France, Spain, Slovenia, Croatia and

others), the evidentiary rule for veracity of the public deeds applies, as a limitation to the principle of free appraisal of evidence. A rebuttable presumption is set for public deeds: *the public deed proves the veracity of what is confirmed or determined in it (assumption of veracity), but it is allowed to prove that in the public deed the facts are untruthfully established or that the deed is incorrectly composed* (art.215, para.1 and 3 of the LLP). This is entirely applicable to notarial deeds as it is to public deeds[6]. The assumption of veracity of the public (including notarial) deeds does not apply in the states that are not familiar to the Latin notary (for example, England, USA, Sweden and others), in which the procedural laws do not recognize the public deeds stronger evidentiary force that other evidence.

It should be emphasized that the *assumption of veracity* of public deeds, with the possibility to prove otherwise, as a principle, applies in every procedure except for criminal procedure, where the principle of free appraisal of evidence applies to public deeds as well. Certainly the evidentiary rules which apply to public deeds refer to the notaries as well, when they while performing their official tasks use the submitted public deeds[7].

Taking into consideration the fact that the assumption of veracity refers to what is confirmed or determined in the public deed, as the notary deeds are concerned the assumption of veracity referring not only to the content of the declaration, but also to the statements in the notarial deed about the identity of the person making the declaration, the declarant's age (relevant for contractual capacity), the notary's belief about the declarant's contractual/testamentary capacity, the place, time and other circumstances of the declaration. What has evidentiary force is not only notarial deeds, i.e. written instruments prepared by a notary, but also declarations attested by the notary. *(*Geimer, 2001: 14-15*).*

Such an evidential effect of the public (including notarial) deeds arises from the *assumption of authenticity (originality)*, which is also connected to public deeds. The public deed is original if it has been issued by a body, an organization or an institution respectively, which is quoted in the deed as issuer. For the domestic public deeds the authenticity is presupposed, unless the body in an appropriate proceeding where the deed is used, suspects its non-authenticity. Thus, if the court suspects the deed is not authentic, it may request the body, or the institution from which the deed is supposed to originate to make a declaration over the issue (art.215, para.4 of LLP). In addition, the authenticity of the deed may be examined with other evidence (Triva - Dika, 2004: 514) – (for example, the authenticity may be contested by any party in the proceedings with an appropriate counter-evidence). Furthermore, a separate litigation proceeding can be conducted upon a declaratory claim for the establishment of the authenticity or the non-auntenticity of the deed[8].

As already stated, the evidential effect of a public deed arises from its authenticity. The deed which shall be established as not original does not have the effects of the public deed, which makes the assumption of authenticity of the deed pointless.

When it comes to foreign public deeds, most of the countries today allow for a foreign public deed to be used on their territory with the evidence effects of a public deed, provided that it is appropriately verified, unless otherwise provided for in an international agreement. In this sense, in the legislation of the Republic of Macedonia as well, the rule that "*in regard of the evidentiary force the foreign public deeds are equalized to domestic public deeds*" applies. *It means that the evidentiary force of the foreign public deeds fundamentally corresponds to that of the domestic ones*. *The equalization is conditioned by the fulfillment of several preconditions*: a) the foreign public deed is properly verified; b) there is reciprocity and c) it is not provided otherwise in an international agreement (art.216 of LLP) These conditions should be cumulatively fulfilled in order to equalize a foreign public deed with a domestic public deed.

The condition "the foreign public deed is appropriately verified" refers directly to the presumption of its originality. Unlike the domestic public deeds, whose authenticity in case of doubt can be controlled by the body conducting the proceedings by addressing to the body which issued the document within the same state, in the case of foreign public deeds, the control of the authenticity of the document is conducted through different mechanisms. The most traditional mechanism is the legalization, while recently i.e. substitutes of the legalization are being developed by international agreements. The evidencing of the originality of a foreign public deed depends on the specific domestic mechanisms for providing of originality depending on the country where the deed comes from.

The term legalization (authentication) of a foreign public deed (including foreign notarial deed) means the certification of the originality of the deed which is requested in international legal relations[9]. As an act for proving the authenticity of the deed, the legalization does not refer to the veracity of the contents of the deed (or the substantive law question of the fulfillment of the notarial form by an authenticator), (Geimer, 2001:41). The procedure for legalization itself is regulated by law and it implies the involvement of multiple bodies (diplomatic body, court, administrative body) with a few chain validations and super-validations, which considerably complicates and delays the proceedings[10].

Foreign public deeds are not subject to certification (legalization) if, on the basis of reciprocity, the domestic public deeds are not subject of certification in the country whose deed is in question (art. 3, para.2 of LLDILR). The domestic public deeds are legalized if according to the law of the country where they are going to be used their certification is requested and if by international agreement it is not provided otherwise. The legalization is not carried out when it has been abolished

at a bilateral, regional or multilateral legislative level. By these instruments, other mechanisms are provided for ensuring the originality of the document (i.e. substitution of legalization), which are simplified and alleviate the proving of the originality of the document.

The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (HCARL) of 1961 (Official gazette of SFRJ, International contracts-supplements, No.10/62), whose main purpose is abolition of diplomatic or consular legalisation[11], provides for only one formality in function of securing the originality of the deed (document): *issuance of a certificate (l'apostile) by an authorised body of the state from which the deed originates*[12]*, at the request of the person who has signed the document or any bearer (*art.3, para.1 and art.5 of the HCARL). This certificate is considered to be *sufficient evidence to the originality of the deed*[13]*, and it is not be required when either the laws, regulations, or practice in force in the state where the document is produced or an agreement between two or more contracting states have abolished or simplified it, or exempt the document itself from legalisation* (art.3 para.2 of HCARL). It is particularly important to note that the HCARL expressly mentions notarial deeds (acts) among the foreign public deeds[14].

The apostile is certainly not a final resolution of the international community for the need to provide the authenticity of the deeds. At a multilateral level, continuous efforts can be ascertained for further simplification of the formalities for ensuring the authenticity of the deed. We shall mention, for example, the possibilities to place an apostile not only to the original document, but also on its certified copy[15], and also currently in trial the electronic issuance of apostile of notarial public deeds in some countries and others.

On the regional level, the procedure for certifying the authenticity of foreign public deeds has been further simplified by the Brussels Convention abolishing the legalisation of documents in Member States of the European communities (BCAL) of 25 May 1987, which practically does not provide for any formalities for evidencing the authenticity of the public deeds, or respectively it completely abolishes the legalisation of the public deeds between the member states. Among the public deeds, the Convention expressly mentions notarial deeds. Yet, its application is restricted to only a small number of countries of the Union, who have ratified it and have decided to apply it in their mutual relations[16]. Some other instruments of the European Union (for example, the Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[17], provide for the abolishment of the legalisation and the similar formalities for the deeds that fall within their scope[18]. It means that the deeds which are going to be submitted in the exequatur procedure according to these regulations require neither consular certification nor any such similar formality.

By bilateral agreements (which usually refer to legal assistance in civil and criminal matters or to the mutual legal relations) the need for legalization of deeds in legal relations between two contracting states is abolished. The Republic of Macedonia itself has concluded more than twenty such bilateral agreements. Thereby, within these bilateral agreements the notarial deeds are not expressly mentioned as deeds which are exempt from legalisation[19]. The reason for this state in the bilateral relations of the Republic of Macedonia is the fact that at the time these agreements have been concluded most of the notarial tasks were taken by the courts or other state bodies, and they have been subsequently transferred to the notaries. This may generate controversy in practice and may harm the international legal relations with notarial deeds. Namely, if these agreements are interpreted restrictively (in that sense, for example, the notary is not the organ (body) of the contracting state, but an autonomous and independent public service), then they cannot be used for the abolishment of the legalisation of notarial deeds. This means that the HCARL should be applied, which provides for an apostile (l'apostille), which further burdens the legal relations between the two countries with additional formalities. On the other hand, it is common practice for the courts not to check whether a bilateral agreement has been concluded with a particular country, and at the request of the party to always issue an apostile.

Taking in consideration the aforementioned, we can summarize the following: If a foreign notarial deed has the status of a public deed in the country in which it has been issued, and if in the relations with that country the legalization has been abolished, or legalization or apostile are required, and that formality has been complied with, then the foreign notarial deed in terms of its evidentiary force is equalised with the domestic notarial public deed. If the foreign notarial deed does not have the status of a public deed according to the law of the country where it has been issued or in a case when it should be legalised, and it has not been legalised, then in the procedure it shall be considered as a private deed under the principle of free appraisal of evidence (Wedam - Lukić, 1994: 10).

4 The Notarial Deed as an Enforceable Title in International Legal Relations

Unlike court decisions and settlements, which acquire the effect of *res iudicata*, notarial deeds do not have such effect, since they always must be verifiable in additional court procedure (Rijavec, 2003: 127, and also Geimer, 2001:17*)*. Yet, the aforementioned does not mean that the rights arising out of a notarial deed can not be enforced. This possibility arises out of the *effect of enforceability* that certain notarial deeds posess[20]. The possibility of the notarial deed to possess characteristic of an enforceable title, aims to contribute to the more efficient implementation of subjective civil rights, primarily to protect creditors by facilitating the possibility of enforcement of their due claims (Dika, 1995: 552). It

is well known that in the countries where the Latin notary profession exists, enforceable notarial deeds are an efficient alternative to court proceedings, and they enormously alleviate the burden on the judiciary. Unlike these countries, the Common Law countries have not implemented the progressive institution of the enforceable deed in their legal systems. A large number of matters that are settled by enforceable notarial deeds in the area of Civil Law notarial profession are settled in a functionally comparable manner, but in conceptually more old-fashioned way, in summary proceedings, by judgment by consent or by confession. (Geimer, 2001:66).

According to the legislature of the Republic of Macedonia*, the notarial deed is an enforceable title (instrument) if a certain obligation for acting on which the parties may agree is determined in the deed, and if it contains a stetement by the debtor that on the basis of that deed, enforcement for the realisation of the action after the obligation is due can be conducted directly* (art. 43, para.1 of LN). The consent of the debtor that direct enforcement may be conducted on the basis of the notarial deed is a procedural disposition which refers to a certain claim and does not affect the origination of the obligation (Rijavec, 2002: 36).

The same legal effect as the notarial act is also possessed by a private deed with the specified content which has been confirmed (solemnised) by the notary (Trgovčević – Prokić, 2007: 277). If the private deed does not contain the statement of the debtor that on the basis of the deed enforcement can be conducted, such statement is added by the notary by consent of the parties and in accordance with the conditions provided in the procedure for confirmation (solemnisation) of private deeds (art.43, para.6 of LN).

According to the legislature of the Republic of Macedonia, the attestation of enforceability of the notarial deed is placed by the notary, upon a written request by a party, to which a verified statement that the claim or part thereof is due is attached (art.43, para.7 of LN).

According to the Law on enforcement - LE (Official gazette of the Republic of Macedonia, No. 35/2005, 50/2006, 129/2006, 8/2008, 83/2009, 50/10, 83/10, 88/10 and 171/10; consolidated text in No.59/11), the enforceable notarial deeds are expressly noted as enforceable instruments[21]. The enforcement on the basis of the enforceable notarial deeds is conducted by the competent (private) bailiff.

Within the analysis of the notarial deeds in international legal relations, the question propounds whether foreign notarial deeds have the effect of enforceable title and are directly enforceable in other countries? Are the legal provisions of the native country that confer enforcement effect of a notarial deed significant per se for the enforcement organs of the other country?

The possibility of enforcement of foreign notarial deeds is evaluated strictly by the law of the country of enforcement. On such an occasion, the internal legislature of the country of enforcement, as well as any international agreements and conventions to which that country can be considered a signatory. These may affect the international legal relations with notarial deeds favorably or unfavorably, since "despite all the globalisation and international interconnections, even today the enforcement effect of a notarial deed attributed to it in its state of origin does not automatically extend to foreign states, especially not those in which the enforcement should take place." (Geimer, 2001:45)

According to the legislature of the Republic of Macedonia, enforcement of the decision of a foreign court can be conducted in the Republic of Macedonia if the decision meets the preconditions for recognition provided by law[22] or an international agreement that has been ratified in accordance with the Constitution of the Republic of Macedonia (art.8 of LE). *The LE of the Republic of Macedonia does not contain a specific provision for enforcement on the basis of foreign notarial deeds*[23]. It seems that the Macedonian legislators have overlooked the question of enforcing the foreign notarial deeds. In addition to this, any of the bilateral agreements concluded by the Republic of Macedonia do not provide for enforcement on the basis of foreign enforceable notarial deeds, but only for the recognition and enforcement of foreign court decisions. Given that the Republic of Macedonia is not yet a Member State of the European Union, and the regulation for enforcement of directly enforceable notarial deeds which have been confirmed as an European enforcement order[24] can not be applied, it is questionable whether enforcement on the basis of a foreign notarial deed can be conducted in the Republic of Macedonia at all.

Enforcement of a foreign enforceable notarial deed by the private bailiff in the Republic of Macedonia can be conducted only if an extensive interpretation of art.7 of LN is accepted. According to this article „*notarial deeds issued abroad, have the same legal validity as if issued pursuant to this law, under the conditions of recipocity*"[25]. If under the notion of „same legal validity"[26] the characteristic of direct enforceablitily of the notarial deed is established, then the foreign notarial deeds can be equalised with the deeds issued in accordance with the LN, under the principle of reciprocity, and direct enforcement of foreign notarial enforceable deeds in the territory of the Republic of Macedonia might occur[27]. Regarding the principle of reciprocity, it should be noted that, for foreign court decisions, according to the PIL, the reciprocity is no longer a condition for the recognition of a foreign court decision[28], thus the question arises whether it is reasonable not to reqiure reciprocity in the event of enforcement on the basis of foreign notarial deed? In addition, with regards to Slovenian legislature, the question arises whether it is necessary for the Macedonian bailiff during the enforcement, on the basis of a foreign notarial deed, to be careful in case the enforcement violates the public order of the Republic of Macedonia[29]. In the situation where an express

provision in the LE does not exist, this obligation might be imposed on the bailiff through a subsidiary application of the provisions of the civil (litigation) procedure in the enforcement procedure[30]. In that sense, the public order of the Republic of Macedonia would be protected by the obligation of the bailiff to take care for any unallowed disposal of the parties, or dispositions which are contrary to the mandatory rules, the provisions of the international agreements ratified in accordance with the Constitution of the Republic of Macedonia and morality, in terms of art.3, para.3 of the LLP.

5 Composing Notarial Deeds in Matters with International Element

As a consequence of the sovereignty of the country, the activity of composing notarial deeds can be conducted only on the territory of the state in which the notary is appointed (territorial principle). Notarial acts which the notary has drawn up outside of the area on which the sovereignty of his native country extends have no legal effect[31]. That, however, does not mean that the notary cannot compose notarial deeds for legal matters in which there is an international element expressed in the subjects or in the mere content of the legal matter. When the notary takes actions within his native country his area of activities is not limited on account of international connections of the subject matter of his notarization, i.e. the fact that foreign law is applied, the persons involved in the transaction are foreigners or have their domicile or registered office abroad, or because the objects of the legal transaction are situated abroad (Geimer, 2001:39). In addition, the international element cannot be a reason for the notary to refuse to prepare a notarial act[32]. The international competence of the notary for preparation of deeds with international element arises out of the legal system of his native country.

While preparing notarial deeds, the notary takes into consideration the rules for preparation of notarial acts in the native country - lex loci actus (see art.44 of LN)*, regardless whether the relationship in question has an international element.* Taking into consideration the fact that in certain cases the notary deed should produce legal effects in foreign country, in the international legal relations with notarial deeds *the principle of assignation of the notary deed is established, which gives the notary the right, apart from the domestic law on notary, to respect the substantive and procedural, as well as the collision provisions of the country in which the deed will be used.* He can do that by himself or, he could be helped by a notary from the designated country (Veble, 2010: 36). In this way, it is provided that the notary deed in formal and substantive sense is composed in accordance with the requirements of the country where it is going to be used.

The principle of assignation of the notarial deed, as one of the mechanisms of providing the free circulation of notarial deeds, is promoted by the autonomous notarial law (for example, the acts of the International Union of Latin Notaries[33], on the Conference of Notaries in the European Union[34]). Thus, the basis for

international legal assistance for the notaries of different countries is established, and by adoption of the principle of assignation of notarial deeds the negative effects of the territorial principle as an expression of the sovereignty of countries are compensated. By the possibility of including elements which are imminent to the legal order of a foreign country in the notarial deed, the universal legal effects of notarial deeds are provided, and the unimpeded and efficient international legal relations are enabled.

6 Concluding Remarks

The above is just an elaboration of several issues related to international legal relations with notarial deeds, and only some aspects of these issues. The concept of notarial deeds in international legal relations is too complex to be exhausted with the previous partial analysis. However, certain conclusions can be deduced from this analysis, which are the features of the current position of notarial deeds in international legal relations and of actual trends *pro futuro.*

Notarial deeds are a fundamental instrument of international legal relations, which provide for greater legal certainty in international transactions. Because of the prerogative of public deeds, the legal regime of notarial deeds in international legal relations is still burdened by numerous rules (*lex loci actus,* legalization or its substitutes, reciprocity etc.) which are an expression of the sovereignty of the country where the notary works and which generally weaken the confidence in foreign notarial deeds. That, in turn, is itself inconsistent with the reputation that the notary has, as a service in which the citizens generally express the greatest confidence. In order to increase the exterior efficiency of notarial deeds, it is necessary continuously to work on the abolition of the legal barriers which prevent the free cross-border relations with notarial deeds, to fill the existing legal gaps, and in practice to decrease the skepticism and to strengthen the principle of faith in foreign public deeds, certainly only to an extent that does not threaten the public order of the country where the foreign public deed is going to be used

Notes

[1] See art. 10 of the Declaration of the International Union of the Latin Notaries on the role of the public notary in the society, from the XXI International Congress of the Latin Notaries, Berlin 1995.
[2] See art. 4 of the Law on Notaries (LN), Official gazette of the Republic of Macedonia, No.55/2007, 86/2008, 139/2009 and 135/2011.
[3] Art. 42 of LN. This does not affect the provisions of this or any other law under which for the validity of the legal action it is necessary for the deed to be drawn up by a court or a notary.
[4] As *prof. Geimer* would say, the Archimedes Principle apllies to the notarial deeds: "a notarial deed does not have any effect per se and of itself; rather, it needs to be embedded in a particular legal system." See *Notary professor Dr. Reinhold Geimer, Munchen, The Circulation of Notarial acts and their effect in law, XXIII International Congress of Latin*

Notaries, Report of German Delegation, p.14, on http://www.bnotk.de/_downloads/UINL_Kongress/Athen/GEIMER_ENGLISH.pdf.

[5] In this direction see also art. 215, para.1 of the Law on litigation procedure (LLP) of the Republic of Macedonia (Official gazette of the Republic of Macedonia, No.79/2005, 110/2008, 83/2009 and 116/2010; consolidated text in No.7/11).

[6] This is a general rule for the evidence effect of the notary deeds, since the evidence effects of the notarial deed depend on the type of notary deed (notarial act, notarial minute, notarial certificate).

[7] It is considered that concerning the evidencing by public deeds, the notary can not be entailed greater responsibility that a judge in civil proceedings. This is due to the fact that the notarial function covers non- contentious administration of the justice, which usually means preventive justice.

[8] See art.177 of LLP. The same situation is in other countries form the roman procedural area (France - *inscription de faux,* Italy - *querela di falso,* and similar).

[9] In the Republic of Macedonia, the Law on legalization of the deeds in international legal relations –LLDILR (Official gazette of SFRJ, No.6/73) is in force. According to article 3 of this law, by the verification, the authenticity of the signature of the person who has signed it and the authenticity of the seal placed on the deed are certified.

[10] For example, public deeds issued abroad can be used in the Republic of Macedonia only if they are verified by the Ministry of foreign affairs, or a diplomatic or consular office of the Republic of Macedonia abroad (art.3 para.1 of the LLDILP). See also art.6 and 7 of this law.

[11] See the preamble and art.2 of HCARL - "legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears".

[12] It may be convenient to mention here the idea that in time appeared in the expert public in the Republic of Macedonia for transference of the competence of issuing apostiles to the notaries, within the trend for unloading the courts from the uncontested matters. In that sense, see Tumanovski, 2001:100-114.

[13] To the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears.

[14] See art.1, line c of HCARL.

[15] Understandably, here it is necessary to confirm the functions of both persons: the issuer of the deed and the notary who has certified the copy. See *Conclusions and Recommendations adopted* by the *Special Commission* on the *practical operation* of the Hague *Apostille*, *Evidence and Service Conventions* (28 October to 4 November 2003).

[16] These are Belgium, Denmark, France, Italy, Ireland and Latvia.

[17] Also the Regulation (EC) No.2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, Regulation (EC) No.1346/2000 on insolvency proceedings, and Regulation (EC) No.1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents).

[18] On the actions taken within the European Union for abolishment of the formalities for certifying the authenticity of the public deeds, see Green paper, Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, European Commission, Brussels, 14.12.2010, COM(2010) 747 final.

[19] For example, by the Agreement between Republic of Macedonia and Republic of Slovenia on legal assistance in civil and criminal matters from 1996 (Official gazette of the Republic of Macedonia – International agreements, No.24/96) it has been agreed that "*for the deeds, which in the prescribed form have been issued or certified by the court or other competent body of the contracting state, which have been signed or a seal has been placed on them by the competent body, further certification is not required for use on the territory on the other contracting state"* (art.17, para.1). The contract uses the general term "deed", but does not mention the notarial deeds at all. On the other hand, for example, in the Agreement between Republic of Macedonia and Bosnia and Herzegovina on legal assistance in civil and criminal matters from 2006 (Official gazette of the Republic of Macedonia - International agreements, No.10/06), in the part concerning the abolition of legalization of the public deeds, the notarial deeds are expressly mentioned.

[20] "The notarial deed, in the cases provided by law, represents an enforceable title" – art.4 para.3 of LN.

[21] Art.12, para.1, line 3 and art.16 of LE - "The notarial deed is an enforceable instrument, if it has become enforceable in accordance with a separate regulation providing for the enforceability of such deeds. On the basis of a notarial deed which has become enforceable only in one part, the enforcement will be conducted only in that part".

[22] In the Republic of Macedonia, that is the Law on international private law - PIL, (Official gazette of the Republic of Macedonia, No. 87/07 and 156/10)

[23] On the contrary, for example, in the legislature of the *Republic of Slovenia* there is an express provision according to which *under conditions of reciprocity, the foreign notarial act is directly enforceable in the Republic of Slovenia if it refers to rights that are not contrary to the legal order of the Republic of Slovenia and if it contains all the elements necessary for enforceability according to the Law on notaries of the Republic of Slovenia* - "Pod pogojem iz prejšnjega odstavka je tuji notarski zapis v Republiki Sloveniji izvršljiv neposredno, če se nanaša na pravice, ki niso v nasprotju s pravnim redom Republike Slovenije, in če vsebuje vse elemente, ki so za izvršljivost potrebni po tem zakonu" (čl.7, st. 2 Zakon o notariatu (uradno prečiščeno besedilo) (ZN-UPB1), Uradni list RS, 23/05. Some other countries in their statutes have legal provisions for this question (according to article 79 of Austrian Execution Act, enforcement can also be conducted on the bases of deeds that have been established abroad and are enforceable there).

[24] Regulation (EC) No.805/2004 creating a European Enforcement Order for uncontested claims.

[25] The starting point is the assumption that in the countries of the Latin notary there are no differences in the procedure for drawing up the notarial deeds itself, or the differences are minimal, and for that reason except for the reciprocity, no other additional substantive criteria for the equivalency of the foreign with the domestic notarial deeds are provided.

[26] The term "same legal validity" is to be understood in the sense that the foreign notarial deed under the condition of reciprocity is equalised to domestic notarial deed. It is a matter of determining the equality of the foreign with the domestic notarial deed, and not recognition in a procedural sense. However, the term "same legal validity" is quite controversial, because it is not clear which are all the effects of the notarial deeds that substitute this term.

[27] The fear that arises in connection with this interpretation is justified, taking in consideration the fact that in the Macedonian system of enforcement no act (decision) for allowing the enforcement is rendered, which might mean an implicit recognition of the enforceability of the foreign enforceable deed.

[28] It is considered that the domestic legal system is sufficiently protected by the condition "the effect of the recognition of a foreign court decision is not contrary to the public order of the Republic of Macedonia", and therefore the reciprocity has been abolished.
[29] The violation of the public order is a negative procedural prerequisite for the recognition of a foreign notarial deed as well under the PIL.
[30] According to art.10 of LE, "in the conduction of the enforcement, the provisions of the Law on litigation procedure are appropriately applied, unless otherwise provided by this or any other law".
[31] According to the legislature of the Republic of Macedonia, the area of work of the notary is even more limited. The official area of the notary is the area of the primary court for which he has been appointed, and for the notaries of the city of Skopje, it is the area of the primary court of Skopje. The preparation and the validation of the deeds and other activities can be performed by the notary only in his official area. The deeds prepared by the notary outside his area have no legal effects (art.22, para. 1 -4 of LN).
[32] More extensively see, Veble, 2010:34-93.
[33] See supra note 1.
[34] See The European Code of Professional Conduct for Notaries, Naples, 3/4 February 1995, which sets a single system of processing cases with international element.

References

Dika, M. (1995) Javno bijeležništvo i zaštita vjerovnika, *Pravo u gospodarstvu*, 34(7-8), pp 544-560.
Geimer, R., Munchen (2001) The Circulation of notarial acts and their effect in law, XXIII International Congress of Latin Notaries, Report of German Delegation, 2001, avaliable at http://www.bnotk.de/_downloads/UINL_Kongress/Athen/GEIMER_ENGLISH.pdf.
Rijavec, V. (2003) *Civilno izvršilno pravo* (Ljubljana: GV Založba).
Rijavec, V. (2002) Neposredna ovršnost javnobilježnićkog akta, *Javni bilježnik*, 6(13), pp 35-41.
Trgovčević – Prokić, M. (2007) Ovlašćenja javnog beležnika (Beograd).
Triva, S. - Dika, M. (2004) *Građansko parnično procesno pravo* (Zagreb: Narodne novine).
Tumanovski, D. (2001) Legalizacija na ispravite vo međunarodniot javen promet, *Sudiska revija*, 12(1), pp 100-114.
Veble, A. (2010) *Dokazni efekti na notarskite ispravi vo pravniot promet među Republika Slovenija i Republika Makedonija*, doktorska disertacija (Skopje).
Wedam - Lukić, D. (1994) Pravni učinki notarskih listin v civilnih postopkih, *Pravna praksa*, 13(17), pp. 8-11.
The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961.
Brussels Convention abolishing the legalisation of documents in the member states of the European communities, 1987.
The European Code *of* Professional Conduct for Notaries, Naples, 3/4 February 1995.
Conclusions and Recommendations adopted by the Special Commission on the practical operation of the Hague Apostille, Evidence and Service Conventions (28 October to 4 November 2003).
Green paper, Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, European Commission, Brussels, 14.12.2010, COM(2010) 747 final.

Law on Notaries, Official gazette of the Republic of Macedonia, No.55/2007, 86/2008 and 139/2009, 135/2011.

Law on litigation procedure of the Republic of Macedonia (Official gazette of the Republic of Macedonia, No.79/2005, 110/2008, 83/2009 and 116/2010; consolidated text in No.7/11).

Law on legalization of the deeds in international legal relations (Official gazette of SFRJ, No.6/73).

Law on international private law (Official gazette of the Republic of Macedonia, No. 87/07 and 156/10).

CROSS-BORDER CIVIL PROCEEDINGS IN THE EU
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pp. 47 - 59

Improved Transparency of the Debtor's Assets in Civil and Commercial Enforcement Matters having Cross-Border Implications in the EU

MIKAEL BERGLUND

ABSTRACT The aim of this article is to highlight the problems of private creditors of having efficient and sufficient access to information about the debtor's assets in civil and commercial enforcement matters having cross-border implications within the EU as well as to national information for enforcement purposes and to put forward arguments and suggestions of possible reform solutions in these areas e.g. taking into consideration the interests of the creditor and the debtor.

KEYWORDS: • insufficient transparency of the debtor's assets in civil and commercial enforcement matters having cross-border implications within the EU • increased access to national information for enforcement purposes in civil and commercial enforcement matters • balanced equilibrium between the creditor's right to efficient enforcement of his claim and the debtor's right to humanity • dignity and privacy; including data protection.

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1 Introduction

The topic of this article is the problem of insufficient transparency of the debtor's assets in civil and commercial enforcement matters having cross-border implications within the EU. The analysis is limited to some aspects of access to information for enforcement purposes after a title of execution. It departs from some of my previous works in this area and readers should be aware of the fact that references to these works are only made here once, for simplicity reasons, concerning the following contents of the text of this article.[1] In addition, references are made to sources and recent initiatives to the extent required to facilitate for the readers.

The subject is examined by comparing solutions to the problem in: other parts of EU law, conventions, and studies. The purpose is to identify, evaluate, and draw conclusions about possible ways of development and to make suggestions for new EU law in order to improve transparency in support of enforcement matters having cross-border implications in the areas covered by the scope of application of the four EU regulations concerning civil and commercial matters.

The four regulations concerned are: the Council regulation (44/2001/EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I regulation)[2], Regulation 805/2004/EC of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (European Enforcement Order for uncontested claims)[3], Regulation 1896/2006/EC of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (European Order for payment procedure)[4], and Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July establishing a European Small Claims Procedure (European Small Claims Procedure)[5]. This problem is also of equal concern in relation to the four mentioned regulations.

The lack of efficient access to information for enforcement purposes in civil and commercial matters, after a title of execution, results, not only in the national context, but also in the cross-border context, in the value of the title to a creditor being reduced only into a beautiful picture that he can put onto his wall, while the debtor despite of the title actually may continue undisturbed to dispose over and move his assets. Therefore, an improvement of the private creditor's lack of efficient access to/lack of information for enforcement purposes about the debtor's assets for these purposes in the cross-border and national context in civil and commercial matters having cross-border implications is essential in support of enforcing the result of previous judicial procedures in the quality of titles of execution.

The relatively low frequency in the use of the four regulations may likely, at least to some extent, be explained by the awareness of the creditor of the problem of obtaining efficient access to information for enforcement purposes in matters having cross-border implications both before and after he has obtained a title of execution.[6] Therefore, if the creditor does not have access to any reliable information about the location of the debtor and his assets in other Member States, he may not find it worth the time and effort to obtain a title of execution falling under the regulations, and instead write the claim off. This is not exclusively so, but especially likely, in cases when the creditor's claim concerns a minor amount. In order to address this problem of the creditor, the transparency of debtor's assets has to be improved through efficient means in EU law both in the cross-border and national context. No doubt an improvement in EU law of the problem of transparency would stimulate creditors to make more frequent use of the four regulations concerned. Also, if debtors become aware of an improved transparency about their assets in the EU this may increase their willingness to pay both before and after a title of execution.

2 New Brussels I Regulation and the European Judicial Network in civil and commercial matters

The proposal for a new Brussels I regulation suggests that a more detailed and updated description of national rules and procedures concerning enforcement comes into force, including authorities competent for enforcement, information on any limitations on enforcement and in particular debtor protection rules and limitation or prescription periods shall be included in the European Judicial Network in civil and commercial matters.[7] This is a good initiative, but merits to be further developed.

2.1 Conclusions

In this context, as a further step of improvement aimed at an increase in efficiency, it should be contemplated that Member States also should be obliged to make available to the network a description of the national information available for enforcement purposes, including any limitations. No doubt, this would be of some value to both creditors and legal professionals, but is not on its own sufficient to solve the creditor's problem on a practical level in matters having cross-border implications.

3 EU system for exchange of information for enforcement purposes

There exist several arguments for the establishment in EU law of a new system for exchange of information for enforcement purposes between Member States. This is evident from the European Council's Tampere conclusions[8], and the Council's Hague Programme[9], which foresees the possibility of developing an exchange of

information between Member States related to civil and commercial claims in enforcement matters by means of communication between the regulated enforcement agents in Member States for the benefit of the creditor[10]. The European Council's Stockholm Programme emphasizes the importance of creating a clear regulatory environment, allowing small and medium enterprises in particular to take full advantage of the Internal market so that they can grow and operate across borders as they do in their domestic market.[11] The European Council has agreed to important elements of the European Commission's communication about a strategy for smart, sustainable and inclusive growth.[12] The Commission's communication underlines the importance of a more competitive economy, the removal of remaining bottlenecks to cross-border activity that every day business and citizens are faced with despite the legal existence of the single market, and that access for small and medium enterprises to the single market must be improved.[13]

A solution to the creditor's problem with regards to having access to information for enforcement purposes in the cross-border context exists in the Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. (Maintenance regulation)[14] The regulation includes some rather advanced provisions on co-operation between central authorities, as representatives for a creditor, which leaves an option for a private creditor to benefit from an exchange of information for the purpose of efficiently recovering maintenance claims, improving the access to information and the notification of information to the debtor.[15]

Another solution to the creditor's problem of having access to sufficient information for enforcement purposes in the cross-border context has been suggested in the recent Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters.[16] The proposal suggests that it become mandatory for financial institutions in the Member States to provide information on the debtor's assets on accounts in order to safeguard the interests of the private creditor.[17]

However, in contrast to the Maintenance regulation and the public EU law and convention areas, and in particular the parts of EU law concerning cross-border recovery of tax and social security claims, which include provisions for an exchange of information for recovery purposes, there exists yet no corresponding solution in the cross-border area for enforcement matters related to the four regulations here concerned in the civil and commercial areas.[18] Therefore this situation needs to be more efficiently addressed, irrespective of the amount of the claim, and to be substantially further improved by reforms of EU law, based on the Council's reform programmes, with the aim of providing more efficient access

to information for enforcement purposes in civil and commercial matters having cross border implications in relation to the scope of application of the regulations here concerned.

The need for efficient access to information has, of course, to be balanced against the interests of the debtor concerning humanity, dignity and privacy; including data protection. Access to information regarding the assets of the debtor for enforcement purposes calls for a balanced equilibrium between the creditor's right to efficient enforcement of his claim and the debtor's right to humanity and privacy in such situations. These rights can be derived from the European Convention on Human Rights. Arguments exist, i.a. based on the interpretation of article 6, 1 of this European convention, in favour of considering a demand of access to information for enforcement purposes as an important requirement in order to make the execution of a judgment efficient. Also, it may be argued that efficiency in this context should mean a demand on the availability of all necessary information for enforcement purposes should be satisfied, in order to safeguard the creditor's right of efficient enforcement, and by such means promote a realization of the creditor's claim in the assets of the debtor, in the interest of his right of peaceful enjoyment of his possessions according to Protocol No. 1, article 1, of this European convention.

There exist strong arguments in favour of the principle of considering the availability of information for enforcement purposes related to the assets of the debtor at the enforcement and seizure of a creditor's claim, to constitute a fundamental right based on article 6, 1 of the European convention. Efficient access to information regarding the assets of the debtor must, however, be balanced against the rights to a treatment of humanity and dignity for the debtor, and in case of a collision between these interests, in favour of the latter. This access to information must also be balanced against the right of privacy for the debtor and be proportionate in relation to the need of information for enforcement and recovery purposes in order to ensure that the debtor is exposed as little as possible.

Consequently, no more information should be obtainable, and used for the enforcement of a claim than corresponds to the necessary need, for the purpose of efficient enforcement of the creditor's specific claim. In this way only a proportionate amount of information should be made available, which would contribute to avoid abuse of information related to the assets of the debtor and subsequently minimize the risk to the debtor.

Access to information should also be acceptable, and even beneficial, to the debtors under the conditions that it is used in a balanced way for enforcement purposes, not by the creditor in person or by obscure private recovery agencies, but under the control of an independent neutral third party, a regulated

enforcement agent, who has the task of establishing this balanced equilibrium between the rights of the creditors and the debtors, under the rules of law and the supervision of State bodies, courts and authorities.

Other important reasons, that motivate why an improved access to information for enforcement purposes should be provided directly to the enforcement agents, instead of to the private creditor, are that these agents, at an application for the enforcement of a claim by the creditor, would anyway have to review and evaluate received information about assets of the debtor from the creditor, as an integrated part of an actual enforcement procedure, in a justified balance between the interest of efficiency of the private creditor and the interest of privacy of the debtor, which may, or may not, result in the attachment of assets indicated by the private creditor.

In an overall evaluation of these reasons and conditions related to access to information for enforcement purposes, it becomes clear that the creditor's interest in efficiency is of a greater weight than that of the debtor's privacy. This does not, however, mean that this interest of the debtor may be ignored. There are good arguments in favour of that both new EU law and national legislations in the Member States should be influenced more by this interest of efficiency.

The idea of an introduction in EU law of a European Assets Declaration, which would require the debtor to declare his assets on the initiative of a private creditor, in an affidavit, or other corresponding official document to the enforcement agents, or in court in a matter of enforcement, aims to encourage uniformity across Member States. It is intended to lead to creditors' equal access to information about assets, while the debtor would receive equal protection. This idea comes close to the concept of a general disclosure of information in insolvency proceedings, e.g. in the case of a bankruptcy. The objectives of insolvency and enforcement proceedings are, however, not identical, although one similar feature exists: the realization of the assets of the debtor in the interest of the creditor. Still, other important objectives and structures of insolvency are different from those of enforcement.

Therefore, the principle of universality, as implemented in the area of general civil execution, in bankruptcy and in the area of international insolvency proceedings is not suitable for introduction in the search for information for enforcement purposes in the area of special execution, the enforcement area, in a European Assets Declaration. The concept of a general disclosure of information in a European Assets Declaration also risks including more sources of information related to the assets of the debtor in the Member States than needed for the purpose of enforcing the claim of a creditor in the debtor's assets. Consequently, this may, from the debtor's perspective, be disproportionately weighted against his interest of privacy. On the other hand, it satisfies a creditor's right to obtain all

information in the European judicial area related to the debtors' assets in order to make a choice between them in a matter of enforcement.

There are States in which only the enforcement agent determines what measures of enforcement to undertake. There are also States where the creditor has almost completely free choice as to the method of enforcement to be adopted. The actual choice of the assets to be seized should however, not, for reasons of efficiency and privacy, be entrusted to the creditor, even if he may express his preference of choice, but instead to the regulated enforcement agents. The reason is that these agents have the task to establish a justified and proportionate balance, in terms of access to information for enforcement purposes, in the enforcement proceedings, between conflicting interests, i.e. to make use of no more, or less, information than is needed.

The approach of the European Assets Declaration of a general disclosure of information by the debtor in a declaration about his assets in the European judicial area risks, even to the extent it would be possible to argue that a justified balance between the conflicting interests of the debtor and the creditor is possible to establish, being contrary to the interest of efficiency of the creditor for several reasons. The declaration only covers obtained information from the debtor and not access to information from independent sources of information of a reliable and official status.

The debtor may also, despite a threat of sanctions, refuse to declare his assets, or provide insufficient, or incorrect, information in his declaration. If the debtor disappears, a declaration becomes impossible. If, in addition, the debtor repeatedly changes his domicile from one Member State to other Member States, the creditor risks having to apply for a European Assets Declaration correspondingly, that is in several Member States, before such a declaration can be obtained.

A request by a private creditor of a European Assets Declaration seems only possible if it forms part of an application for enforcement measures, based on his title of execution. Otherwise, no enforcement matter is established as the necessary legal basis for a declaration. If the private creditor receives useful information from the debtor in the European Assets Declaration, he will still have to make an application for the enforcement of his claim, based on his title of execution, in one or several other requested Member States in parallel, where the assets of the debtor have been indicated by the debtor.

The enforcement agents of these requested States would, based on the applications, also have to review and evaluate the provided information by the creditor in relation to other possible sources of information available about the debtor's assets as an integrated part of the actual enforcement proceedings. This is in order to establish a justified balance in that proceeding between the interest of

efficiency of the private creditor and the debtor's interest of privacy and may, or may not, result in the attachment of assets indicated by the private creditor. Consequently, the possible advantages of a European Assets Declaration are not of sufficient importance to counter balance its disadvantages to both the private creditor and the debtor.

A European Garnishee's Declaration has been proposed to oblige third-party debtors to give information on the assets seized. A better solution would be, when the enforcement organs have received an application for the enforcement of a judgment and before the actual seizure takes place, in order to deal with the differences in national laws, to oblige any third-party debtor, including an employer or any financial institution, in national laws to provide, at the request of the enforcement organs, information about the debtor's assets to these organs. This would also enable enforcement organs to make a choice between all assets held by this third-party, before their actual decision to seize. As already mentioned, the recent Commission's proposal for a regulation of the Parliament and of the Council Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters addresses exchange of information for third-party debtors in their capacity of financial institutions. This solution would however not, if accepted by the EU legislator, be applicable in an enforcement situation where a final enforceable title of execution, i.e. which has gained legal force, has been established.

3.1 Conclusions

The conclusions are, in an overall evaluation, that the Maintenance regulation, which creates an optional right for a private creditor who holds a title of execution, to make use of an exchange of information for enforcement purposes, is best suited to serve as a model to be adopted and developed to the corresponding needs of a private creditor for an exchange between the regulated enforcement agents of the Member States in civil and commercial enforcement matters having cross-border implications. It is suggested, for practical reasons, that reforms should be conducted, aiming to include the relevant provisions in one separate new EU regulation in support of the scope of the four EU regulations here concerned than to enter such similar provisions in the four regulations.

This is in order to achieve a higher degree of service and efficiency for the private creditor at the enforcement of his title of execution and for a proportionate treatment of exchanged information and privacy in relation to the debtor.

Also, it may be contemplated as a practical and efficient service measure available to the creditor that he should have an optional right, as already available under the Maintenance regulation, to file an application, related to a specific matter, in the Member State of origin of his title of execution, for an exchange of information

for enforcement purposes with another Member State. A request for information following the private creditors' application, should, for reasons of efficiency and integrity, be transmitted electronically in a closed communication system between Member States as speed is of the essence.

This solution involving co-operation will, as any other alternative, give rise to the question about the financing of the increased costs created by the necessary work. It remains to be discussed to what extent and proportion the private creditors, respectively the Member States, should pay for the services made available under such a possible co-operation, and what possible fees creditors should pay, or not pay, to their national regulated enforcement agents for using their services in relation to this available option in matters of exchange of information for enforcement purposes. Also it remains to be discussed how such a possible co-operation, which would include work in the Member States for communications between the national designated competent authorities, or contact points, and/or the national regulated enforcement agents, and the private creditors, should best be structured. These ideas conform to the objectives of the Council's programmes and would also promote a better functioning of the Common Internal Market.

4 EU harmonization of national legislation

The establishment of a minimum level of harmonization of national legislations for access to information for enforcement purposes and of a sufficiently efficient solution for access to information for enforcement purposes in civil and commercial enforcement matters having cross-border implications is required in new EU law to meet the objectives of the Council's conclusions and programmes and the standards of the European Convention on Human Rights.[19]

The establishment of a more equal level of access to information provided to the enforcement organs would guarantee better efficiency of justice and a more equal treatment of creditors and debtors in the European judicial area. Consequently, the national differences of access to information for enforcement purposes would be reduced and creditors, who are able to present enforceable titles of execution under the four regulations here concerned, at an application for their enforcement, would then come into a more similar position to the creditors, who hold national titles, on the disclosure of assets in all enforcing Member States.

A harmonization of the national legislation is also motivated by and required in the interest of States to implement the Council of Europe's recommendation on enforcement and by such means respond to the legal objectives of this recommendation.[20] Such a harmonization corresponds, in addition, to the objective of the general State interest of a more efficient enforcement of claims in society and to the interest of efficiency for the creditor.

The Council of Europe has established the goals in its recommendation on enforcement. The debtors should provide up-to-date information about their income, assets and other relevant matters. The search and seizure of the debtors' assets should be made as efficient as possible, taking into account relevant human rights and data protection provisions in the Data protection Directive. Also there should be a fast and efficient collection of necessary information on the debtors' assets achieved through access to relevant information in registers and other sources as well as the option for the debtor of making a declaration of his assets. Consequently, the Council of Europe's recommendation on enforcement may, in a longer perspective, contribute to alter national law of the Member States of the Council of Europe into more equal levels of access to information for enforcement purposes.

Several authors have also emphasized the importance of, and confirmed the need, for access to information for enforcement purposes based on various aspects, particularly in the civil enforcement law area and including the twofold objectives to increase access to national information and to establish a multilateral co-operation system between States for the exchange of nationally available information.

In order to achieve all these objectives of an improved access to information for enforcement purposes of judgments to enforcement organs in the civil enforcement law area, a harmonization in EU law of national legislation, under the option of any national system, should stipulate the goals of an efficient and up-to-date access to information to enforcement organs for enforcement purposes of judgments achieved preferably by "electronic means", through access to relevant information in registers and other sources of information regarding the debtor.

The establishment of a sufficiently efficient solution for access to information for enforcement purposes in the cross-border civil enforcement law area would also have to take into consideration a sufficiently harmonized level of access to information for enforcement purposes to regulated enforcement agents in national laws in order to guarantee at least some kind of reciprocally acceptable level of exchange of information, which could be used for the benefit of cross-border enforcement of a private creditor's claim within the EU. This means that any attempt to improve efficiency by access to information for enforcement purposes in the cross-border context would also have to consider the establishment of a sufficiently high level of access to national information.

4.1 Conclusions

In order to achieve harmonization through EU law in relation to matters having cross-border implications, detailed provisions for a harmonization of national legislations should be stipulated, under the option of any national system through

the use of regulated enforcement agents. It would be an advantage if such provisions could be entered into the same new regulation as suggested for exchange of information for enforcement purposes.[21]

National legislation should preferably provide an efficient and up-to-date access of information to enforcement organs for enforcement purposes of titles of execution related to civil and commercial law claims in order to secure access to information about the debtor's: address, or place of location, employer, or business, through corporate registers, or other sources of income, including private, or social, insurance institutions, incomes and other assets in his possession, e.g. through debtor's registers kept by such officials, declaration of his assets made to the enforcement agents, and status of indebtedness or insolvency, i.e. bankruptcy or other collective insolvency procedures. This access to information should preferably be achieved by/through "electronic means".

Notes

[1] Berglund, M., Cross-Border Enforcement of Claims in the EU – History, Present Time and Future, No. 65 in the series European Monographs of Kluwer Law International/Norstedts Juridik, the Netherlands, 2009 (Berglund 2009), in particular pp. 227-242 and 269-279, which also include references to several other sources and authors. Also see, for a more brief account about access to information for enforcement purposes in matters having cross-border implications, Berglund, M., Scope of Application of EU Law in the Judicial Procedures of Debt Collection in Civil and Commercial Matters, LeXonomica - Journal of Law and Economics, University of Maribor, Faculty of Law, Slovenia, Volume II, No. 2, December 2010, pp. 167-168, 170-171, and 176-181.
[2] OJ 2001 L 12.
[3] OJ 2004 L 143.
[4] OJ 2006 L 399.
[5] OJ 2007 L 199.
[6] See, about the very low frequency use of matters under the Brussels I regulation as compared to the corresponding national matters, Berglund 2009: 31-32, footnote 86. Also see, about the situation of frequency use of matters under the European Enforcement Order for uncontested claims, the European Order for payment procedure, and the European Small Claims Procedure, as compared to the corresponding national matters, the EU-study "Simplification of Debt Collection in the EU" under the Commission's "Specific Programme Civil Justice".
[7] Article 86.
[8] Presidency conclusions, European Council 15 and 16 October 1999. The conclusions foresee measures in seeking to make more efficient the enforcement, in the requested State, of judgments delivered in another Member State and to enable the precise identification of a debtors' assets in the territory of the Member States for implementing the principle of mutual recognition.
[9] European Council, the Hague Programme: strengthening freedom, security and justice in the European Union.
[10] See III, 2.1 of the Hague Programme of the European Council about improving the exchange of information and III, 3.4.1 of the same Programme about facilitating civil law procedures across borders.

[11] Section 3.4.2 Supporting economic activity of the European Council, the Stockholm Programme – An open and secure Europe serving and protecting the citizens, OJ 2010 C 115.
[12] European Council's conclusions of 25/26 March 2010, EUCO 7/10.
[13] Commission's communication "Europe 2020: a strategy for smart, sustainable and inclusive growth", COM(2010) 2020 final, sections 2 and 3.1.
[14] OJ 2009 L 7.
[15] Articles 50.1 a), 51.1 c) and 61-62.
[16] COM(2011) 445 final.
[17] Article 17.
[18] Compare article 5 about request for information for recovery purposes of tax claims and some other public claims in Council Directive 2010/24/EU of 16 March concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ 2010 L 84. This directive enters into force on 1 January 2012 and provides for an even more advanced cooperation than the present directive. Also compare article 76 about requests for information for recovery purposes of social security claims according to the Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ 2009 L 284. See, for some comments about this provision of the regulation, Berglund, M., Indrivning inom EU av socialförsäkringsfordringar, Europarättslig Tidskrift nr 2, 2011, pp. 262-263. The Council of Europe and OECD convention on mutual administrative assistance in tax matters (ETS No. 127 and UNTS No. 33610, 1997) covers a lot of non Member States of the EU, which are Member States of the Council of Europe and OECD and provides for an exchange of information for recovery purposes on request, see article 5. However, since 2010, the convention received a possible global coverage when it was opened up for accession of States which are not a member of the Council of Europe or of the OECD, see article VIII, paragraph 5, of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters (CETS No. 208).
[19] Compare under section 3 above.
[20] See Council of Europe's recommendation on enforcement, Rec (2003) 17, of 9 September 2003.
[21] Compare under section 3 above.

References

Berglund, M. (2009) *Cross-Border Enforcement of Claims in the EU – History, Present Time and Future* (Alphen aan den Rijn: Kluwer Law International).

Berglund, M. (2011) Indrivning inom EU av socialförsäkringsfordringar, *Europarättslig Tidskrift*, 2011(2), p. 257.

Berglund, M. (2010) Scope of Application of EU Law in the Judicial Procedures of Debt Collection in Civil and Commercial Matters, *LeXonomica - Journal of Law and Economics*, 2(2), pp. 161-183.

Sources

Convention on mutual administrative assistance in tax matters, done at Strasbourg on 25 January 1988, Council of Europe and OECD, ETS No. 127 and UNTS No. 33610 (1997), as amended in 2010, CETS No. 208

Council Directive 2010/24/EU of 16 March concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ 2010 L 84

Council of Europe's recommendation on enforcement, Rec (2003) 17, of 9 September 2003

Council Regulation (44/2001/EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12

Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ 2009 L 7

European Commission's communication "Europe 2020: a strategy for smart, sustainable and inclusive growth", COM(2010) 2020 final

European Council, the Hague Programme: strengthening freedom, security and justice in the European Union, OJ 2005 C 53/01

European Council, the Stockholm Programme – An open and secure Europe serving and protecting the citizens, OJ 2010 C 115

European Council's conclusions of 25/26 March 2010, EUCO 7/10

Presidency conclusions, European Council 15 and 16 October 1999. Also see website of the European Parliament (www.europarl.eu.int/summits/tam_en.htm)

Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2010) 748 final

Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters, COM(2011) 445 final

Regulation 805/2004/EC of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ 2004 L 143

Regulation 1896/2006/EC of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ 2006 L 399

Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July establishing a European Small Claims Procedure, OJ 2007 L 199

Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ 2009 L 284

CROSS-BORDER CIVIL PROCEEDINGS IN THE EU
(NOVEMBER 17, 2011 - NOVEMBER 18, 2011)
pp. 61 - 77

The Complexity of Article 5(1) of the Regulation 44/2001 – The Impact of the Case Law on the Interpretation of Place of Performance

MARTINA REPAS & TOMAŽ KERESTEŠ

ABSTRACT This article deals with the determination of international jurisdiction in contractual matters as regulated by Article 5(1) of the Regulation 44/2001. Although the explanation of the concept of »contractual matter« is of great importance for the applicability of this provision, this article is confined to the concept of the place of performance of the obligation in question under which jurisdiction of the court of the Member State is established. The place of performance is determined differently for contracts of the sale of goods and the provision of services on one hand and for other contracts that fall under Article 5(1) of the Regulation 44/2001 on the other. The Article analyses the complexity of these different regulations, which pose many difficult questions in theory and practice. The CJEU gave several decisions with regard to interpreting the place of performance – some very important were delivered just recently. Thus, the aim of this article is to present and analyse the CJEU's decisions and their impact on the explanation of Article 5(1) of the Regulation 44/2001.

KEYWORDS: • international jurisdiction • contractual matter • place of performance of obligation • place of delivery • sale of goods • provision of services • Regulation 44/2001• case law of the CJEU

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1 Introduction

Council Regulation Nr. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters[1] (hereinafter: Regulation 44/2001) provides uniform rules on international jurisdiction in the Member States of the EU. Despite the fact that it is not applicable in every situation, it has profound impact on international contracts and the existence of pre-defined and precise grounds of jurisdiction and has strengthened the mutual trust between Member States (Kuipers, 2010: 659). The system of international jurisdiction is generally determined according to the defendant's domicile in Article 2 of the Regulation 44/2001. This general rule is supplemented by additional rules in Articles 5 – 24 of the Regulation 44/2001, meaning that the defendant can also be sued in the Member State which is not a Member State of his domicile. These additional jurisdictional rules are exceptions from the general rule in Article 2, and are the following: special or alternative jurisdictions (Articles 5 – 7), mandatory jurisdictions (Articles 8 – 21), exclusive jurisdictions (Article 22), prorogation of jurisdiction (Article 23) and submission (Article 24). Since they are exceptions, their narrow interpretation is required, as confirmed by the Court of Justice of the EU (CJEU) in several decisions.[2] As regards the interpretation of Regulation 44/2001, it is also important to stress that Regulation 44/2001 operates with several concepts (e. g. civil and commercial matters, contractual matters, torts, consumer etc.), which can be interpreted differently according to national rules of the Member States of the EU. As such interpretation could jeopardise the uniform rules on international jurisdiction in EU, the majority of concepts used in the Regulation 44/2001 have autonomous meaning under which they are interpreted according to the purpose, aim and the general system of the Regulation 44/2001 and independently from national law (Briggs, Rees, 2005: 26–28).

This article deals with special jurisdiction in Article 5(1) of the Regulation 44/2001, which relates to contractual matters and has a significant role in practice. Under this provision the jurisdiction of the court is based on the place of performance of the obligation in question, which is defined as the place of delivery or the place of provision of services for the two most common contracts in international trade: the contract for the sale of goods and the contract for the provision of services (Article 5(1)(b)). For other contracts, regulated by Article 5(1)(a), the place of performance of the obligation in question lacks any further definition. The purpose of this article is thus to analyse the concept of the place of performance of obligation under Article 5(1)(a) and 5(1)(b) of the Regulation 44/2001 and to expose several difficulties, raised in theory and practice regarding the interpretation of these two provisions. Since several questions were already addressed to the CJEU, the article introduces and analyses the existing case law of the CJEU and its impact on the explanation of Article 5(1) of the Regulation 44/2001. As for other questions, different solutions could be proposed according

to the accepted interpretative methods that suit the system and the purpose of the Regulation 44/2001 most.

2 International Jurisdiction in Contractual Matters – the Comparison between Regulation 44/2001 and Brussels Convention (1968)

International jurisdiction in contractual matters is regulated by Article 5(1) of the Regulation 44/2001 which provides:[3]
"A person domiciled in a Member State may, in another Member State, be sued:
1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,
(c) if subparagraph (b) does not apply then subparagraph (a) applies."

Before the entry into force of the Regulation 44/2001, Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters (1968) regulated international jurisdiction in these matters. Article 5(1) of the Brussels Convention provided:

"A person domiciled in a Member State may, in another Member State, be sued:
1. in matters relating to a contract, in the courts for the place of performance of the obligation in question."

It follows that Brussels Convention only regulated issues that are now contained in Article 5(1)(a) of the Regulation 44/2001.[4] A reason to amend Article 5(1) was to remedy the shortcomings of the Brussels Convention, which were the following. First, the need to identify the particular obligation in question; second, the need to identify the place of performance of the obligation in question; and third, the need to identify the applicable law to answer the question of the place of performance in case where the contracting parties failed to identify the place of performance of obligation in question (Forner, Torres, 2010), which meant that rules of conflict of laws of the forum applied. As a consequence, a new rule in Article 5(1)(b) of the Regulation 44/2001 provides the definition of the place of performance for the contract of the sale of goods and the provisions of services, which is the same regardless of the obligation in question.

However, new rules contained in Article 5(1)(b) of the Regulation 44/2001 caused several other difficulties. For example, a question is how to interpret Article

5(1)(c) in cases where the place of delivery of goods is not in a Member State: is Article 5(1)(a) applicable or the applicability of entire Article 5(1) is excluded. Further questions refer to cases where contracting parties failed to identify the place of delivery of the goods in the contract and to the delivery of the goods in several different places in one Member State or in several Member States.

3 Explanation of the Concept of the Place of Performance of Obligation under Article 5(1) of the Regulation 44/2001

3.1 Generally

As regards the place of performance of the obligation in question, the distinction should be drawn between two situations, provided by Article 5(1)(a) and 5(1)(b) of the Regulation 44/2001. According to Article 5(1)(c), Article 5(1)(a) is confined to contracts which do not have as their object the sale of goods or the provision of services. Namely, Article 5(1)(b) explicitly provides the place of performance for the two most common contracts in international trade, i.e. contract for the sale of goods and for the provision of services. Therefore, Article 5(1)(a) is applicable for all contracts not covered by Article 5(1)(b), except for the contracts that are regulated by other provisions of the Regulation 44/2001 (e. g. contracts for the protection of weaker parties, tenancy of immovable property etc.) and it is more of an exception than the rule in practice (Mankowski, 2007: 100). However, the question is whether Article 5(1)(a) has a supplementary role in case of contracts for the sale of goods and the provision of services in situations where Article 5(1)(b) is inapplicable (e. g. because the place of delivery or the place of the provision of services is not in a Member State). In other words, can jurisdiction be determined under Article 5(1)(a) even for contracts specially covered by Article 5(1)(b) of the Regulation 44/2001?

In answering this question, one should focus on the provision in Article 5(1)(c), which states: "*if subparagraph (b) does not apply then subparagraph (a) applies*." According to this provision, two interpretations are possible. Under the first interpretation Article 5(1)(c) creates a delineation between different types of contracts. Therefore, if the place of delivery is not in a Member State, it is not possible to apply Article 5(1)(a). Consequently, Article 5(1) is excluded in its entirety and jurisdiction should be determined according to other provisions in the Regulation 44/2001 (e. g. under Article 2 of the Regulation 44/2001). It follows, that according to the first interpretation Article 5(1)(a) is never applicable to contracts for the sale of goods or the provision of services.

According to the second interpretation, Article 5(1)(a) is also applicable to contracts for the sale of goods or the provision of services in cases where the place of delivery of goods or the place of provision of services is not in a Member State (Mankowski, 2007: 101; Forner, Torres, 2010; Leible, Mankowski, Staudinger,

2006: 168). Therefore, the distinction between Article 5(1)(a) and (b) is not based on the type of the contract in question. In order to further support this interpretation, it has to be stressed that Regulation 44/2001 establishes jurisdiction of the courts of the Member States of the EU and consequently delineates the jurisdiction between them. Therefore, if jurisdiction of the courts of the Member States cannot be established according to Article 5(1)(b) then Article 5(1)(a) applies (see also Mankowski, 2007: 161). This interpretation is also confirmed by the Proposal of the Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[5] (hereinafter: Proposal 1999). Thus, the conclusion should be that Article 5(1)(a) is not completely irrelevant to the contracts for the sale of goods or the provision of services.

3.2 Place of Performance under Article 5(1)(a) of the Regulation 44/2001

Article 5(1)(a) deals primarily with contracts not defined as contracts for the sale of goods or provision of services (e. g. contracts for the sale of securities, contracts for the sale of intellectual property rights, licence contracts,[6] franchising contracts, contracts of exchange, loan contracts etc.) (Stone, 2010: 92). Contrary to Article 5(1)(b), Article 5(1)(a) lacks any definition on the place of performance of obligation in question.

According to the decision of the CJEU in the *De Bloos*[7] case, the obligation in question is the contractual obligation on which the plaintiff's action is based. Therefore, if the dispute is about the late or faulty performance of the object of obligation, the place of the disputed performance is relevant to determine international jurisdiction; if dispute concerns the payment, then the place where the payment has or should have been made is relevant (Bogdan: 2006: 47–48). The place of performance of the relevant obligation is in most cases explicitly or implicitly agreed upon by the contracting parties.[8] Where there is no such agreement, that place must be determined by the law governing the contract in question pursuant to the conflicts of laws rules of the forum as decided by the CJEU in the *Industrie Tessili*[9] case. In most cases the applicable conflicts of laws rules would be those defined in the Rome Convention on the law applicable to contractual obligations (1980) or Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations[10] (Rome Regulation I). However, the place of performance could also be determined by a uniform substantive law defined in an international treaty which prevails over Rome Convention or Rome Regulation I (Stone, 2010: 94). Consequently, the court will first have to find applicable law in order to establish its jurisdiction. Some authors argue that there is no alternative to this approach. An argument against this approach could be the lack of uniformity of view on the question of jurisdiction, but this is a weak argument for three reasons. First,

Article 5(1) of the Regulation 44/2001 is concerned only with special (alternative) jurisdiction. This means that court is concerned only to determine whether it also has jurisdiction and not whether another court has special jurisdiction. Therefore, the practical need for a uniform view is diminished. Second, Member States harmonise their conflict of laws rules. And third, the adoption of an autonomous interpretation of place of performance in Article 5(1)(b) of the Regulation 44/2001, which reduces the scope of divergence of view as to the place of performance (Briggs, Rees, 2005: 171–172).

Article 5(1)(a) poses several questions, which are irrelevant in the context of Article 5(1)(b). For example, which obligation is important in determining the jurisdiction in cases where the dispute is about several parallel obligations under the same contract or which obligation is important in cases of several equal obligations? According to the decision of the CJEU in the case of *Shenavai v Kreischer*,[11] the distinction has to be made between principal and accessory obligations. Under the principle *accessorium sequitur principale* the principal obligation is relevant. Thus, jurisdiction is based upon the place of performance of the principal obligation. In cases of obligations under the same contract which are equal in rank, the jurisdiction has to be determined according to each obligation in question.[12]

Article 5(1)(a) is not applicable if the place of performance of obligation is undetermined because contractual obligation contains negative obligation without geographical delineation as the CJEU decided in case *Besix v WABAG*.[13] In such cases several places of performance exist; as a consequence, Article 5(1) is excluded. The same conclusion applies in cases where the place of performance is not in a Member State as ruled by the CJEU in the case of *Cf. Six Constructions v Humbert*.[14] Therefore, the applicability of Article 5(1) is excluded in situations described above, which mean that jurisdiction can be determined only by use of the general criterion laid down in Article 2 of the Regulation 44/2001.[15]

3.3 Place of Performance under Article 5(1)(b) of the Regulation 44/2001

3.3.1 Generally

As already mentioned, Article 5(1)(b) is applicable only to two types of contracts: for the sale of goods and for the provision of services. Regulation 44/2001 lacks definition of these two contracts and also does not provide any criteria which could help to make delineation between them. Despite the differences, there is a connection between them. The CJEU ruled in the case of *Rehder v Air Baltic*[16] that solutions or rules accepted for one type of contract are also applicable for other type of contract since they have the same origin, pursue the same objectives and occupy the same place in the scheme established by the Regulation 44/2001.

According to Article 5(1)(b) of the Regulation 44/2001, the place of performance of the obligation in question is in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered and in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided. It follows, that the jurisdiction criterion is determined with regard to characteristic performance of the contract. Therefore, if the dispute is about the late or faulty delivery of the goods, the place of delivery is relevant for the determination of international jurisdiction; if the dispute concerns the payment, the place of the delivery of goods is relevant as well. This means that the place of delivery will determine jurisdiction regardless of the obligation in question, unless it is otherwise agreed by the contracting parties, as provided explicitly by the wording of Article 5(1)(b) of the Regulation 44/2001,[17] which enables the parties to displace this rule by an explicit agreement on the place of performance.[18] Although, the ruling in the case of *MSG v Les Graviéres Rhénanes*[19] has to be considered, according to which, agreement on the place of performance which is designated not to determine the place where the person liable is actually to perform the obligations incumbent upon him, but solely to establish that the courts for a particular place have jurisdiction, is not governed by Article 5(1) but Article 23 of the Regulation 44/2001 (see also Stone, 2010: 87).

3.3.2 The Place of Performance not Determined in the Contract

The place of delivery and the place of provision of services do not pose particular difficulties in cases where they are determined by the contracting parties. Difficulties arise when parties lack such agreement. In such situations the question is how to determine these places which are of greatest importance in the process of establishing international jurisdiction. The solution at hand is of course the application of the conflicts of laws rules of the forum State and the substantive law which would be applicable thereunder. However, it has to be remembered that at the time of drafting Article 5(1)(b) of the Regulation 44/2001 the Proposal 1999 stated that it was intended 'to remedy the shortcomings of applying the rules of private international law of the State whose courts are seised' and that that 'pragmatic determination of the place of enforcement' was based on a purely factual criterion. Before CJEU's rulings in the case of *Car Trim v KeySafety Systems*,[20] there were different opinions in theory and practice on the applicability of United Nation Vienna Convention on international sale of goods from 1980 (hereinafter: Vienna Convention)[21] and Article 31,[22] which defines the place of delivery, as well as UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law regarding the interpretation of place of delivery in the absence of agreement of the parties. According to the first opinion, the Vienna Convention should be relied upon since it constitutes a set of rules which even European legislature has used as a model, while under the second opinion several reasons exist to avoid reliance on the Vienna Convention,

mainly that Regulation 44/2001 is an EU procedural instrument and thus cannot be interpreted in light of a substantive law instrument of "extra European" origin and that procedural law concepts cannot be defined the basis of substantive law rules (Vezyrtzi: 2009).[23] It also has to be stressed that Vienna Convention is not applicable to all types of contracts quoted in Article 5(1)(b); indeed, not even for all contracts for the sale of goods as some are excluded from its scope.[24] It seems that a solution under which, according to Article 5(1)(b) of the Regulation 44/2001, the place of delivery as defined in Vienna Convention applies to certain contracts on one side and the place of where the goods were physically transferred to the buyer at their final destination to other contracts on the other side doesn't seem acceptable.

In the case of *Car Trim v KeySafety Systems*,[25] which involved a sale of components by a German manufacturer to an Italian manufacturer, CJEU follows the intention of the EU legislator and precluded application of the choice of laws rules of the forum State. The CJEU stated that determination of the place of enforcement' should be based on a purely factual criterion and did not refer to the Vienna Convention. In a given case of a sale involving carriage of goods, two places could serve as the place of delivery to be applicable in the absence of a contractual provision. The first is the place of the physical transfer of the goods to the purchaser and the second is the place at which the goods are handed over to the first carrier for transmission to the purchaser. According to the CJEU, the first place is the most consistent with the origins, objectives and scheme of the Regulation No 44/2001 because it is highly predictable and meets the objective of proximity. It also stressed that goods, which are the subject of the contract, must, in principle, be in that place after performance of the contract. Furthermore, the principal aim of a contract for the sale of goods is the transfer of those goods from the seller to the purchaser, which is fully complete when goods arrive at their final destination.[26] Therefore, the CJEU ruled that, in the case of a sale involving carriage of goods, the place of delivery must be determined primarily on the basis of the express provision in the contract. If contracting parties failed to identify the place of delivery, the place of delivery is the place where the goods were or should have been physically transferred to the buyer at their final destination. The place of delivery of goods will, in most common cases be the place of the buyer's domicile.

In view of the CJEU's decision in the case of *Rehder v Air Baltic*, under which the same rules apply to contracts for the sale of goods and for the provision of services, one could take the conclusion that by analogy the place where the services were provided or should have been provided, is the place in a Member State where services were actually provided.

The decision of the CJEU in the case of *Car Trim v Key Safety Systems*[27] has two restrictions. The first restriction refers to the contracts for the sale of goods

involving carriage of goods, and the second refers to cases where goods were actually physically transferred to the buyer. As regards the first restriction, we believe that the ruling of the CJEU should also be stretched to the contracts for the sale of goods, which do not involve the carriage of goods, although it has to be emphasised that such contracts usually do not pose such problems. This conclusion arises from the purpose of the Regulation 44/2001 and arguments put forward by CJEU that the concept of place of delivery is independent and should be determined according to the criteria consistent with the origins, objectives and scheme of Regulation 44/2001. As far as the second restrictions are concerned, the rule established by the CJEU in case *Car Trim v Key Safety Systems* refers to contracts only under which the seller actually delivers the goods but not to contracts under which the seller failed to perform this obligation and the buyer claims the delivery of goods or/and compensation. In this connection, three potential solutions are possible as to the determination of the place of delivery:

- conflicts of laws rules of forum State applies under Article 5(1)(b);
- conflicts of laws rules applies under Article 5(1)(a);
- a presumption applies as to which, the goods would be physically transferred to the buyer in a place of buyer's domicile.

The first solution seems unacceptable as they refer to the use of conflicts of laws rules of the forum State under Article 5(1)(b). The acceptance of such a solution would be contrary to the reasoning put forward by the CJEU in the case of *Car Trim v Key Safety Systems* and to the intention of EU legislators as well. According to the second solution, Article 5(1)(a) in relation to Article 5(1)(c) applies and the conflicts of laws rules given that Article 5(1)(b) is inapplicable, since the place of delivery cannot be determined. As for the third solution, the presumption applying that goods would be physically transferred to the in a place of buyer's domicile. We believe that latter seems the most appropriate and consistent with the origins, objectives and scheme of the Regulation No 44/2001 and also does not contradict the CJEU's ruling and reasoning in case *Car Trim v Key Safety Systems*, since the place of performance (delivery) should be based on purely factual criteria.

3.3.3 The Impact of International Commercial Terms

In the case of *Car Trim v Key Safety Systems* the CJEU didn't analyse the relevance of international commercial terms and their impact on determination of the place of delivery of goods. However, this question did arise in the case of *Electrosteel Europe v Edil Centro*[28] where the Italian seller Edil Centro and the French buyer Electrosteel concluded a contract for the sale of goods. As a result of a dispute regarding the performance of that contract, Edil Centro applied to the Italian court for an order directing Electrosteel to pay certain amount of money for the goods purchased. Electrosteel pleaded that the Italian court seised lacked jurisdiction because they had their seat in France and that they should have been

sued before the French courts. Edil Centro claims to the contrary that the contract, concluded at their own seat in Italy, contains the clause 'Resa: Franco ns. [nostra] sede' (Delivered free ex our business premises), which corresponds to the Incoterm concerning the place of delivery of the goods and that the Italian courts have jurisdiction to hear the case.

The CJEU once again gave the priority to the place of delivery as determined on the basis of the provision of the contract. But in order to verify whether the place of delivery is determined under the contract, the CJEU stressed the importance of taking into account all the relevant terms and clauses of that contract, which are capable of clearly identifying that place, including terms and clauses, which are generally recognised and applied through the usages of international trade or commerce, such as the Incoterms. Therefore, international commercial terms do have an impact on the determination of the place of delivery of goods if they are capable of identifying the place of delivery of the goods.[29] Thus, the rule established in the case of *Car Trim v KeySafety Systems* is applicable only if it is impossible to determine the place of delivery on the basis of contractual terms, including international commercial terms. According to the decision of the CJEU in the case of *Electrosteel Europe v Edil Centro*, the rule of thumb must be that E-terms, F-terms and C-terms of Incoterms will usualy indicate the jurisdiction of court of a seller's domicile, while a D-term of Incoterms will usualy indicate the court of the buyer's domicile (Thies, Tjarks, 2011).

3.3.4 Several Places of Performance

The place of delivery of goods and provision of services under Article 5(1)(b) refers to the place in the Member State of the EU. The wording of this Article indicates to a single place of performance in a single Member State. However, the CJEU took a different view in the cases *Color Drack v Lexx*[30] and *Rehder v Air Baltic*.[31] The first case concerns a sale of goods involving several places of delivery within a single Member State while the second concerns a provision of services involving several places in different Member of the EU.

In *Color Drack v Lexx* the Austrian company Color Drack and German company Lexx concluded a contract for the sale of goods, under which Lexx undertook to deliver goods to various retailers of Color Drack in Austria, which undertook to pay the price of these goods. The dispute concerns in particular the non-performance of the obligation to which Lexx was subject under the contract to take back unsold goods and to reimburse the price to Color Drack. By reason of that non-performance Color Drack brought an action for payment against Lexx before an Austrian court. Lexx appealed on the ground that the first instance court did not have jurisdiction. The appeal court took the view that a single linking place under Article 5(1)(b)(i) of Regulation 44/2001 could not be determined where there were several places of delivery. Color Drack appealed against the

decision of the appeal court to the Oberster Gerichtshof, which stayed the proceedings and referred the following question to the CJEU: "Is Article 5(1)(b) of Regulation 44/2001 applicable in the case of a sale of goods involving several places of delivery within a single Member State and, if so, whether, where the claim relates to all those deliveries, the plaintiff may sue the defendant in the court for the place of delivery of its choice."

The CJEU ruled that Article 5(1)(b) of Regulation 44/2001 applies whether there is one place of delivery or several. The applicability of this provision in cases where there are several places of delivery within single Member State complies with the predictability as an object of Regulation 44/2001 and with objective of proximity underlying the rules of special (alternative) jurisdiction in matters relating to contract as well. Therefore, contracting parties can easily and reasonably foresee before which Member State's courts they can bring their dispute. As far as the objective of proximity concerns, the courts of single Member State will have jurisdiction to hear the case in any event.[32]

But it has to be emphasised that such interpretation of Article 5(1)(b) does not confer concurrent jurisdiction on a court for any place where goods were or should have been delivered, because the purpose of the EU legislator was to establish the jurisdiction of just one court to hear all the claims arising out of the contract. Therefore, the court which is competent to hear all claims based on the contract for the sale of goods is the court for the principal place of delivery, which must be determined on the basis of economic criteria.[33] If it is not possible to determine the principal place of delivery, the applicant may sue the plaintiff in the court for the place of delivery of their choice.[34] According to the CJEU, such a conclusion concerning the plaintiff's choice does not contradict the principle of predictability because the defendant is sufficiently protected since he can only be sued, in application of Article 5(1)(b) of the Regulation 44/2001, in the courts of single Member State for the place where a delivery has been made.[35]

In the case of *Rehder v Air Baltic*[36] the principles established in the case of *Color Drack v Lexx* were extended even to situations concerning places of delivery or places of provision of services, located in different Member States (Stone, 2010: 85). In the case of *Rehder v Air Baltic,* which concerns the interpretation of Article 5(1)(b) of the Regulation 44/2001 in relation to the place of provision of services, Mr. Redher domiciled in Munich booked a flight from Munich to Vilnius with a Latvian company, Air Baltic. Just before the schedule time of departure from Munich, passengers were informed that their flight had been cancelled. As a consequence, Mr. Rehder took a flight via Copenhagen to Vilnius, where he arrived more than six hours after the flight which he had initially booked should have landed. Therefore, he claimed compensation before German court. The question was, whether the German court had jurisdiction under Article 5(1)(b) of the Regulation 44/2001.

The CJEU quoted that in cases where services have to be provided in more than one Member State, the courts for the place or places at which the main provision of services is to be carried out has jurisdiction. In the given case the question was, which place is decisive in determining jurisdiction: the place of the registered office or the principal place of establishment of the airline concerned, the place where the contract for air transport is concluded, the place where the ticket is issued, the place of departure of the aircraft or place of arrival of the aircraft or other places? Since the first three of the above mentioned places don't have the necessary link to the contract because operations and activities undertaking from these places are logistical and preparatory measures for the purpose of carrying out a contract relating to air transport, other places, especially the places of departure and arrival of the aircraft should be considered. According to the CJEU, the services the provision of which corresponds to the performance of obligations arising from a contract to transport passengers by air are the checking-in and boarding of passengers, the on-board reception of those passengers at the place of take-off agreed in the transport contract in question, the departure of the aircraft at the scheduled time, the transport of the passengers and their luggage from the place of departure to the place of arrival, the care of passengers during the flight, and the disembarkation of the passengers in conditions of safety at the place of landing and at the time scheduled in that contract.[37] It follows, that the only places which have a direct link to those services are those of the departure and arrival of the aircraft as agreed in the contract. Since air transport consists, by its very nature, of services provided in an indivisible and identical manner from the place of departure to that of arrival of the aircraft, with the result that a separate part of the service which is the principal service, which is to be provided in a specific place, cannot be distinguished in such cases on the basis of an economic criterion, both the place of arrival and the place of departure of the aircraft must be considered as the place of provision of the services which are the subject of an air transport contract.[38]

Therefore, the CJEU confered additional special (alternative) jurisdiction under Article 5(1)(b)(ii) for a contract to transport passengers by air, since the plaintiff has a choice, whether to file a claim before the court in the Member State of the defendant's domicile according to Article 2 of the Regulation 44/2001 or in the Member State of the departure or arrival of the aircraft.

Although the ruling in the case of *Rehder v Air Baltic* concerns contracts to transport passengers by air, it seems clear that it can apply also to contracts for carriage of goods and to contracts for carriage of passengers or goods by other means than air. However it has to be stressed that the CJEU expressly confined this ruling to cases in which there is a single contracting and operating carrier. Thus the precise effect of his matter in relation to contracts for multi-modal carriage awaits further elucidation (Stone, 2010: 89–90).

Special interpretation of jurisdictional criterion in Article 5(1)(b) of the Regulation 44/2001 in relation to the commercial agency contract was given by the CJEU in case *Wood Floor Solutions Andreas Domberger v Silva Trade*.[39] In this case the dispute arose between the company Wood Floor registered in Austria and the company Silva trade from Luxembourg concerning damages for termination of a commercial agency contract and compensation. Wood Floor filed a claim before Austrian court since it carried on business exclusively from its seat. Silva Trade challenged the jurisdiction of the court seised by arguing that more than three quarters of Wood Floor's turnover was generated in countries other than Austria and that the place of performance of the obligation in question cannot be established because that obligation is not subject to geographical limitations, Article 5(1) is inapplicable.

The CJEU referred to earlier decisions in cases *Color Drack v Lexx* and *Rheder v Air Baltic* under which Article 5(1)(b) is applicable to contracts where goods are delivered or should have been delivered in several places in a single Member State and where services are provided or should have been provided in more than one Member State. Albeit case *Wood Floor Solutions Andreas Domberger v Silva Trade* concerned very different type of contract, in light of cases *Color Drack v Lexx* and *Rehder v Air Baltic*, it would have been surprising if the CJEU had decided that Article 5(1)(b) of the Regulation 44/2001 did not apply (Shine, 2011: 24). Thus, for the purposes of applying the rule contained in Article 5(1)(b) of the Regulation 44/2001 when there are several places of provision of services, the place with the closest linking factor is decisive to determine jurisdiction.[40] As a general rule this will be at the place of the main provision of services.

In a commercial agency contract the commercial agent performs the obligation which characterises the contract and provides services.[41] Accordingly, in case whereby services by an agent are provided at more than one place, the place of performance under Article 5(1)(b) of the Regulation 44/2001 must in principle mean the place of the main provision of services by the agent.[42] The place of the main provision of services must be deduced from the provisions of the contract itself. Thus, in the context of a commercial agency contract, the place where the agent was to carry out his work on behalf of the principal, consisting in particular in preparing, negotiating and concluding the transactions for which he has authority has to be identified, on the basis of that contract.[43] If the provisions of a contract do not enable the place of the main provision of services to be determined, for example because several places or none are provided, it is appropriate to take into account the place where the agent has in fact provided such services, provided that the provision of services in that place is not contrary to the parties' intentions as it appears from the provisions of the contract.[44] If neither of these alternatives can be determined, the place must be identified by another means which respects the objectives of predictability and proximity

pursued by the legislature. For that purpose, it will be necessary to consider the place where that agent is domiciled, since it is likely that it was there the agent would have carried out substantial part of his services.[45]

4 Conclusion

Regulation 44/2001 aims to create clear and uniform rules of international jurisdiction in contractual as well as in other civil and commercial matters regulated by this regulation. However, despite the intention of the EU legislator to facilitate and simplify the applicability of Article 5(1) of the Regulation 44/2001 for the two most common types of contracts in international trade provided by Article 5(1)(b); i.e. contracts for the sale of goods and contracts for the provision of services, this provision poses several difficulties, which were exposed and analysed in this article.

Regulation 44/2001 has been applicable since 2002. Eight years after the EU Commission reviewed its use and operation in practice. The proposals for its amendments are found in the Proposal of the European Parliament and EU Council of the Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters[46] (hereinafter: Proposal). The Proposal does not foresee any changes or amendments concerning Article 5(1), although it would perhaps be appropriate to consider possible reform. Discussion on positive and negative sides of Article 5(1) of the Regulation 44/2001 is justifiable as well as on its eventual deleting and the consequences of that to the determination of international jurisdiction according to this regulation (see more Stone, 2010: 97–98).

Notes

[1] OJ L 12, 16. 1. 2001, p. 1–23.
[2] See for example: case C-115/88 *Reichert v Dresdner Bank* [1990] ECRI-27, case 189/87 *Kalfelis v Bankhaus Schröder Münchmeyer Hengst Co.* [1988] ECR 5565, case C-220/88 *Dumez France SA v Hessische Landesbank* [1990] ECR I-49 etc.
[3] Article 5(1) of the Regulation 44/2001 covers contracts on general, although some types of contracts are excluded because they are specially regulated by other provisions in the Regulation 44/2001 (e. g. insurence contracts, consumer and employment contracts, tennacy contracts of immovable property), or are excluded at large from its scope (see Article 1 of the Regulation 44/2001).
[4] Under Article 5(1) of the Brussels Convention several decisions of the CJEU were adopted which are nevertheless important for the interpretation of Article 5(1)(a) of the Regulation 44/2001 (see the decision of the CJEU in case C-533/07 *Falco Privatstiftung and Thomas Rabitsch v Giseli Weller-Lindhorst* [2009] ECR I-3327).
[5] Brussels, 14. 7. 1999 COM (1999), 348 final.
[6] Case C-533/07 *Falco Privatstiftung and Thomas Rabitsch v Giseli Weller-Lindhorst* [2009] ECR I-3327.

[7] Case 14/76 *A. De Bloos, SPRL v Société en commandite par actions Bouyer* [1976] ECR 1497.
[8] If contracting parties specifies the place of performance, it is not necessary to comply with the formal requirements in Article 23 of the Regulation 44/2001 (prorogation of jurisdiction). See case 56/79 *Siegred Zelger v Sebastiano Salinitri* [1980] ECR 89.
[9] Case 12/76 *Industrie Tessili Italiana Como v Dunlop AG* [1976] ECR 1473,
[10] OJ L 177, 7. 7. 2008, p. 6–16.
[11] Case C-266/85 [1987] ECR 239.
[12] Case 429/97 [1999] ECR I-6747.
[13] Case C-256/00 [2002] ECR I-1699.
[14] Case 32/88 [1989] ECR 341.
[15] In cases where obligation which identifies jurisdiction under Article 5(1)(a) is performed across the borders of Member States, the courts for the place where the obligation in question was pricipally to be performed, or had its centre, will be competent to hear the case as ruled CJEU in cases *Mulox IBC v Geels* (case C-125/92 [1993] ECR I-4075) and *Rutten v Cross Medical Ltd* (case C-383/95 [1997] ECR I-57). Although these cases was concerning a contract of emplyment, now regulated seperately by Articles 18 – 21 of the Regulation 44/2001, *Riggs* and *Brees* stand the view that principles established in these two cases are of general application in relation to an obligation which calls for performance across borders (Briggs, Rees, 2005: 166).
[16] Case C-204/08 *Peter Rehder v Air Baltic Corporation* [2009] ECR I-6073 at [36].
[17] On the effect of the wording »unless otherwise agreed« in Article 5(1)(b) of the Regulation 44/2001 see more by Stone, 2010; Forner, Torres, 2010; Mankowski, 2003; Schlosser, 2003; Kropholler, 2002.
[18] See the Proposal 1999.
[19] Case C-106/95 [1997] ECR I-911.
[20] Case C-381/08 [2010] ECR I-1255.
[21] Although, it referred to it as regards criteria to delineate between contracts for the sale of goods and contracts for the provision of cervices (see case *Car Trim v KeySafety Systems* at [36]).
[22] This Article provides: "If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists: *(a)* if the contract of sale involves carriage of the goods – in handing the goods over to the first carrier for transmission to the buyer; *(b)* if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place – in placing the goods at the buyer's disposal at that place; *(c)* in other cases – in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract."(As for commentaries to this provision, see Achilles, 2000: 78 – 85; Huber, Widmer, 2004: 358–389; Witz, 2000: 245 – 257).
[23] As for UNIDROIT principles and the Principles of European Contract Law, non-binding character and lack of generally applicable rules should be added (Vezyrtzi, 2009).
[24] See Article 2 of the Vienna Convention.
[25] Case C-381/08 [2010] ECR I-1255.
[26] Case C-381/08 at [60–61].
[27] Case C-381/08 [2010] ECR I-1255.
[28] Case C-87/10 *Electrosteel Europe SA v Edil Centro SpA* [2011] ECR.
[29] Ibid. at [23].

[30] Case C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-3699
[31] Case C-204/08 *Peter Rehder v Air Baltic Corporation* [2009] ECR I-6073.
[32] Case *Color Drack v Lexx* at [28–35].
[33] Ibid. at [37–40].
[34] Ibid. at [42].
[35] Ibid. at [44].
[36] Case C-204/08 *Peter Rehder v Air Baltic Corporation* [2009] ECR I-6073.
[37] Case *Rehder v Air Baltic* at [40].
[38] Case *Rehder v Air Baltic* at [40–43].
[39] Case C-19/09 *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA* [2010] ECR I-2121.
[40] Ibid. at [33].
[41] Ibid. at [34].
[42] Ibid. at [36].
[43] Ibid. at [38].
[44] For that purpose, the factual aspects of the case may be taken into consideration, in particular, the time spent in those places and the importance of the activities carried out there.
[45] Ibid. at [39–42].
[46] Brussels, 14. 12. 2010 (COM(2010) 748 final).

References

Achilles, W.-A. (2000) *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)* (Neuwied, Kriftel, Berlin: Hermann Luchterhand Verlag GmbH).

Bogdan, M. (2006) *Concise Introduction to EU Private International Law* (Groningen: Europa Law Publishing).

Briggs, A., Rees, P. (2005) *Civil Jurisdiction and Judgements* (London, Singapore: Norton Rose).

Forner, J.-J, Torres, M. (2010) *International Jurisdiction in International Contracts*: New Art. 5.1 Brussels I and the ECavaliable at http://www.migueltorres.org/rutina/fichero_ENG.asp?id_ficheros=181 (December 15, 2011).

Huber, U., Widmer, C. [Schlechtriem, P., Schwenzer, I.] (2004) *Kommentar zum Einheitlichen UN-Kaufrecht – CISG* (München: Verlag C. H. Beck).

Kropholler, J. (2002) *Europäisches Zivilprozeßecht – Kommentar zu EuGVO und Lugano-Übereinkommen* (Heidelberg: Verlag Recht unf Wirtschaft GmbH).

Kuipers, J. – J. (2010) *Determining Jurisdiction in International Licence Agreements: Falco Privatstiftung v Weller – Lindhorst (C-533/07)* [2009] E.C.R. I-3327, E.I.P.R., 12, pp. 659–663.

Leible, S., Mankowski, P., Staudinger, A. [ed. Rauscher, T.] (2006) *Europäisches Zivilprozeßrecht, Kommentar* (München: Sellier European Law Publisher).

Magnus, U, Mankowski, P. [ed.] (2007) *European Commentaries on Private International Law: Brussels I Regulation* (Sellier, European Law Publisher).

Schlosser, P., F. (2003) EU-*Zivilprozessrecht* (München: Verlag C. H. Beck).

Shine, P. (2011) The Problem of Place of Performance in Contract under the Brussels I Regulation: Can One Size Fit All?, *International Company and Commercial Law Review*, (22)1, pp. 20–25.

Stone, O. (2010) *EU Private International Law* (Cheltenham, Northampton: Edward Elgar).

Vezyrtzi, A. (2009) *Jurisdiction and International Sales Under the Brussels I Regulation: Does Forum Shopping Come to an End?*, avaliable at: http://www.cjel.net/online/15_2-vezyrtzi-2/ (January 26, 2012).

Witz, W. in Witz, W. et al. (2000) *International Einheitliches Kaufrecht – Praktiker-Kommentar und Vertragsgestaltung zum CISG* (Heidelberg: Verlag Recht und Wirtschaft GmbH).

CROSS-BORDER CIVIL PROCEEDINGS IN THE EU
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Cross-border Effects of Provisional Measures in Civil and Commercial Matters

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ABSTRACT The aim of this article is the presentation of great diversity of provisional measures and the search of their common strings. The terminology problems can't be overridden but the author uses the designation of the BU I which is provisional measures and refers to the terminology of Slovenian Enforcement and Protection of Civil claims Act which regulates two types preliminary and interlocutory injunctions. There is a discussion of different effects of the provisional measures. The revision of BU I will introduce significant improvement expressly regulating "ex parte" measures which are intended to be enforced without prior service of the defendant, if the defendant has the right to challenge the measure subsequently under the national law of the Member State of origin. The new provisional measures and protective measures should therefore in future „include" protective measures to obtain information and evidence.

KEYWORDS: • provisional and protective measures • Brussels I Regulation • recognition and enforcement of foreign decisions • interlocutory injunctions

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1 Introduction

Orders of courts and other state authorities which decide upon substantial rights and obligations, a part of which are provisional measures, have primary effects only in the legal order which they belong to. Legal effects in foreign legal system are not applied directly but during the process of 'adoption' of foreign decision. Three different ways of recognition are commonly known around the world:

- The foreign decision becomes equal to the domestic decision according to its effects (system of unification);
- The same effects of the foreign decision are recognised as in the State of origin (extension of effects);
- The effects of recognition are taken into account by cumulative use of the law; the effects of recognition are taken into account by use of the law in the State of origin as well as the country of recognition. Thus only those effects known to the foreign and the domestic legal order (Vardi, Bordaš, Knežević, 2005:531; Vuković, 1987:145) are recognised. However, the legal decision in the country of enforcement cannot have greater effects than in the State of origin.

Private international law traditionally links the concept of recognition to the concept of enforcement, whereas not deciding on the enforcement but deciding on the recognition of the effects together with the question of enforceability is meant[1]. The conditions to achieve enforcement are the same as those for the recognition (Cigoj, 1984:190). Three forms of foreign decision recognition can be distinguished: recognition of foreign decision which does not include its enforceability (declarative and constitutive decisions), recognition concerning especially the effect of enforceability[2] and recognition with simultaneous decisions on the recognition of all effects with emphasis on enforceability (Dika, Knežević, Stojanović, 1991: 276). Academic theory warns that it would be more appropriate to talk about 'recognition of the effects of foreign decisions' than to talk about 'recognition and enforcement' (Vuković, Kunštek, 2005:419).

According to the legal sources, we can determine that there are three relevant legal systems of recognition and enforcement of foreign legal decisions in Slovenia:

- based on the law of EU,
- based on international treaties,
- based on ZMZPP[3] and ZN[4].

National law is considered only if European law (for example The Brussels I Regulation, from now on BR I) or any other international treaties aren't applied.

In any case, the recognition of effects of provisional measures represents a very problematic field, because these are not final decisions. A interlocutory injunction is an enforceable instrument if it is a qualified document, based on which the

coercive enforcement of the claim determined in the order can be carried out, when this is explicitly predicted by the law or any other international treaty. Provisional measures with the aim of protection in a certain form are known to all legal systems; however the conditions to issue such measures, the effects and even the names vary according to each individual state.

The choice of provisional measure according to the type and content in international disputes, depends on numerous specific factors for each individual procedure, but it is clear that the relevant national legislation has an important impact on the content and form as on the procedure of their issuing. The titles also differ. Problems occur even when trying to name the orders, therefore general expressions such as »provisional measures« or »provisional protection« are used. Even BR I uses the general term »provisional, including protective, measures. « In Slovenia Enforcement and Securing of Civil Claims Act (Zakon o izvršbi in zavarovanju; further referred to as ZIZ[5]) regulates two types of provisional measures: preliminary injunctions and interlocutory injunctions. This contribution will only be focused on second ones.

2 Concept and Types of Provisional Measures in Private International Law

Despite national particularities, all provisional measures have the same aim and have something in common. Their effect is to distribute the risk for the time of the procedure between on one hand the party who demands the issue of the order and on the other hand the passive party. According to the EC Court of Justice, provisional measures are intended to *» preserve a factual or legal situation so as to safeguard rights of which is otherwise sought from court having jurisdiction as to the substance of the case«*.[6]This is a concept which directly reacts to the danger of the procedure on the main matter being too long and thus the execution after the conclusion of the procedure being made impossible (Brox, Walker, 2004: 811). Provisional measures prevent violence in civil relations and the formation of hard-to-repair damage before a decision on the dispute is reached. They are given in emergency cases and the speed of the procedure has precedence over material justice, therefore the court decides on the balance of probability that one party is in the right (Article 270 ZIZ).

Interlocutory injunctions can be understood and used differently and can stand for various concepts in different legal systems. In France *actio pauliana* (refuting a debtor's actions because of the possible detriment to the creditor) can be applied as a protective measure. The EC Court of Justice has provided a starting point for determining the provisional measures in the *Reichert*[7] case due to impugnment of a debtor's actions to the detriment of the creditors; therefore these are all measures which are supposed to preserve a factual or legal situation so as to safeguard rights

which are sought from the court having jurisdiction to decide on the substance of the case.

Three structural types of provisional measures exist: provisional protective measure (*einstweillig sichernde Maßnahmen*, for example German *Arrest*, Paragraph 916 n ZPO or *freezing injunction*), provisional regulatory measures (*einstweillig regelnde Maßnahmen*) and payment orders (*Zahlungsanordnungen*) (Hess, 2010:366).

A special type of international provisional order *Worldwide Freezing Injunction* (previously known as a *Mareva Injunction*) has been developed in Anglo-American law and ensures protection of judgement debtor's active when there is a high probability that the debtor will use the resources to such an extent that the later execution will not be possible. What is meant by this the »freezing« of the debtor's accounts (abroad) with the aim of preventing fraudulent transactions which would result in the creditor not being able to get repayment. This rule was set by the English Court of Appeal in the case *Mareva Compania Naviera S.A. v. International Bulk Carriers S.A.* (1975) (In detail Kennet, 2000:107, 108; Briggs, Rees, 2005:460 ff). The specific feature of this measure is that it acts »*in personam*« meaning that it is not aimed at a specific part of the debtor's property but directly at the debtor, thus referring to all his property, even abroad. At first, there were strict conditions for applying this interlocutory injunction and the plaintiff would often have difficulties proving them (the debtor's intention to make his resources inaccessible had to be verified). More recent practice (for example in Canada) is much more flexible, as it enables such orders every time when this is considered »fair and justified«, whereby the court decides upon each individual case on its own facts. In the case of international enforcement a question arose whether such freezing (*freezing order)* could be bound to a third party, the debtor's debtor, as for example a bank in a foreign country. At first the answer was positive. However, the position has changed lately (as in the judgement of the EC Court of Justice of 17. 11. 1998 in the case C-391/95, van Uden, ZOdl. 1998, p. I-07091) (Albrecht, 1991:55). A special provision called the »*Babanaft Provision*« is used: a decision does not bind the third party as long as it is not recognised in its country (Briggs, Rees, 2005:462).

A provisional measure known as an *Anton Piller Injunction* (securing of evidence – *search order*) is named after a very famous English case *Anton Piller KG v. Manufacturing Process Ltd.* (1976). It sets a rule whereby the court is enabled to implement a special rule, if there is a suspicion that a party will get rid of incriminating documentation and thus incapacitate further procedure. This measure resembles an investigation order, but differs in the fact that entrance into the defendant's facilities is possible only with his consent, whereby uncooperative behaviour is appropriately sanctioned. Forcible entry is not permitted. Courts issue a special warrant with the aim to secure evidence which enables the plaintiff's

lawyer to enter defendant's facilities, search for evidence or documentation, confiscate, photograph, photocopy or record evidence in any other way.[8] To use this measure the following conditions must be fulfilled:

- It must be an extremely strong prima facie case;
- There is a threat of immense damage;
- There exists evidence which states that the defendant possesses certain objects or documents he could hide or destroy must be present. However, the court must carefully consider the interests of both parties, as this represents a major intrusion into one's privacy. This intrusion must not exceed the minimum measures necessary to achieve the purpose. There are also some other restrictions on this warrant regarding the time (during the working hours of the defendant) and the way of execution (the defendant must be informed of his rights) (Scheef, 2000: 128).

An *Anti-suit injunction* is a protective measure used by English courts in extraordinary cases when the court orders the party not to file a suit or to withdraw the suit at a foreign court. This is unacceptable as it emphasizes mistrust amongst Member States. It is against the rules of BR I, if a court of a Member State forbids the commencement or the continuance of proceedings at a court in another Member State (*anti-suit injunction*). Such proceedings can violate the rules of BR I on international jurisdiction[9] or arbitration agreements.[10] Recognition and enforcement of such a judgement would also be against public policy (Gottwald, 2008: 1469).

Slovenian law distinguishes between preliminary injunctions to protect monetary claims only and interlocutory injunctions to protect monetary and non-monetary claims.

3 Provisional Measures and the Trans-Border Context

Trans-border context is given if:

- the residence or the seat of the parties is in different countries,
- the property of parties is present in different countries,
- there are other circumstances giving rise to cross-border relations.

In such cases:

- a foreign insurance of future enforcement in the proceedings on the main substance of the case which is in progress or will be filed at a court in Slovenia is suggested;
- a interlocutory injunction is suggested in Slovenia; the proceedings on the main substance of the case is in progress at a foreign court or will need to be filled there;
- a interlocutory injunction was issued in Slovenia, but needs to be enforced in a foreign country;

- a interlocutory injunction was issued abroad, but needs to be enforced in Slovenia.

4 Demarcation between Domestic and Foreign Executive Instrument

To demarcate between domestic and foreign executive instruments territorial or personal criteria are applied. In the majority of cases the first one is applicable and the order obtains the nationality of the country where it was issued.

5 Orders that can be Recognised and Enforced

In European civil procedure regulations the concept is interpreted in a broader sense (Briggs, Rees, 2000: 523). »Judgement« stands for every decision a court or a tribunal of a Member State gives, despite its name, together with the decree, order, decision or writ of execution, comprising the decision on the costs issued by a court official (Article 32 BR I).

The concept of judgement comprises also protective measures (interlocutory injunctions); as a judgement can be declared as enforceable although it is not yet final, if it is enforceable in the State of origin (BR I Article 31 together with 38) (Leible, 2006: 538; Galič, 2005:1128).

The EC Court of Justice EU also explains that BR I is not applied although the subject of the provisional measure in relation to the civil obligation is a part of the regulation (For more see Rijavec, 2007: 1147-1163), the substance of the matter, however, does not fall under BR I.[11] Judgment on protective measures, such as sealing and freezing of the spouse's property in the course of divorce, does not fall within BR I. Although these measures do not yet represent a direct solution to property relations between spouses and are of property nature, a close connection of the claim to the solving of property relations arising from marriage between two persons who are or were spouses is sufficient. BR I does not only exclude relations which are according to national law significant only from marriage, but also property relations which arise directly from them.[12]

According to ZMZPP, a judgement is perceived as a foreign judgement, if it is issued in the form of a judgement or decision, in a civil or non-contentious procedure, as well as in an associated action for damages. The rules of the specific foreign law in use determine whether it is a judgement or not (Ilešič, Polajnar-Pavčnik, Wedam-Lukić, 1992: 134). Decisions made by other authorities (i.e. administrative decision) hold the same validity as foreign judgements, which equate in the State of origin with the judgement or settlement if it governs personal, family, social labour, property and other civil law relations with international element (Paragraph 3, Article 94 ZMZPP), such as decisions of an administrative authority on adoption.

The recognition of judgements and their potential enforcement is relevant foremost for final decisions but also for interlocutory injunctions. ZMZPP requires finality (res iudicata), EU regulations, however, do not.[13] Therefore, the party that demands enforcement of a foreign judgement under ZMZPP must present beside its verified copy and a certificate stating its finality also a certificate declaring enforceability according to the law of the State of origin (Article 95 and 103 ZMZPP).[14] The court thus considered that the requirement of enforceability certificate can be fulfilled also with a writ of enforcement issued in the State of origin based on the same address as it confirms the enforceability of the decision, since the foreign court would not allow the enforcement to take place without enforcement title.[15]

6 Court or Competent Authority

The question also arises as to what court or other authority can issue decisions or other documents which are appropriate for recognition and enforcement. There are various types of courts (civil, criminal, labour, administrative courts, etc.). There are also different proceedings for issuing orders (civil or non-contentious proceedings). The evaluation whether the judgement can be granted the same effects as a civil matter can be made based on the law of the Member State of origin or the Member State of enforcement. Equalising of decisions of other authorities with judgements can be regarded in a different way. In both cases it would be more appropriate to consider the legal position in the Member State of origin. Such solutions are foreseen in the regulations of the EU on civil procedure and of the ZMZPP. Orders are recognised and pronounced enforceable under the same rules, regardless of the fact that according to Slovenian law, the court of jurisdiction or any other authority is competent for some matter (Ilešič, Polajnar-Pavčnik, Wedam-Lukić, 1992:134).

7 International Jurisdiction for Provisional Measures According to BR I

The BR I section on jurisdiction contains only one provision on provisional measures, stating that the injunctions foreseen in the law of one Member State (protective orders included) can be proposed in courts of the same State even though a court of another Member State has jurisdiction as to the substance of the matter (Article 31 BR I). This provision clearly states that interlocutory injunctions can be applied and given in another Member State, not only in the State with pending procedure on the substance of the matter (Kropholler, 2005:379). BR I does not regulate international jurisdiction on interlocutory injunctions, therefore national law of the Member State of issuing or the national rules on international jurisdiction are applied (Briggs, Rees, 2000:467). When national law is used, excessive jurisdiction although forbidden in Paragraph 2

Article 3 BR I, is not excluded (Kropholler, 2005:377). Jurisdiction on enforcement and securing claims is mainly decided upon the place where the debtor's property is situated. This is not a gap or deficiency of the regulation, as the creditor in the order follows not the debtor but his property (see also Galič, 2004:128). Two solutions are thus foreseen. Interlocutory injunctions can be issued in a Member State by a court having jurisdiction to the claim according to BR I and by a court in another Member State if its national law foresees jurisdiction on issuing interlocutory injunctions in a concrete case (Gottwald, 2008:1463). The provision of Article 31 BR I must be interpreted restrictively. Its aim is to prevent the jurisdiction on provisional measures to be inseparably bound to deciding on the substance of the matter when BR I is applied (Schlosser, 2009:153).

8 Recognition and Enforcement of Interlocutory Injunctions as in BR I

A special significance of BR I lies in the fact that it enables the effects of judgements in all Member States. Judgements and other documents are understood in a broader sense and even enforcement of foreign protective measures are regulated by BR I (Article 32). However, in the foreground are judgements and other documents without provisional aspect, but BR I no longer requires the exequatur to be granted to make the judgement final (see Jenard, 1979: 44; Leible, 2006: 538), which is for example conditioned by Article 32 of ZMZPP. Regarding the recognition and enforcement, two types of interlocutory injunctions must be distinguished; orders of a court deciding on the substance of the matter based on Article 2 and the following of BR I and orders of a court not having jurisdiction on the substance of the matter according to BR I provisions and thus justifies its jurisdiction on issuing interlocutory injunctions based on Article 31 BR I (jurisdiction as available under the national law). The first can represent a subject of recognition and enforcement abroad according to BR I, the latter, however in the principle, cannot due to the requirement of a *real connecting link (*see Leible, 2006: 531, 532, Chapter F. and G.3.b)cc).

As BR I includes an obligation to recognise provisional measures issued in other Member States, it is obvious that this regulation does not foresee obstacles in issuing orders with extraterritorial effect. BR I generally determines that a court in a Member State enforcing the order has exclusive jurisdiction on the enforcement proceedings (Point 5 Article 22 BR I). This rule is not valid for interlocutory injunctions. The issuing of interlocutory injunctions stands for proceedings of issuing an instrument permitting enforcement (*titelschaffendes Verfahren*) and not proceedings of enforcement as seen in Point 5 Article 2 BR I (Stadler, 2009: 2669). BR I only states regarding interlocutory injunctions that the decision making is not only pegged to the course of the proceedings on substance. National law of the Member State giving the order applies for all the proceedings and

conditions of issuing (Brigs, Rees, 2000: 467). BR I is applied again when the order is recognized and enforced (compare Article 32 BR I) (Stadler, 2009:2685).

9 Ex Parte Provisional Measures

The EC Court of Justice has set up a solution in its decisions, according to which, a judgement in accordance with Article 32 BR I is a subject of recognizing and declaring enforceability only if an adversary procedure was ensured prior to the judgement in the Member State of origin (Judgement C-125/79 Case Denilauler). A procedure can be contradictive also when a judgement was given at the end of a no contradictive part of the procedure (even if it is a writ of enforcement) against which an objection or any other legal means is lodged. Judgement C-39/02 Maersk discusses this matter.

Only through a interlocutory injunction issued in ex parte proceedings, can the goal of insuring the provisional protection of rights be achieved, as the surprise effect is thus guaranteed. Therefore the required finality in the meaning of ZMZPP and adversaries of BR I represent a difficult burden for the creditor. The revision of BR I thus lays down recognition and enforcement of ex parte provisional measures, but under additional conditions (See Chapter Revision of BR I on provisional measures).

10 Conformity with the Claim

The requirement not to prejudice against key questions means that interlocutory injunctions should not coincide substantially with the civil claim;[16] however, this often cannot be avoided as the effects of issued interlocutory injunctions are frequently linked to the end effects of the expected judgement.

The EC Court of Justice discussed this matter in the aforementioned *van Uden* case [17] and limited the possibility of issuing interlocutory injunctions that completely fulfil the claim on the substance of the matter stated in Article 31 BR I. Although the Court determines that the congruence of provisional measure with the claim is sometimes essential, following the requirement for granting the proposal must be met; the reversibility of the situation if the claim is not accepted must remain possible. Therefore the debtor must be given bail or some other guarantee. The measure has only effect in the State issuing the order, where the court must solidly define the property under order.[18] Claims for ensuring bail are especially inappropriate in matters relating to maintenance; therefore they should not be applied there. Unfortunately, even the Maintenance regulation[19] does not look at the problem in detail and only summarizes Article 31 BR I (Hess, 2010: 368). Claims for ensuring bail are not relevant if the interlocutory injunction which sets partial or complete fulfilment of the claim is given by a court having

jurisdiction on the substance of the matter as stated in the rules of BR I on international jurisdiction.[20]

Interlocutory injunctions must necessarily guarantee effective insurance and prevent irreversible damage (in economic terms), whereby the principle of balance between the importance of the insured right and the rights of counter party which is being temporarily intervened with should be considered as well as the principle of balance between the interests of the parties.[21] Actions or omissions of parties can play an important role in guaranteeing the balance of interests, when the parties e.g. do not wish to provide bail or do certain actions, this can have an important effect on the decision of arbiters whether to issue a certain type of interlocutory injunction or not.[22]

Another provisional measure falling under Article 31 is the ordering of provisional service (in German *Leistungsverfügung*). This can be given by a court not having the jurisdiction in the meaning of Article 2 and the following only if the order refers to some objects of property within the area of court's jurisdiction the repayment of a definite sum to adversary is possible. The forum of necessity does not represent a premise for accepting provisional insurance (Schlosser, 2009: 154).

Even according to the law in Slovenia, interlocutory injunctions should not influence the outcome of the proceedings on the substance of the matter, although the order must be materially bound to the proceedings themselves. This is not explicitly forbidden by the law, but the claim during this phase is still so uncertain that the order should not completely use the content of the claim. The purpose of the interlocutory injunction is not to solve the claim but to establish possibilities according to which the claim can be achieved through enforcement, if the claim with the instrument permitting enforcement is established. Therefore the restriction that the proposal for interlocutory injunction and claim must not match completely is necessary due to the nature and purpose of interlocutory injunctions (Triva, Belajec, Dika, 1984: 393).

11 Lis Pendens and Irreconcilability of Provisional Measures

The rule of lis pendens from BR I for provisional measures is invalid and thus more measures can be claimed from courts of various Member states (Hess, 2010: 370). Courts having jurisdiction according to national rules can under Article 31 decide on the matter even though the proceedings on the substance of the matter are pending before a court in another State (Schlosser, 2009: 153). The interlocutory injunction enforcing a measure contradictory to the measure in a interlocutory injunction in another State, however, cannot be issued.[23] This is similar to application of BR IIa, where the EC Court of Justice decided that »law of European Union does not allow a court of a Member State to take a provisional

measures in matters of parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another Member State, which has jurisdiction under that regulation as to the substance of the dispute relating to custody of the child, has already delivered a judgment provisionally giving custody of the child to the other parent, and that judgment has been declared enforceable in the territory of the former Member State.«.[24]

If the provisional measures issued in different Member States are irreconcilable, this results in the rejection of exequatur. In the case of *Italian Leather SpA*[25] the company Italian Leather SpA and German company WECO signed a contract on the distribution of goods in a specific geographical territory. The parties agreed that the court in Bari would solve potential disputes. Two years after the contract WECO informed Italian Leather SpA that due to the breach of contract by Italian Leather SpA it would no longer trade the goods for the company, but under its own trade mark. Italian Leather SpA submitted a proposal for issuing interlocutory injunction to the court in Koblenz to forbid WECO Company from selling a specific trade mark under its name. The court in Koblenz held the opinion that not all the requirements for issuing interlocutory injunction were met (Italians did not prove irreversible damage would arise if the interlocutory injunction was not issued). Afterwards, the same proposal was filled in the court of Bari which granted it. Italian Leather SpA then suggested declaration of enforceability of the Italian interlocutory injunction at the court of Koblenz and this was also granted. WECO company filed a complaint that the Italian order in the matter of Point 3 Article 27 Brussels Convention[26] (further referred to as BC) is irreconcilable with the German order according to which the proposal to issue interlocutory injunction was rejected. The Higher court agreed with position. The dispute was brought to the German Supreme Court which sought counsel on the matter at the EC Court of Justice. EC Court of Justice considered the Italian order to be irreconcilable with the German order, therefore the declaration of enforceability was not granted. Based on the Court's opinion, even interlocutory injunctions can be irreconcilable with judgements in the State of enforcement according to Point 3 Article 27 BC. Irreconcilability of judgement is related to the supposed effect if the judgement were declared as enforceable. The purpose of Point 3 Article 27 BC lies in the fact that the rule of law and legal security of one State would be disturbed if a judgement given in the same State could be bypassed by a judgement issued in another Member State.

12 Procedure of Exequatur

BR I does not just regulate the presumptions for granting exequatur but also basically defines the course of proceedings for declaring enforceability (Article 40 and the following) (Kodek 2003: 289). For questions not regulated by BR I, national law of the Member State issuing the enforcement is applied instead (Kodek 2003: 293). Procedure of exequatur is not a part of enforcement

procedure, as it is a special non-contentious procedure[27] enabling the enforcement of foreign instrument permitting enforcement in the Member State of enforcement. It is a unified, independent, autonomous and well-rounded procedure, by which the provisions of BR I take over national law (Geimer, 2004: 622).[28] Procedure of exequatur cannot be replaced by enforceable relief on behalf of an enforceable judgement of foreign court, even though such suit would be cheaper than the exequatur procedure, as the court of the Member State of enforcement would be in violation of the principle *ne bis in idem (*Geimer, 2004: 623).[29]

13 Effects of Interlocutory Injunctions

Through exequatur the interlocutory injunction obtains only effects from the Member State of origin. The EU holds the position that judgements acquired through enforcement the effects ascribed in the Member State of origin.[30]

One question remains to be answered: if the permission of enforcement in the Member State of origin can be given effect. Exequatur relates to the effect in the part where a interlocutory injunction stands for an instrument permitting enforcement; however after permission is granted, it is required that this enforcement is actually carried out by the Member State in question. Even though, the foreign interlocutory injunction can be an instrument permitting enforcement in the State issued, it must first acquire exequatur to be enforced in the Republic of Slovenia and at the same time it must meet the conditions stated in BR I (Article 38 and following). Granting exequatur does not yet signify the beginning of the execution procedure. Creditor must propose enforcement at a Slovenian court having jurisdiction, although the enforceable means are already provided by the instrument permitting enforcement (e.g. German *Arrest*). Foreign courts cannot determine the use of repressive means as to bind the Slovenian court. It is not possible to implement enforcement actions which were given in another State.[31] Each State can only give and enforce (repressive) enforcement actions on its own territory (Nagel, Gottwald, 2007: 851; Geimer, 2005: 1007). This question is not completely without dispute, as diverse approaches are found in enforcement means which do not require explicit functioning in enforcement, e.g. notifying the debtor's debtor. Thus for example, German case law considers during enforcement the consequences arising from foreign seizure if the debtor's debtor was notified of the seizure and prohibition of fulfilment toward the debtor. The foreign country should not exercise legal authority over the debtor's debtor but should only inform him that his fulfilment to the debtor will not have the effects of a valid fulfilment. For the notification purposes, it is enough that the third debtor is served in a foreign country using the legal means for serving (Schack, 1996: 376).

In the Republic of Slovenia, a court's decree of interlocutory injunction has the effect of an enforcement decree; however it can only interfere with the sphere of the debtor but not with third parties. The issuing of interlocutory injunctions does

not therefore result in the formation of a lien over the subject of insurance. According to everything stated, interlocutory injunctions by which, for example, measures for prohibiting the disposal of the subject of insurance were issued, does not prevent legal interventions of other parties in the same subject (e.g. proceedings of enforcement). The consequence of the debtor's violation of such a interlocutory injunction is therefore only the creditor's right to challenge legal acts done to creditor's detriment, according to the obligatory law. The acquirer of the object which was not subject to the free disposal of the debtor is insured in cases when he obtained the object in good faith (as he was or could not be aware that such action is in creditor's detriment). If the object was not acquired in good faith, the legal action loses its effect only towards the creditor (the plaintiff) to such extent as it is necessary to settle his claim. This is different in fixed property where a interlocutory injunction is evident in the land register.

When the debtor disobeys the interlocutory injunction, he is held criminally liable for the criminal offence of violating the rights of others. The court responsible can fine the debtor if he violates the interlocutory injunction. The debtor has the right to the recovery of the loss caused by a interlocutory injunction which was not grounded or justified by the creditor.

With interlocutory injunctions the debtor's debtor can be given restrictions regarding the payment (e.g. bank). In this case the restriction takes effect when it is served on the debtor's debtor. From then on, the latter cannot legally fulfil his obligations to the debtor and can be held liable for paying the compensation to the creditor. During the proceedings for issuing interlocutory injunctions, the bank can reveal information on the existence and number of bank accounts or any other debts of the debtor towards the bank only upon court order. Regardless of these facts, all the information on numbers and freezing of bank accounts are publicly available on the web pages of Bank of Slovenia in the Register of Transaction Accounts.

14 Duration of Interlocutory Injunction and its Expiry

National law of the country issuing the order is valid for the duration of the interlocutory injunction. The duration of a interlocutory injunction is set in the decision on the issue. If the order is given before the suit is filed or any other procedure being started, or if the order is issued to protect claims not yet arisen, the court sets a date for the creditor according to which he must start the proceedings or file a suit; otherwise the protection procedure will be stopped by the court. Interlocutory injunctions can be valid after the issuing of the judgement based on which they were given. Proceedings can be stopped upon debtor's proposal if the circumstances have been changed in a way that they no longer justify insurance with a interlocutory injunction. If the court has issued the order for a limited time, the debtor can suggest an extension before the expiry date when

such is grounded (Article 277 and 278 of ZIZ). The court can also dismiss proceedings in cases which represent reasons for expiry of the earlier order if one of the following conditions is met:

- the debtor provides the court protected claim together with interests and costs;
- the debtor proves on the balance of probability that the claim had already been paid or sufficiently secured when the decree on earlier order was given;
- it was stated finally that no claim arose or that it ceased to exist (Paragraph 1 Article 264 of ZIZ).

15 Revision of BR I on Provisional Measures

Right now a reform of fundamental procedure regulations of BR I is taking place, with the objective to re-open the European legal systems.[32]

For the purposes of Chapter III on recognition and enforcement, an additional claim was added to the definition of the concept of „judgement" with reference to provisional measures and protective measures. Therefore the court which has jurisdiction as to the substance of the matter must order such measures. The proposal explicitly includes measures ordered without the defendant being summoned to appear and which are intended to be enforced without prior service of the defendant, if the defendant has the right to challenge the measure subsequently under the national law of the Member State of origin. The new provisional measures and protective measures should therefore „include" protective measures to obtain information and evidence.

The issuing of exequatur is also foreseen for orders "ex parte", but not if these were ordered by an incompetent court, as such orders are limited to the State of origin. The rule is that only a court with jurisdiction over the subject matter according to BR I should issue interlocutory injunctions.

In a case where there are proceedings on the content of the matter running at one court, but another court has been requested to issue a provisional measure, both courts should cooperate to assure that all the circumstances have been considered when issuing the provisional measure.

16 Conclusion

This legal area brings up problems which are a necessary consequence of the diversity arising from individual legal orders. Some solutions have been formed, but the EC Court of Justice will have to work at it in the future. Although the Brussels convention from 1968 has begun to unify some basic premises on civil procedural law, the process is not yet finished and the end is not in sight.

Nevertheless, it represents a challenge to all modern jurists as well as politicians. Protection of creditors, as well as protection of debtors must be equally considered in process standards.

Notes

[1] Brussels I Regulation (EC No 44/2001)) also distinguishes between recognition (Articles 33 to 37) and enforcement (Articles 38 to 52).
[2] According to EC No 44/2011, recognition is automatic, the decision on exequatur is one-sided, and the conditions are examined upon the client's objection.
[3] Zakon o mednarodnem zasebnem pravu in postopku (Private International Law and Procedure Act); Ur. l. RS (Official Gazette of the Republic of Slovenia), No. 56/1999, 45/2008-ZArbit.
[4] Zakon o notariatu (Notary Act); Ur. l. RS, No. 2/2007-UPB3, 33/2007-ZSReg-B, 45/2008.
[5] Zakon o izvršbi in zavarovanju (Enforcement and Securing of Civil Claims Act); Ur. l. RS, No. 3/2007-UPB4, 93/2007, 6/2008 Skl.US: U-I-354/07-6, 37/2008-ZST-1, 45/2008-ZArbit, 113/2008 Odl.US: U-I-344/06-11, 28/2009, 47/2009 Odl.US: U-I-54/06-32 (48/2009 corrected.), 57/2009 Skl.US: Up-1801/08-10, U-I-237/08-10, 51/2010, 26/2011.
[6] Judgement of EC Court of Justice of 17. 11. 1998, Case C-391/95, van Uden, ECR. 1998, p. I-07091.
[7] Judgement of the Court of 26. 3. 1992, Case C-261/90, Reichert, ECR 1992, p. I-02149.
[8] The stated warrant for securing the evidence is codified in Civil Procedure Act 1997 (Compare with Briggs, Rees, 2005: 463).
[9] Judgement of EC Court of Justice of 27. 4. 2004, Case C-159/02, Turner, ECR. 2004, p. I-03565.
[10] Judgement of EC Court of Justice of 10. 2. 2009, Case C-185/07, Allianz SpA, ECR. 2009, p. I-00663 (For details on the judgement see Illmer, 2009:336 ff; Seriki, 2010:24 ff).
[11] Judgement of EC Court of Justice of 31. 3. 1982 Case 25/81, W./H., ECR 1982, 1189.
[12] Judgement of EC Court of Justice of 27. 3. 1979 Case 143/78, de Cavel, ECR. 1979, p. 01055.
[13] Different to BR I and EEO, where only enforceability is required but not the finality of foreign judgement (compare Article 38 BR I and Article 6 EEO).
[14] Decision of Supreme Court of the Republic of Slovenia Cp 3/95. If a statement is proposed that there are no limits for enforcing a foreign judgement, the judgement in question must include a proviso on its enforceability. However, a certificate on enforceability is not needed if only the recognition of foreign judgement is proposed. (Decree of SC RS Cp 11/2005).
[15] Decision of the Supreme Court of the Republic of Slovenia II Ips 606/2005.
[16] See example ICC, No. 8113, 11(1) ICC Bulletin 65 (2000) 67.
[17] Judgement of EC Court of Justice of 17. 11. 1998 Case C-391/95, Van Uden, ECR. 1998, p. I-07091.
[18] Compare to the judgement of EC Court of Justice of 27. 4. 1999 Case C-99/96, Mietz, ECR. 1999, p. I-02277.
[19] Council regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations .
[20] Hereby, it is not excluded that such demand is set by the national law (Hess, 2010: 369).

[21] For the requirements of necessity in the Swiss law see example ICC, No. 8786, 11(1) ICC Bulletin 81 (2000) 83; (Berger, 1993: 336).
[22] On this see Case ICC, No. 7544, 11(1) ICC Bulletin 56 (2000) 59.
[23] Judgement of the EC Court of Justice of 6. 6. 2002, Case C-80/00, Italian Leather, ECR. 2002, p. I-04995).
[24] Judgement of the EC Court of Justice of 23. 12. 2009, Case C-403/09, PPU Detiček.
[25] Judgement of the EC Court of Justice of 6. 6. 2002, Case C-80/00, Italian Leather, ECR. 2002, p. I-04995).
[26] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Official Journal C 027, 26/01/1998 P. 0001 - 0027).
[27] Geimer talks about »Erkenntnisverfahren besonderer Art« (Geimer, 2004: 612).
[28] Judgement of the EC Court of Justice of 2.7.1985 Case 148/84, Deutsche Genossenschaftsbank v. Brasserie du Pêcheur, ECR. 1985, p. 1981.
[29] Judgement of the EC Court of Justice of 30.11.1976 Case 42/76, De Wolf in Cox, ECR. 1976, p. 1759.
[30] As well Jenard Report as the legal practice of EC Court of Justice (C-145/86, Hoffmann/Krieg).
[31] Exception is only valid for seizure of cross-border claims relating Austria and Germany, as the later no longer perceives seizure as intervention in its sovereignty (Summed up Czernich, Tiefenthaler, Kodek, 2003: 289).
[32] Proposal of a Regulation of the European parliament and of the Council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, 14 December 2010, COM (2010) 748 final.

References

Albrecht, C. (1991) *Das EuGVÜ und der einstweilige Rechtsschutz in England und in Bundesrepublik Deutschland* (Heidelberg : C. Winter).
Berger, K. P. (1993) *International Economic Arbitration* (Boston: Kluwer Law and Taxation Publishers in Deventer, The Netherlands).
Briggs, A., Rees, P. (2005) *Civil Jurisdiction and Judgements* (London, Singapore: Norton Rose, 4th Ed).
Brox, H., Walker, W. D. (2004) *Zwangsvollstreckungsrecht* (Köln, Berlin, Bonn, München: Carl Heymans Verlag KG).
Cigoj, S. (1984) *Mednarodno pravo osebnih in premoženjskih razmerij* (Ljubljana: ČZ Uradni list SRS).
Dika, M., Knežević, G., Stojanović, S. (1991) *Komentar Zakona o međunarodnom privatnom i procesnom pravu (Zakon o rešavanju sukoba zakona sa propisima drugih zemalja u određenim odnosima)* (Beograd: Nomos).
Galič, A. (2004) *Začasne odredbe v evropskem civilnem procesnem pravu* (Ljubljana: Zbornik znanstvenih razprav Pravne fakultete Univerze v Ljubljani).
Galič, A. (2005) Pristojnost ter priznanje in izvršitev sodb v civilnih in gospodarskih zadevah, *Podjetje in delo*, 6-7/2005, pp. 1118-1130.
Geimer, R. (2005) *Internationales Zivilprozeßrecht* (Köln: 5 Auflage, Verlag: Dr. Otto Schmidt).
Geimer, R. Schütze, Rolf A. (2004) *Europäisches Zivilverfahrensrecht : Kommentar zur EuGVVO, EuEheVO, EuZustellungsVO, zum Lugano-Übereinkommen und zum nationalen Kompetenz- und Anerkennungsrecht* (München: 2nd ed., C. H. Beck).

Gottwald, P. (2008) *Münchener Kommentar zur Zivilprozessordnung* (München: 3. Auflage, Beck München).

Hess, B. (2010) *Europäisches Zivilprozessrecht* (Heidelberg : C. F. Müller).

Ilešič, M., Polajnar-Pavčnik, A., Wedam-Lukić, D. (1992) *Mednarodno zasebno pravo* (Ljubljana: Uradni list RS).

Illmer, M. (2009) Anti-suit injunctions zur Durchsetzung von Schiedsvereinbarungen in Europa, *IPRax-Hefts* 4/2009, pp. 312-318.

Jenard (1979) *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels* (Official Journal C 59).

Kennet, W. (2000) *The Enforcement of Judgements in Europe* (Oxford: University Press).

Kodek, G. in Czernich, D., Tiefenthaler, S., Kodek, G. E. (2003) *Kurzkommentar. Europäisches Gerichtsstands- und Vollstreckungsrecht. EuGVO und Lugano-Übereinkommen* (Wien: 2., aktualisierte Auflage, LexisNexis ARD Orac).

Kropholler. J. (2005) *Europäisches Zivilprozessrecht, Kommentar zu EuGVVO* (Frankfurt a.M: 8 Auflage, Verlag Recht und Wirtschaft).

Leible, S. in Rauscher, T. (2006) *Europäisches Zivilprozessrecht Kommentar* (München: 2 Auflage, Sellier).

Nagel, H., Gottwald, P. (2007) *Internationales Zivilprozessrecht* (6., neubearbeitete Auflage, Verlag Dr. Otto Schmidt).

Rijavec, V. (2007) Pomen sodb Sodišča ES za opredelitev pojma civilne ali gospodarske zadeve z mednarodnim elementom, *Podjetje in delo*, 6-7/2007, pp. 1147-1163.

Schack, H. (1996) *Internationales Zivilfahrensrecht: ein Studienbuch* (München : Beck).

Scheef, H. C. (2000) *Der einstweilige Rechtsschutz und die Stellung der Schiedsrichter bei dem Abschluß von Schiedsvergleichen nach dem deutschen und englischen Schiedsverfahrensrecht Eine rechtsvergleichende Untersuchung Series: Schriftenreihe der August Maria Berges Stiftung für Arbitrales Recht - Volume 3* (Frankfurt/M., Berlin, Bern, Bruxelles, New York, Oxford, Wien).

Schlosser, P. (2009) *EU-Zivilprozessrecht* (München: Beck Juristischer Verlag; Auflage 3).

Seriki, H. (2010) Anti-Suit Injunctions, Arbitration and ECJ: An Approach Too Far?, *Journal of Business Law*, 2010(1), pp. 24-35.

Stadler, A. in Musielak, H. J. (2009) *Kommentar zur Zivilprozessordnung : mit Gerichtsverfassungsgesetz* (München : 7th ed, F. Vahlen).

Triva, S., Belajec, V., Dika, M. (1984) *Sudsko izvršno pravo* (Zagreb: Informator).

Varadi, T., Bordaš, B., Knežević, G. (2005) *Međunarodno privatno pravo* (Novi Sad: Forum,).

Vuković, Đ, Kunštek, E. (2005) *Međunarodno građansko postupovno pravo* (Zagreb: Zgombić i partneri).

Vuković, Đ. (1987) *Međunarodno građansko procesno pravo* (Zagreb: Informator).

CROSS-BORDER CIVIL PROCEEDINGS IN THE EU
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Prorogation under the New Brussels I Regulation

KLÁRA DRLIČKOVÁ

ABSTRACT The aim of this paper is to analyse the changes concerning the prorogation agreements under the Proposal for the Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, to compare them with the current regulation and to evaluate the benefit of these changes. Firstly, the way the Proposal was developed will be briefly described. Then, specific changes under the Proposal will be analysed. These are mainly: the personal scope of Article 23, the rule for substantive validity of prorogation agreements and the relationship between choice of court agreements and lis pendens rule.

KEYWORDS: • Brussels I Regulation • Proposal for new Brussels I regulation • prorogation • Article 23

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1 Introduction

In December 2010 the European Commission published the Proposal for the Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Proposal" or "new Brussels I Regulation").[1] The Proposal is the result of work on the revision of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation or Regulation").[2] If the Proposal is adopted, it will replace the current Brussels I Regulation.

The Proposal brings several important changes to the text of the Brussels I Regulation. Some of them concern the choice of court agreements regulated by Article 23. The aim of this paper is to analyse the changes concerning the prorogation agreements under the Proposal, to compare them with current regulation and to evaluate the benefit of these changes.

Firstly, the way the Proposal was developed will be briefly described. Then, specific changes under the Proposal will be analysed. They are mainly: the personal scope of Article 23, the rule for substantive validity of prorogation agreements and the relation between choice of court agreements and *lis pendens* rule.

2 The Way towards the Proposal

As mentioned above, the Proposal is the result of work on the revision of the Brussels I Regulation. The Regulation itself foresees its own revision in its Article 73. The first step was the Report on the Application of Regulation Brussels I, known as the Heidelberg Report which was submitted in September 2007.[3] The Heidelberg Report provided for a comprehensive analysis of the application of the Regulation in Member States. It addressed the practical application of the Regulation in the Member States and made proposals for its improvement.

In April 2009 the European Commission published the Report on the application of Brussels I Regulation[4] and Green Paper.[5] The main aim of the Report was to present an assessment of the application of the Regulation. The Green Paper contained suggestions for the review of the Regulation.

On the basis of these documents, four main problems of the Regulation were identified in the Proposal. They were the following: the existence of exequatur, the non-application of the Regulation on defendants from third states, the efficiency of choice of court agreements and interface between court litigation and arbitration. The Proposal therefore recommended that several elements of the Regulation be revised, namely: the abolition of exequatur, improving the functioning of the Regulation in the international legal order, enhancement of the effectiveness of

choice of court agreements, improvement of the interface between the Regulation and arbitration, better coordination of legal proceedings before the courts of Member States and improving access to justice.

In this paper, the element concerning the enhancement of the effectiveness of choice of court agreements will be specifically discussed. Also the operation of the Regulation in the international legal order has to be mentioned as regards to choice of court agreements.

3 The Suggested Changes Concerning Prorogation Agreements

The Proposal introduces the following changes concerning choice of court agreements: Firstly, the universal personal scope of Article 23. Secondly, the new rule on substantive validity of prorogation agreements. And thirdly, the regulation of the relationship between choice of courts agreements and *lis pendens* rule.

3.1 Personal scope of Article 23

3.1.1 Present situation

At present, the Regulation is in principle only applicable if a defendant is domiciled in a Member State.[6] The domicile of the plaintiff on the other hand has no relevance for the application of the Regulation.[7] The use of national jurisdiction rules against defendants domiciled in the EU is, in fact, forbidden (Bogdan, 2006: 43). Article 4 demarcates the personal scope of the Regulation. If a defendant is not domiciled in a Member State, the jurisdiction of courts of Member States shall be determined under the national rules of Member States. The jurisdiction rules in the Regulation are not applicable.

The domicile of a defendant in a Member State is the basic criterion for determination of jurisdiction[8] as well the condition for application of other rules of jurisdiction in the Regulation.[9] The text of the Regulation expressly states three exceptions to this basic rule that the defendant's domicile is to determine jurisdiction. The first exception is Articles 9(2), 15(2) and 18(2),[10] the second is Article 22 and the third Article 23. According to several opinions, also Article 24 represents the exception.[11]

Article 23 requires that at least one of the parties of the prorogation agreement has domicile in a Member State. It is irrelevant if the party will later be the defendant or plaintiff, because at the time of conclusion of the choice of court agreement this is not usually known. Domicile is determined in accordance with Articles 59 and 60 (Magnus, Mankowski, 2007: 390).

What is not so clear is the relevant point in time for the determination of domicile in a Member State. It could be the moment of conclusion of the agreement or the

moment of institution of proceedings. Article 23 does not expressly solve this problem. Article 23 certainly applies when one of the parties has domicile both at the moment of conclusion of the agreement and at the moment of institution of proceedings. It is probably not necessary that it has to be the same party. On the other hand, it is disputed whether Article 23 also applies if one of the parties has domicile only at the moment of conclusion of the agreement or only at the moment of bringing the action. (Magnus, Mankowski, 2007: 393 – 394). There exist arguments for both of these possibilities.[12]

Article 23 does not generally apply where two parties domiciled outside the EU choose a court or courts in a Member State. In this case, the provision of Article 23(3) applies. It excludes the possible jurisdiction of courts of other Member States. The courts of other Member States shall have no jurisdiction over such dispute unless the chosen court declines its jurisdiction. The substantive and formal validity of such an agreement will not be determined under Article 23, but under national law. Article 23(3) gives precedence to the chosen court. Courts of other Member States have to refuse jurisdiction. (Magnus, Mankowski, 2007: 391).

Article 23 does not solve the situation where the choice of court agreement is concluded in favour of courts of a third state. The Regulation cannot grant jurisdiction to a court of a third state (Kruger, 2008: 235). However, it could be the case that the parties have chosen a court in the third state, but the defendant has domicile in a Member State. Therefore, at least courts of the Member State where the defendant is domiciled have jurisdiction under the Regulation. Is the court of the Member State which has jurisdiction under Article 2 or Article 5 obliged to accept jurisdiction? Or should the court decline the jurisdiction in favour of the chosen court of a third state? The Brussels I Regulation does not expressly provide a solution for this. There are two opinions on this. The first is that provisions of the Regulation are applicable and the courts of the Member States have to accept their jurisdiction. The other is that the courts of the Member States should decline their jurisdiction.

The first opinion is supported by the mandatory nature of the jurisdiction rules contained in the Regulation. The wording of Article 2 itself suggests that the rules are mandatory (Kruger, 2008: 186). This mandatory nature was also confirmed by the Court of Justice in the *Owusu* case.[13] The Court states that "*Article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention.*" The Court concluded in this case that a court in a Member State cannot, on the basis of national rules, decline its jurisdiction based on the Regulation in favour of a third state. However, the Court did not consider the nature of jurisdiction of courts in third state. This opinion seems to be also supported by the Court's *Opinion C-1/03* (Kruger, 2008: 187). According to this

opinion, the choice of court agreement in favour of third state would be ignored (Kruger, 2008: 235).

The alternative opinion is based on the theory of the reflexive effect (*effet reflexe)*. This theory asserts that, if the Member States claim in certain cases exclusive jurisdiction, they should allow the same to third states in similar cases. This theory is based on reciprocity, self-restraint and comity. The theory of reflexive effect tries to use the hierarchy of rules created by the Regulation and apply it in relation to third states. The court of a Member State should therefore decline its jurisdiction in the case where the jurisdiction of courts in third state is based on hierarchically higher criteria (Kruger, 2008: 188 – 189).

Concerning the theory of reflexive effect, it is not clear what the ground for declining jurisdiction is under it. Is it the Regulation itself or national law? According to the first possibility, the Regulation should expressly state that a court in a Member State can decline the jurisdiction. It is a logical extension of the rules contained in the Regulation. This possibility results from the premise that the Regulation contains the complete set of rules. Second possibility refers to the application of national law, as Brussels I Regulation does not solve this question. The use of national law seems to be hard to defend in the light Court's decision in *Owusu* case (Kruger, 2008: 190 – 191).

The validity of the prorogation agreement in favour of courts of a third state cannot be determined under Article 23. The Court of Justice stated in the *Coreck Maritime case*[14] that: *"Article 17 of the Convention does not apply to clauses designating a court in a third country. A court situated in a Contracting State must, if it is seized notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits."* The Court allowed in this case the national court to consider the validity of a prorogation clause in favour of courts of third state by which it acknowledged the effects of such a clause. In this regard, the Court did not consider domicile of the defendant in the EU. It viewed the rules of jurisdiction contained in the Regulation to be inapplicable in such a case (Kruger, 2008: 237).

3.1.2 The situation under the proposal

The Proposal brings into effect the universal application of jurisdiction rules contained in the Regulation. These rules are also applicable to defendants from third countries. The Proposal also creates two additional jurisdictional rules for disputes involving persons domiciled outside the EU. The Proposal thus creates the complete set of rules leaving no space for national law (Weber, 2011: 3). Moreover, the rule of *lis pendens* in relation to third states is introduced.

Universal application has the impact on most of the jurisdiction rules in the Regulation, including Article 23. The sphere of application of Article 23 is now

wider. This Article is also applicable to situation where two persons domiciled outside the EU choose a court or courts in a Member State. The provision of Article 23(3) is therefore deleted, because it is unnecessary.

As the Proposal does not require the domicile of one of the parties to the prorogation agreement to be in a Member State, it is not necessary to determine this domicile. Therefore, the question of point in time for determination of domicile also becomes irrelevant.

Unfortunately, the Proposal does not expressly touch the situation where parties conclude the choice of court agreement in favour of the courts of a third state. The debate on the applicability of reflexive effect of the Regulation remains unresolved. The Proposal only includes a new rule on *lis pendens* in relation to third states. This rule can be used if there are parallel proceedings between the same parties and with the same cause of action before a court of a Member State and a court of a third state. It is not applicable to the situation where the parties enter into the prorogation agreement in favour of a court in a third state and the action is brought before a court in the EU.

It is uncertain what consequences derive from this version of the Proposal. The new rule of *lis pendens* can be understood as an exhaustive rule concerning the possibility for a court in the EU to decline its jurisdiction given by the Regulation. The court therefore has no power to give effect to a choice of court agreement in favour of third state. On the other hand, the rule of *lis pendens* can be interpreted as governing only the situation of parallel proceedings and the Proposal does not address the effect of prorogation agreement in favour of third state. The second possibility seems to be more probable. It would be strange if choice of court agreements in favour of courts of third state could no longer be enforced (Weber, 2011: 11).

What is certain is that the new Article 23 does not cover choice of court agreements in favour of courts of third state. These agreements will be further governed by national law as was stated by the Court of Justice in the case *Coreck Maritime*.

There are several advantages to the universal application of jurisdiction rules. All defendants before the courts of Member States will be treated adequately. Defendants domiciled outside the EU will be no longer subjected to exorbitant national rules (Bogdan, 2006: 44). The differences among national rules can result in unequal access to justice, because some Member States are more generous in providing grounds for jurisdiction against defendants from third states (Weber, 2011: 5). This problem will be removed. The present version of the Regulation raises the question why only the domicile of the defendant should constitute the sufficient link with the EU whereas other connection factors do not suffice even though they can create a close link with a particular state (Weber, 2011: 6).

Universal rules also reduce the costs of proceedings as it is possible to bring an action against defendants domiciled both in the EU and outside the EU under the same rules. Universal application contributes to better protection of weaker parties (Weber, 2011: 5). Concerning prorogation agreements, the new Article 23 brings to persons domiciled outside EU who want to choose a court in the EU a uniform regime of choice of court agreements valid in all Member States. This increases the foreseeability and legal certainty for these persons (Weber, 2011: 7 – 8). On the other hand, there are problems with the universal nature of jurisdiction rules. In some cases, the courts of Member States will have jurisdiction even though the link between the dispute and the territory will be abatable.(? tenuous perhaps would be a better word?) Also, the possibility of parallel proceedings between a court in a Member State and a third state will be higher.

3.2 Substantive validity of prorogation agreements

3.2.1 Present situation

Article 23 now expressly regulates only the formal validity of prorogation agreements. Concerning the form, the Regulation excludes any reference to national law (Magnus, Mankowski, 2007: 404). Even though there are still some minor uncertainties as regards the provisions on the form, they remain untouched by the Proposal.[15]

On the other hand, the question of substantive validity is much more problematic. This question is not expressly regulated by Article 23. Therefore, two questions can be raised: How far does Article 23 allow a reference to national law as regards substantive validity? And to which national law does one have to refer? (Hess, Pfeiffer, Schlosser, 2008: 91)?

The validity of prorogation agreements can be assessed by autonomous standards of Article 23 or by national law. While this is clear as regards formal validity, it is less clear concerning substantive validity (Magnus, Mankowski, 2007: 400). The central element of substantive validity is the existence of agreement or consent between the parties. The existence of consent is necessary for the choice of court clause in order for it to have procedural effects (Magnus, Mankowski, 2007: 399). It could be said that if the prorogation agreement meets the formal requirements of Article 23, there is no room for further ascertainment if there exists consent between the parties or not. The formal requirements sufficiently guarantee the existence of agreement between parties. However this is not always truly the case. There can be a situation where a party signs the choice of court agreement under duress. The formal requirement is satisfied, but true consent of the parties does not exist. The question of agreement or consent and question of form are two distinct issues (Briggs, 2008: 245 – 246).

Although Article 23 does not expressly say so, it seems that the basic requirement – the existence of consent can be inferred from the Article itself (Magnus, Mankowski, 2007: 401). The Court of Justice has stated that Article 23 regulates the existence of consent and in this regard, reference to national law is not possible. (Hess, Pfeiffer, Schlosser, 2008: 91 - 92).

The Court stated in the case *Estasis Salotti*[18] that "*the requirements set out in Article 17 governing the validity of clauses conferring jurisdiction must be strictly construed. By making such validity subject to the existence of an "agreement" between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated."*[19] From this case it is clear that the existence of consensus is a basic element of the substantive validity of prorogation agreements, which must be ascertained by a court. As the Court does not refer to national law, but only to Article 23, it seems that the existence of consensus is governed autonomously by Article 23.

In the case of *Powell Duffryn*[20] the Court concluded that the concept of "agreement conferring jurisdiction" in Article 23 must be regarded as an independent concept. The case of *MSG* [21] reflected on new possibilities of form which were added to the Brussels Convention by 1978 Accession Convention. The Court in this regard stated: "*Yet that relaxation incorporated in Article 17 by the 1978 Accession Convention does not mean that there is not necessarily any need for consensus between the parties on a jurisdiction clause, since it is still one of the aims of that provision to ensure that there is a real consent on the part of the persons concerned. (...) The relaxation introduced relates solely to the requirements as to form. (...)"* The Court clearly distinguishes between the question of consent and question of form and subjects the question of consent only to Article 23.

Despite the case law of the Court of Justice, national courts often apply national law also to the determination of the existence of consent (Hess, Pfeiffer, Schlosser, 2008: 91 - 92). The applicability of Article 23 with respect to substantive validity seems to be very limited. The Article gives no indication where the line is drawn between the autonomous scope of Article 23 and national law. (Magnus, Mankowski, 2007: 401 – 402).

The courts of Member States determine the law applicable to choice of court agreements under their conflict rules. Rome I Regulation[16] excludes prorogation agreements from its scope[17] thus there is no unification of conflict rules. The law of some Member States refers to *lex fori*, others refer to *lex causae* (Hess, Pfeiffer, Schlosser, 2008: 92). This depends on their understanding of the nature of prorogation agreements. Due to these differences between national laws, choice of court agreements can be considered valid in one Member State and invalid in

another Member State. This question is now not satisfactorily answered by neither the Regulation nor by the case law of Court of Justice.

3.2.2 Situation under the proposal

The Proposal introduces the conflict rule on the substantive validity of choice of court agreements. New Article 23 states: *"If the parties have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substance under the law of that Member State (...)."*

The new Article 23 thus introduces the uniform conflict rule for substantive validity which will be applicable in all Member States. Of course, it is applicable only to those prorogation agreements that are within the scope of Article 23. Under this rule, the law applicable to substantive validity is the law of the Member State whose court or courts are chosen.

There are several questions as regards the new rule that have to be answered. Firstly, what is the scope of application of this rule? In other words, what does the concept "substance" cover? Concerning prorogation agreement, one can distinguish between formal validity, substantive validity and capacity of parties to conclude such an agreement. Formal validity is governed directly by Article 23. Capacity of parties to conclude choice of court agreements is governed by the personal law determined under the conflict rules of a forum (Magnus, Mankowski, 2007: 403). Other factors causing invalidity of prorogation agreements represent substantive validity. Substantive validity therefore covers the consensus between parties and questions relating to the existence of valid consent, e.g. fraud, mistake, duress and similar ((Magnus, Mankowski, 2007: 402). Only substantive validity in this sense is covered by the new rule.

Secondly, does the uniform conflict rule refer to substantive law or also to conflict rules? In my opinion, only the former possibility makes sense. If the aim of this rule is to ensure the same outcome on matters of substantive validity of prorogation agreements whatever the court seized, only reference to substantive law would be logical. Thirdly, is there any more room for the autonomous application of Article 23 as regards substantive validity? Or are all elements of substantive validity governed by applicable national law? The wording *null and void as to its substance* seems to cover all aspects of substantive validity. All elements which cause invalidity of prorogation agreements seem to be covered, including non-existence of consensus between parties. Article 23 does not state any exception. I deduce from this that substantive validity as such is not covered by Article 23, but by national law.

3.3 Prorogation agreements and *lis pendens*

3.3.1 Present situation

At present, the rule of *lis pendens* contained in Article 27 takes precedence over Article 23. Article 27 regulates situations with parallel proceedings concerning the same parties and the same cause of action in two Member States. In such a case any court other than the court first seised shall of its own motion stay its proceedings until the jurisdiction of the court first seised is established. 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. This is also valid in the situation where the court secondly seised is the court chosen by the prorogation agreement. Article 27 does not make any distinction between the various heads of jurisdiction under the Regulation (Hess, Pfeiffer, Schlosser, 2008: 102). The only exception is exclusive jurisdiction under Article 22, where Article 25 is applicable.

These conclusions can be arrived at from examining the case of *Gasser v MISAT*.[22] The Court of Justice held that Article 27 of the Regulation must be interpreted "*as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction."* Moreover, the Court concluded that Article 27 must be interpreted "*as meaning that it cannot be derogate from where, in general, the duration of the proceedings before the court of the Member State in which the court first seised is established is excessively long."* The Court based its decisions on the following main arguments. First, the court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction. Secondly, Article 25 covers only exclusive jurisdiction under Article 22. Thirdly, the difficulties stemming from delaying tactics by parties who commence proceedings before a court which they know to lack jurisdiction cannot be used for the interpretation of any provision of the Regulation. Fourthly, the Regulation contains no provision under which Article 27 ceases to apply because of the length of proceedings before the courts of the Member State. Finally, the Regulation is based on mutual trust between Member States as regards their legal systems and judicial institutions. This mutual trust enables the compulsory system of jurisdiction to be established, which all courts are required to respect.

The conclusions of the Court from the *Gasser case* have been criticised because they undermine the effects of prorogation agreements. Thus, they disrespect the party autonomy and legitimate expectations of the parties (Magnus, Mankowski, 2007: 495). The party who wants to avoid the litigation before the chosen court has the possibility to use dilatory tactics. The party can commence court proceedings typically for negative declaratory relief before a court of a Member State which is known for excessively slow proceedings ("torpedo actions") (Hess,

Pfeiffer, Schlosser, 2008: 108). According to *Gasser* conclusions, only the court first seised has the power to determine the effects of Article 23 and thus the validity of prorogation agreement. The court chosen by the parties is prevented from addressing this issue. The court first seised may determine the validity of the choice of court agreement differently from the chosen court (Magnus, Mankowski, 2007: 495 – 496). If it finds the agreement invalid and decides on the merits of the case, its decision is recognisable in all Member States. Even if the court first seised finally decides that the chosen court has exclusive jurisdiction, it can be only a relative victory. The delay and expenses involved in the proceedings before the court first seised could potentially cause the defendant not to recommence the proceedings before the chosen court. Article 27 in fact gives the tactical victory to the party who first commences the proceedings (Magnus, Mankowski, 2007: 496). Also the argument that the *Gasser decision* is incompatible with Article 6(1) of the European Convention of Human Rights has appeared. The possibility of "torpedo actions" deprives the party of the right to access to justice under Article 6(1) of this Convention.[23]

The Regulation itself does not contain any provision which would prevent a party from using dilatory tactics. In other words, the Regulation does not have a provision which would prevent a party bringing an action before a court other that the chosen one. Moreover, the Court decided in *Turner v Grovit*[24] that the Regulation must be interpreted "*as precluding the grant of an injunction whereby a court of a Member State prohibits a party to proceedings before a court of another Member State, even where that party is acting in bad faith with a view to frustrating the existing proceedings."* The Regulation therefore prohibits the use of injunctions under national law.

3.3.2 Situation under the proposal

During the work on the revision of the Regulation it was apparent, that the result of the *Gasser case* is, to say the least, problematic and that prorogation agreements should be given the fullest possible effect.[25] The Green Paper suggested several solutions. The Proposal introduced a new rule contained in Article 32(2) which gives the priority to the chosen court to decide on its jurisdiction. This rule constitutes the exception from the general *lis pendens* rule contained now in Article 29. The general *lis pendens* rule is the same, however the Proposal introduces a time limit for the court first seised in which the court has to establish its jurisdiction. This limit is six months, except where exceptional circumstances make this impossible. This new rule aims to prevent the use of dilatory tactics, where a party brings an action before an apparently non-competent court in order to have an advantage of the first court's priority under *lis pendens* rule. What is not so clear is what occurs in a situation where a court does not establish its jurisdiction within the prescribed time limit. Does it mean that the court second seised can continue with the proceedings? Article 29 now also contains the information duty of the court first seised.

In any case Article 29 does not cover the situation where the parties concluded the prorogation agreement and one of them commences proceedings before a court other than the chosen one. In such a case, Article 32(2) applies. Under this rule, where an agreement confers exclusive jurisdiction to a court or the courts of a Member State, the courts of other Member States shall have no jurisdiction over the dispute until such a time as when the court or courts designated in the agreement decline the jurisdiction. It is only the chosen court that can decide on its jurisdiction. In other words, it is only the chosen court that can decide on the validity of a prorogation agreement. Article 32(2) applies only in the situation where the choice of court agreement confers exclusive jurisdiction. If the parties agree that the jurisdiction is not exclusive, which is possible under Article 23, the general *lis pendens* rule will be applicable. Article 32(2) does not govern prorogation agreements in matters of insurance, consumer contracts and employment contracts.

The new Article 32(2) should increase the effectiveness of choice of court agreements and eliminate the dilatory tactics, at least in the situation where the parties concluded prorogation agreement. Moreover, as was mentioned above, the Regulation introduces the uniform conflict rule on substantive validity which should ensure the similar outcome before the courts of Member States.

The new rule under Article 32(2) reflects most of the critique that was raised against the *Gasser case*. On the other hand, as typical for the Regulation, it is again a strict rule which must be used in all covered situations. Therefore national courts will not have any discretion to consider the specifics of particular cases. I can imagine a situation where the prorogation agreement is apparently invalid. Even in such a case, only the chosen court can decide on its jurisdiction. Only after that would it be possible to decide the case before another court. The delay in court proceedings is thus inevitable.

4 Conclusion

The revision of Brussels I Regulation brings three important changes concerning the regulation of choice of court agreements. First, the new Article 23 has a universal personal scope of application. The condition of domicile of one of the parties is therefore cancelled. Also Article 23(3) is deleted, because it is no longer necessary. The prorogation agreements "from outside" are now fully within the regime of Article 23. However, the revision does not answer the question of effects of choice of court agreements in favour of courts of third states before the courts of Member States that can be competent under other rules of the Regulation. This answer thus still remains unclear.

Secondly, Article 23 introduces a uniform conflict rule for substantive validity of prorogation agreements. The legal regime of substantive validity is questionable

under the present version of the Regulation, so this change seems to be a step forward.

Finally, the revision introduces the new *lis pendens* rule for the situation where the proceedings are commenced before a court of a Member State other than the chosen one. Under this rule, it is always the chosen court that can determine its competence notwithstanding the fact that it is first or second seised. This new rule on *lis pendens* reflects the critique of the conclusions from *Gasser case* and again can be considered as a good step. However, it is again a strict rule with no exceptions and there can be situations in which it would not be suitable.

Notes

[1] COM(2010), 748 final, 14.12.2010.
[2] OJ L 12/1, 16.1.2001.
[3] Study JLS/C4/2005/03, available from http://ec.europa.eu/civiljustice/news/whatsnew_en.htm, accessed on 14 October 2011 or in Hess, B., Pfeiffer, T., Schlosser, P. (2008) The Brussels I Regulation 44/2001 Application and Enforcement in the EU (München: C.H.Beck).
[4] Report from the Commission to the European Parliament, the Council and the European Economic and social committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 174 final, 21.4.2009.
[5] Green Paper on the Review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175 final, 21.4.2009.
[6] Domicile of natural persons is determined by national law (Article 59 of the Regulation). Domicile of legal persons is defined autonomously by the Regulation (Article 60).
[7] See Case C-412/98 – Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC), 13 July 2000.
[8] Article 2.
[9] Articles 5, 6, 8 – 21.
[10] For details see e.g. Magnus, U., Mankowski, P. (2007) Brussels I Regulation (München: Sellier European Law Publishers), pp. 273, 307, 318 – 319, 329 – 331 or Kruger, T. (2008) Civil Jurisdiction Rules of the EU and Their Impact on Third States (Oxford: Oxford University Press), pp. 169 – 176.
[11] For detail see e.g. Magnus, U., Mankowski, P. (2007) Brussels I Regulation (München: Sellier European Law Publishers), pp. 446 – 448 or Kruger, T. (2008) Civil Jurisdiction Rules of the EU and Their Impact on Third States (Oxford: Oxford University Press), pp. 120 – 123.
[12] See Magnus, U., Mankowski, P. (2007) Brussels I Regulation (München: Sellier European Law Publishers), p. 394 or Kruger, T. (2008) Civil Jurisdiction Rules of the EU and Their Impact on Third States (Oxford: Oxford University Press), pp. 219 – 220.
[13] Case C-281/02 – Andrew Owusu v N.B. Jackson and others, 1 March 2005.
[14] Case C-387/98 – Coreck Maritime GmbH v Handelsveem BV and others, 9 November 2000.
[15] For details about the regulation of form see e.g. Magnus, U., Mankowski, P. (2007) Brussels I Regulation (München: Sellier European Law Publishers), pp. 404 – 420 or

Kruger, T. (2008) Civil Jurisdiction Rules of the EU and Their Impact on Third States (Oxford: Oxford University Press), pp. 221 – 222.

[16] Regulation (EC) of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[17] Article 1(2)(e).

[18] Case 24/76 – Estasis Salotti di Colzani Aimo e Gianmario Colzani v RŰWA Polstereinmschinen GmbH, 14. December 1976.

[19] Point 7. See also Case 26/76 – Galeries Segoura v Rahim Bonakdarian, 14 December 1976, point 6.

[20] Case C-214/89 – Powell Duffryn plc v Wolfgang Petereit, 10 March 1992, point 14.

[21] Case C-106/95 – Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL, 20 February 1997, points 17 – 18.

[22] Case C-116/02 – Erich Gasser GmbH v MISAT Srl, 9 December 2003.

[23] See in detail Magnus, U., Mankowski, P. (2007) Brussels I Regulation (München: Sellier European Law Publishers), pp. 489 – 493.

[24] Case C-159/02 – Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd., Changepoint SA, 27 April 2004.

[25] See Hess, B., Pfeiffer, T., Schlosser, P. (2008) The Brussels I Regulation 44/2001 Application and Enforcement in the EU (München: C.H.Beck), pp. 102 – 103, 107 – 117; Green Paper on the Review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175 final, 21.4.2009, point 3.

References

Bogdan, M. (2006) *Concise Introduction to EU Private International Law* (Groningen: Europa Law Publishing).

Briggs, A. (2008) *Agreements on Jurisdiction and Choice of Law* (Oxford: Oxford University Press).

Hess, B., Pfeiffer, T., Schlosser, P. (2008) *The Brussels I Regulation 44/2001 Application and Enforcement in the EU* (München: C.H.Beck).

Magnus, U., Mankowski, P. (2007) *Brussels I Regulation* (München: Sellier European Law Publishers).

Kruger, T. (2008) *Civil Jurisdiction Rules of the EU and Their Impact on Third States* (Oxford: Oxford University Press).

Weber, J. (2011) Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation, *Max Planck Private Law Research Paper*, 11/7, pp. 1 – 37.

CROSS-BORDER CIVIL PROCEEDINGS IN THE EU
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Language Issues in Cross-border Service of Judicial Documents

ALEŠ GALIČ

ABSTRACT The EU Service of Documents Regulation strengthens the guarantees concerning language since they apply also to cases of direct postal service and since it is assured that the addressee can effectively exercise the right to refuse to accept the document. On the other hand, by introducing the standard of the "language, which the addressee understands" the Regulation lowers the requirements applied in traditional regimes of cross-border service of judicial documents to a certain extent. On the principled level, the new approach can be favoured. However, the new standard causes numerous difficulties in practice, which does not contribute to legal certainty and predictability in this field of law.

KEYWORDS: • service of process • civil procedure • EU law • fair trial • language of judicial documents • judicial co-operation

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1 Introduction

In the context of cross-border service of judicial documents in civil or commercial matters, the issue of protecting national sovereignty is gradually losing importance. What prevails in focus today, is the striving for protection of individual procedural guarantees for parties to the procedure. From the viewpoint of the defendant, this concerns guarantees of due process and especially the right to be heard (related to language requirements), whereas from the viewpoint of the claimant the speed, reliability and low-cost in transmission in order to facilitate effective access to justice is essential. This paradigm shift is evident in the new system of cross-border service of documents in the European Union law (The Regulation No. 1393/2007[1]), especially if one compares it to the Hague 1965 Convention[2] on the other. Under the Hague Convention, the emphasis is solely on the issue of national sovereignty which is very clearly expressed in two regards. In principle, the Hague convention requires a judicial document which is to be served through a central authority to be translated into the official language of the state addressed. It is the state of destination (its central authority) which has the right to reject acceptance of the service if the conditions concerning language are not fulfilled. However, if the central authority accepts to implement the service of documents without proper translation, there exists no individual right of the addressee to reject acceptance (see e.g. Sladič, 2005: 1147). On the other hand, the 1393/2007 provides for an individual right of the addressee to reject acceptance if requirements concerning language are not met. The second point, where the aforementioned paradigm shift is evident, relates to provisions on direct postal service in the Regulation on one hand and those in the 1965 Hague convention on the other. A contracting party to the Hague convention may namely object to direct service through postal channels (Art. 10), however if such an objection (or declaration as to the language requirements at least) is not declared[3], the Convention itself does not provide for any procedural guarantees as to the language of documents, transmitted through postal channels[4] (guarantees are only provided for in regard to service through central authorities pursuant to Art. 5). Exactly the opposite approach was adopted by the 1393/2007 Regulation. Member states may no longer object against direct postal service. However, the Regulation imposes effective requirements, which enable the addressee to refuse service if documents are not written in or translated into a language, which he or she understands and thus do not enable to sufficiently exercise the right to be heard in procedure (*see infra*). Evidently the service of process is no longer viewed predominantly as an »act of exercising powers of a sovereign state«. It is rather considered as an »act of providing information« with the goal of guaranteeing adversarial procedure and effective exercise of rights of defense (Hess, 2010: 448, Hausmann, 2007: 9, Rasia in Taruffo, Varano 2011: 256).

2 An Outline of Language Guarantees in the Regulation No. 1393/2007

The Regulation provides for different ways of transmitting and serving documents: transmission through designated transmitting and receiving agencies (which are decentralized in most member states – Slovenia including), transmission by consular or diplomatic channels, service by postal services and direct service. Thereby the Regulation, as the ECJ confirmed, establishes neither a hierarchy nor an order of precedence as between the different methods of service allowed under the regulation.[5] In Slovenia at least, the most important methods of service under the Regulation are service via designated transmitting and receiving agencies (Arts. 4-11) and direct service by post (Art. 14). With regard to all methods of service, the Regulation provides for important requirements concerning language. The approach is different than in the Hague 1965 Convention: pursuant to Art. 8, it is sufficient that the document to be served is in a language (or accompanied by a translation) which the addressee understands (or the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected). Otherwise, the addressee may refuse to accept the document, whether at the time of the service or returning the document within one week. The applicant shall be advised by the transmitting agency to which he forwards the document for transmission that the addressee may refuse to accept it if it is not in one of the aforementioned languages (Art. 5/1). Thus an attempt of service may not be refused if the proper translation is not included (compare Art. 146.a of the Slovenian Civil Procedure Act[6]). If the applicant insists, service must be attempted even if it is entirely clear that the document is neither in a language that the addressee understands nor in an official language of the receiving Member State. It is also determined that the applicant shall bear any costs of translation prior to the transmission of the document, without prejudice to any possible subsequent decision by the court or competent authority on liability for such costs (Art. 5/2). In this regard as well, the regime in the Article 146.a CPA is in conformity with the Regulation.

If the addressee has refused to accept the document for reasons concerning language, the receiving agency must immediately inform the transmitting agency thereof (Art. 8/2). The service can then be remedied through another attempt of service of the document accompanied by a required translation. In that case, the date of service of the document is the date on which the document accompanied by the translation is served. However, where according to the law of a Member State, the document has to be served within a particular period of time, the date to be taken into account with respect to the applicant shall be the date of the (attempted) service of the initial document. This is now explicitly provided for in Art. 8 of the Regulation. Even prior to coming into force of the Regulation, substantially the same view was already adopted by the ECJ in the *Leffler* judgment.[7] Unfortunately, the Regulation does not adopt also the view of the ECJ in the aforementioned judgment, that the time-limits shall be saved only if the

filing of a proper translation is done promptly (Sujecki, 2008: 1631, Rasia in Taruffo, Varano, 2011: 272). Since it is now clear that the rightfully rejected service can be remedied, it can be expected that cases where the applicant shall speculate and initially request – cheaper and simpler – service without proper translations, will become more frequent (Ekart, Rijavec, 2010: 102).

The described system of requirements concerning language applies as appropriate also in cases of other means of transmission and service of judicial documents, as well, thus also with regard to direct service through postal channels. Although this is clearly determined in paragraphs 4 and 5 of Art. 8 of the Regulation, one Slovenian court has already overlooked this clear provision.[8] The addressee may decide whether to accept or refuse the documents within 7 days (thus, also after he or she has already opened and seen the content of the document served).

3 The Standard of »Understanding the Language« Concerning Natural Persons and Legal Entities

The standard of "a language which the addressee understands" must clearly be understood in a subjective sense. What matters is whether the particular addressee understands the language. Implementation of more objective criteria (such as that the addressee understands the language of the state, which he or she is a national of) might be desirable from the viewpoint of legal certainty and predictability (in favour of such approach: Lindacher, 2001: 187), however the Regulation gives no ground for such an approach (Heiderhoff in Rauscher, 2010: 626). The word »understands« points to a factual, objective situation and not to a mere assumption, even if that assumption might be based on certain circumstantial evidence.[9] Objective circumstances (such as citizenship of the addressee or the fact that for a longer time she lived in a state, in which a certain language is spoken) may only be regarded as an indication thereto or as one of the applicable circumstances in determining whether the addressee actually understands the language. The ECJ has already taken the standpoint that the parties' contractual agreement concluded in the course of business that correspondence is to be conducted in the language of the Member State of transmission does not give rise to a presumption of knowledge of that language (which is the criterion concerning the validity of the service). Such an agreement is only evidence which the court may take into account in determining whether the addressee actually understands the language.[10] Particularly in consumer contracts the language of the contract or the language in standard contract terms which the contract is referring to, certainly cannot be (at least a strong) evidence of the consumer's knowledge of that language (Heiderhoff in Rauscher, 2010: 626).

How then to determine whether the addressee truly understands the documents when the addressee is a legal entity? Which one of these should understand the language: the legal representative, (one of) in-house lawyers or senior managers, anyone, maybe the person that was actually handling the case for the entity? Or

should it suffice that the language is the official language of State where a branch, agency or other establishment of the legal entity is situated? Would that apply only if the dispute is arising out of an operation of this branch, agency or establishment or maybe even if this is not the case (compare Schlosser, 2003: Par. 2, Art. 8 EuZVO, Mankowski, 2009: 182, Lindacher, 2001: 187)? A certain amount of objectivization is necessary since a legal entity as such does not speak or understand any specific language. The standpoint that it be decisive whether the legal representative of the entity understands the language or not is impractical. It is sensible to ascertain whether the people who were actually working on the subject matter understand the language (Heiderhoff in Rauscher, 2010: 629). It should also be assumed that the legal entity understands the language, spoken in the state of its seat (statutory seat or the seat of administration or of its principal place of business[11]). Also in view of the Attorney General *Trstenjak* the only practicable solution by which it is possible to answer this question would seem to be by reference to the registered office of the legal person as the relevant connecting factor for the linguistic knowledge.[12]. Surely taking the view that in cross-border business relations the legal entity must understand English since it is the *lingua franca* of international trade goes too far.[13] According to the ECJ the agreed language of business correspondence on its own is not a decisive factor (see above), although it certainly is such a circumstance that makes it hard to object that the entity understands the language.

Difficulties might again arise concerning the question, what degree of knowledge of the language is needed in order to rightfully refuse the service of the document. Rudimentary or general knowledge of the language is probably not enough. The level of understanding of legal and expert terminology needed depends on the content of the documents as well; with the summons to a hearing or serving simple court orders the situation is not the same as with service of lengthy and complex statements of claims (Lindacher, 2001: 179- 187). In general however, the linguistic knowledge must be good enough for legal documents to be essentially understood from a linguistic point of view.[14] On the other hand, it must be borne in mind that the primary objective of the Regulation is to lower the costs regarding translations and that the aim of requirements concerning language according to the ECJ is to enable effectively to assert the rights of the defence.[15] From this point of view, lower standards regarding the extent of the translation (with respect to annexes see below), its quality as well as the necessary degree of the addressee's linguistic knowledge are sufficient.

4 Party Autonomy Concerning the Language of Service of Documents?

It is disputed whether autonomy of the parties concerning the determination of the acceptable language of the documents to be served, is allowed. May the parties validly conclude a procedural contract stipulating that in potential future court proceedings they shall accept service of documents, written in certain language even if (one of) the parties do not understand it (in favour: Heiderhoff in Rauscher, 2010: 624, Schlosser, 2007, 621, Hausmann, 2007: 16).? Such an agreement, if admissible, could be framed in different ways, even in an indirect manner e.g. by stipulating that the parties "agree not to exercise their right from the Art. 8 of the Regulation" (the right to refuse to accept the document for reasons of language) or that "the parties agree that they understand a certain language for the purposes of service of documents." It should be clearly distinguished that the aforementioned dilemma relates only to the parties' autonomy concerning language in cross border service of process, not the language of court proceedings. The Regulation does not relate to the language of court proceedings at all. The question whether the parties may contractually agree upon cross-border service of documents in a certain language (presumably in the language of the proceedings) is not answered in the ECJ judgment in the *Weiss* case either.[16] In that case the parties' agreement concerned only the language of correspondence relevant to the performance of the contract and not the correspondence in connection with judicial proceedings brought in that regard. The ECJ merely confirmed that in case when such correspondence is an annex to a document served pursuant to the Regulation, the addressee may not rely on the right to refuse acceptance of annexes, consisting of business correspondence between parties, written in the agreed language (Par. 92 of the Judgment).

There exists no explicit legal basis for giving binding effect to such a procedural contract and thus to the parties' agreement on the language of the documents to be served pursuant to the Regulation on service. The issue concerns the general dilemma, to what extent (if at all) the procedural order allows for so called »procedural contracts«. In certain states, e.g. Slovenia and Austria[17], the general approach towards procedural contracts is negative (e.g. Ude, 2002: 107, Fasching, 1990: 395), whereas in certain other states, e.g. Germany, the doctrine and the case law seems to be more generous in recognizing party autonomy concerning powers contractually to depart from the statutory procedural regime (Rosenberg, Schwab, Gottwald, 2004: 421). In Slovenia at least, it is certain that parties are not authorized contractually to depart e.g. from the legal regime of service of process unless expressly authorized so by the law. Nevertheless, in the context of European civil procedure, in order to assure uniform application, a euroautonomous interpretation of notions and concepts, adopted by the Regulations must be favoured (Rijavec, 2007: 1150). Thus the question concerning the parties' powers to waive in advance their right under article 8 of

the Regulation is »ripe« for a referral for a preliminary ruling to the Court of Justice of the European Union.

Personally I would advocate a restrictive approach. The right to refuse to accept a document aims to guarantee effective exercise of the right to be heard. The fundamental precondition of this right is that the party understands the subject matter of the dispute. This however is not the case if the party does not understand and is not obliged to understand the language of the document.[18] At least the core elements of the right to be heard, which is protected by constitutions of numerous states (e.g. Art. 22 of the Slovenian Constitution) and by the Art. 6 of the European Human Rights Convention are not waivable in advance. This restriction applies even to legal orders, which are otherwise not unfavourable to recognizing legal effect to procedural contracts and even to fields of law, which are generally favourable to party autonomy in determining rules of procedure (such as arbitration[19]). True, it is open to debate whether the guarantees concerning language of documents to be served should be regarded as a "core element" of the right to be heard, but such a view can at least be reasonably argued. Furthermore, the reasoning that »the provision concerning the refusal of documents (Art. 8 of the Regulation) is only giving a right to the party, is only in the party's interest and that it is thus logically subject to a party disposition« (so: Schlosser, 2007: 621) is not convincing either. It is an entirely different matter to determine that the party can waive a right or decide not to exercise it (e.g. file an appeal, file a defense plea, decide not to request a disqualification of a judge, decide not to cross-examine a witness…) if this right can already be effected and the decision not to effect it can be based on circumstances of the pending case. But from this it can not at all be logically concluded that such a waiver of rights may as well and in the same manner be exercised in advance, even before court proceedings are pending. The nature of certain fundamental rights (e.g. the right to a fair hearing) excludes the possibility to waive their enforcement in advance (Landrove, 2006: 89). It is only admissible to waive them during the proceedings. This differentiation must be maintained because before the proceedings parties are not aware of all the consequences of a waiver. In contrast, such safeguards are no more necessary once the facts are known during the proceedings (Landrove, 2006: 89).

A further argument which is invoked in that regard is that if the parties may enter a jurisdiction agreement and thus conclusively agree on the language of court proceedings itself, then they may even more so agree on the language of documents to be served abroad.[20] I do not find that argument convincing either. The parties may depart from the statutory procedural regime (concerning international jurisdiction) and enter a jurisdiction agreement (which indeed conclusively means that they accept the language of court proceedings in the chosen court) because the law expressly authorizes them to do so (e.g. by Art. 23 of the Brussels I Regulation). But there is no such express authorization for a procedural contract concerning the language of the documents to be served abroad either in the Brussels I Regulation or in the Service of documents Regulation. I

find it extremely far reaching to argue that already a jurisdiction agreement in favour of a court in a certain state (or even a choice of law agreement in favour of a law of a certain state) should be understood in the sense that the party either conclusively acknowledges to understand the language of proceedings in that court or that she waives the right to reject cross-border service of documents in the language of that court.

It is also not sufficient to make a reference to the parties' ability freely to agree on language issues in arbitration in order to justify that the same should be the case in regard to language of documents in cross-border service.[21] It is a well recognized fundamental principle in arbitration that The the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Compulsory procedural rules are clearly meant to be only an exception to that fundamental principle in arbitration.[22] In the court proceedings however, the starting point is the opposite: the law imposes the system of procedure, whereas the question may then be put as to what extent may the parties depart from such statutory determined procedural regime. The "arbitration argument" may be as well invoked to argue exactly the opposite: if the parties want more autonomy concerning rules of procedure and particularly to avoid the language requirements they are free to choose arbitration.

In my understanding therefore, an agreement of the parties as to the language of documents to be served would again simply be an indication of the parties' understanding of the language. Giving binding legal effect to agreements of the kind would be very dangerous especially in consumer contracts and in other cases of factual inequality between parties. The stronger party (not only in consumer contracts) would probably establish for itself a favourable language clause (in standard contract terms for example) for correspondence concerning cross-border service concerning judicial proceedings. True, such clauses might be invalid under the »Unfair contract terms directive«[23] (Schlosser, 2007: 620). But that doesn't resolve all situations and it is questionable whether the consumer would risk relying on the probable nullity of the »language clause« in the contract terms (if he or she is at all aware that such a clause could be invalid). But it must foremost be taken into account that the questionable admissibility of an anticipated waiver (relinquishment) of constitutional rights of due process (in particular the right to be heard) does not only concern protection of weaker parties. Furthermore, because such agreements would often be to the detriment of one party only (in case the agreed language is the language of one of the parties), accepting binding effect of such agreements would jeopardize not only the right to be heard but in many cases also another guarantee of due process, namely the equality of arms.

5 Burden of Proof and the Method of Determination of Understanding of a Language

The question of who bears the burden of allegation and the burden of proof when determining whether the addressee understands or does not understand the language of the document is also disputed (Wautelet, 2006: 14, Stadler, 2006, : 121). On one hand, it seems that the entitlement to refuse service of a document due to lack of knowledge of the language is a right of the addressee, therefore he should bear the burden of proof (Hausmann, 2007: 14, Schlosser, 2003, Par 1, Art. 8 EuZVO.). Nonetheless, the opposite viewpoint seems more appropriate. The starting point must be such that the documents should be in a language the addressee understands. When the addressee refuses the service giving the reason that he does not understand the language, the burden of proof that this is not so lies on the opposite party (Heiderhoff in Rauscher, 2010: 632.). This is in accordance with the principle *negativa non sunt probanda*. The question though remains disputed until the ECJ takes a stand on it.

The Regulation does not deal with the question how to practically determine whether the addressee understands the documents (hence whether his refusal of service was justified or if the documents were served properly). The standard »understanding of the language« is appropriate in principle but leads to some problems when applied in practice. Certainly the objective of the Regulation is not such that the court should engage in time-consuming taking of evidence in order to determine relevant circumstances concerning the addressee's knowledge of the language. This may seem necessary in some cases, though.[24] Since the addressee is likely to claim that he does not understand a certain language, proving otherwise will usually mean procuring witnesses and documentary evidence (such as correspondence, that the party made in that language or documents from which it follows that the addressee lived in another State for a longer period of time, where the respective language is spoken, certificates in language proficiency and the party's own statements concerning knowledge of languages e.g. in CV). The problem does not only concern an addressee in bad faith who wishes to obstruct proceedings by falsely claiming that he or she does not understand the language of service. An addressee in good faith who is unaware whether his (faulty) knowledge of the language in question is not sufficient for refusing the service of the document is also worth considering. Due to great consequences that arise in the event of a wrongful refusal, the addressee might consider it safer to accept the service of the document when in doubt (especially until there are some clearer criteria as to the level of the required knowledge in practice).

Because of possible complications in later stages of the proceedings it is advisable that in the event of a refusal of acceptance due to lack of knowledge of the language, the other party uses the possibility of subsequent service of the translated document. This is less risky than counting on later adducing of evidence

that the opposite party does in fact understand the language and it thus did not have the right to refuse the service (Heiderhoff in Rauscher, 2010: 632 and 634.).

6 Consequences of an Unjustified Refusal to Accept Service and of Inadequate Information

The consequences when the addressee understands the documents and still refuses the acceptance are not completely clear. Due to the lack of a specific provision on the issue in the Regulation it seems that provisions in the national law should be considered Heiderhoff in Rauscher, 2010: 632 and 634). In Slovenia the answer to the question would therefore be that the service of process has been dully effected – in the same manner as when the addressee refuses to sign the certificate of receipt without legal justification (for German law: Mankowski, 2009: 182).

The possibility of a party that does not understand the language of the document and is not properly informed of the right to refuse acceptance cannot be ruled out as well (for example, if the documents does not include the forms from Annex II of the Regulation that contain information about the right to refuse to accept the document in all official languages of the EU). If in such a case the party procures its own translation and enters an appearance, it should be considered that the defective service was remedied. It would however be necessary to take the cost of translation into account later on when deciding on the costs (Schlosser, Par. 2, Art. 8 EuZVO). If the party does not enter the proceedings and a default judgment is given there is ground for refusing recognition pursuant to Art. 34 of the Brussels I Regulation (Heiderhoff in Rauscher, 2010: 633, Ekart, Rijavec, 2010: 102).

7 The Quality of Translation

Certain practical and factual questions concerning translations were not unknown before as well (also in the context of the Hague Convention); for example, the question of the appropriate quality of the translation. The standard surely is not that the translation must be entirely without faults (grammatical or one's concerning the meaning); on the other hand, just any patchwork cannot meet the language requirements. What must be taken into account is that the rationale behind the translation is to provide the debtor due information about the process. A poor translation (especially if it is misleading regarding the subject matter) may jeopardize the right (Wilske, Krapfl, 2006: 10-13, Mankowski, 2009: 182.). Nevertheless, case-law in Germany is not too strict (Hausmann, 2007: 14). The question remaining is also whether everything in the original documents must be translated. If only summons to a hearing are concerned, translation of the essential part of the abstract's content is enough. In contrast, when serving applications or judgments and similar documents an approximate translation does not suffice, everything must be translated (Heiderhoff in Rauscher, 2010: 629).

8 Ways of Exercising the Right to Refuse Service

Prior to coming into force of the Regulation it was questionable, how the right to refuse service of non-translated documents due to inappropriate language could be exercised in the case of substitute postal service. For example, under national procedural law, relatives living in the same household, are obliged to accept the document for the addressee. The same logic though cannot apply to the possibility of waiving the right to refuse service of documents that are not in the appropriate language. The will of the person (the relative for example) that accepts the service of the document for the addressee although requirements concerning language are not met, cannot substitute the will of the addressee to accept or refuse to accept the service due to lack of language requirements. The issue is now properly settled, giving the addressee 7 days to decide whether she will accept or refuse service. Thus, this right can be exercised in the case when another person accepted the service on behalf of the addressee as well. This is applicable in all methods of service – substitute service, postal service and personal service "in the hands" of the addressee (Art. 8 of the Regulation). This way she can inform herself of the document and then still decide to refuse the service. It must be taken into account that there will probably be an increase of cases where the addressee will accept the service of documents which are beneficial to him – like a decision on inheritance, and refuse the acceptance of documents unfavourable to him – like statements of claims. Nonetheless, such a regulation is appropriate. In the moment of acceptance, even the addressee himself accepting the document usually does not know of the right to refuse service. Just like he does not know whether the document is understandable to him or not. Simpler documents (such are summons) perhaps are, but complicated and lengthy statements of claim probably are not. The argument that the addressee "knew that the document was in a foreign language since he has signed the advice of delivery which was in a foreign language" is not convincing (not least, the translation may be enclosed in the document itself). The regulation resolves the question of how the addressee is properly informed of the right to refuse service as well. Relying on the postman's correct explanation of the addressee's right to refuse acceptance of the document is unrealistic. According to the Regulation, a notice in all official languages of the EU must be attached to the document, that informs the addressee of his right to refuse acceptance of the service, the requirements to effect this right and necessary steps.

In the event of the addressee (justifiably) refusing to accept the document, the opposite party has the possibility to remedy the defective service by subsequent service of translated documents. In this case the day of the subsequent service will be regarded as the date of the service; in the case where under the national law of the State of transmission the application must be served within a certain period of time, the claimant is still protected, because (from this point of view) the service is regarded to have been effected in the first attempt (Art. 8/3 of the Regulation). The

1393/2007 Regulation with interests of both parties properly considered, thus accepted in essence the views the ECJ had already taken.[25]

9 Translation of Annexes to a Document?

Neither the Regulation nor the Hague convention define the term "document" and therefore a commonly disputed issue concerning cross-border service is also the question of whether all annexes to the document must be translated as well or the translation of the application suffices. The ECJ already ruled on this, saying that the absolute obligation of translation concerns documents instituting proceedings or an equivalent document, regarding the annexes though, an assessment must be made, determining whether a translation is actually needed in order for the defendant to properly understand the content (of the claim and cause of action) and enable him to arrange for his defence.[26] The role and importance of annexes to a document to be served may vary according to the nature of the document. If only documents which have a purely evidential purpose and which are not intrinsically linked to the application in so far as they are not necessary for understanding the subject matter of the claim and the cause of action do not form an integral part of that document. Thus, translation from the standpoint of the Regulation is not obligatory (Par. 69 of the Judgment). The ECJ rejected the view that the annexes must always be considered to form an integral part of the "document" and that only a full translation should be regarded as necessary precondition for guaranteeing the rights of the defence.[27]

10 Payment of the Translation Costs Pursuant to the Civil Procedure Act

The 2008 amendment of the CPA (CPA-D[28]) solved the issue of the bearing of costs in cross-border service when a translation is needed (Voglar, 2010: 102). If an application is served, the costs must be payed for by the party itself (Art. 146.a). By that the CPA of course does not stipulate that a translation is obligatory in all cases. Other sources of law must be considered with respect to the issue. The first attempt of service according to the Regulation may therefore be in Slovenian and the Slovenian court may not require the applicant to provide or pay for a translation. But a danger that the addressee will refuse acceptance exists. That is why in accord with Art. 5 of the Regulation the transmitting agency must advise the applicant who forwarded the document to it, that the addressee may refuse the service of the document if it is not in one of the languages of Art. 8 (the official language of the Member State of destination or a language the addressee understands). In the same article the Regulation determines that the applicant shall bear all costs of the translation occasioned prior to the transmission of the document, without prejudice to any possible subsequent decision by the court or competent authority on liability for such costs. Art. 146.a of the CPA is thus in accord with the Regulation. Requirements with respect to language according to the 1965 Hague convention are stricter, though it is not the addressee who is

entitled to refuse to accept the untraslated documents but only the central authority (see Art. 5 of the Convention). Still, even here an immediate translation is not necessary in every case (if an informal service through a central authority in the state of destination is required and the addressee is willing to accept the document, service in Slovenian is also allowed; if the state of destination does not reject service through direct postal channels and does not impose conditions concerning language, translation is not required in that case either). It is apparent that the provision refers to a preliminary advance for the costs only. Whether the bearer of the costs is entitled to reimbursement of those costs at the end of the proceedings depends on provisions regarding the reimbursement of costs in the national law. In Slovenian civil procedure the »loser pays« rule applies (Art. 151ff of CPA).

11 Conclusion

Comparing to the traditional system of the Hague 1954 and 1965 Conventions, the EU Service of Documents Regulation strengthens the guarantees concerning language on one hand. Foremost, because it is beyond doubt that these guarantees must apply to cases of direct postal service as well, whereby it is assured that the addressee can effectively exercise the right to refuse acceptance of the document for the reasons concerning language. On the other hand, introducing the criteria of the »language, which the addressee understands«, the Regulation lowers the standards, which were applied in traditional regimes of cross-border service of judicial documents to a certain extent. On the principled level, the new approach may be favoured as it corresponds to what should be the overriding principle in cross-border service of documents from the viewpoint of the addressee – effective exercise of the right to be heard in proceedings. On the other hand, the new approach has positive effects concerning certain other equally important procedural guarantees – those which relate to the cost barriers for an effective access to court and those relating to the duration of proceedings. The problem however is that the new standard of »understanding the language« causes numerous difficulties when applied in practice. Numerous questions remain unsolved, which does not contribute to legal certainty and predictability in this field of law. When national courts are faced with these questions in pending proceedings, it would be desirable that they would refer the to the Court of the European Union for preliminary rulings.

Notes

[1] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (*Official Journal L 324 , 10/12/2007 P. 0079 – 0120).*

[2] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

[3] Direct service through postal channels (as a secondary method of transmition – the primary method under the Convention is service through designated central authorities) is

only possible for states, which »do not object« to it (Art. 10). An overview of the status table of notifications, declarations and reservations on the web page of the Convention (http://www.hcch.net/index_en.php?act=conventions.text&cid=17) enables a conclusion that only a formal reservation (declaration) is effective; it is not sufficient that a contracting state opposes postal service in practice. A requirement for an appropriate notification, unlike in the context of the 1954 Hague convention, explicitely follows from articles 21 and 31 of the Convention as well. Slovenia did not comply with such requirements. It can therefore be concluded that a direct service throught postal channels in Slovenia from another contracting state is admissible. Of course, in order for the postal channels to be utilized, it is necessary that it be authorized by the law of the forum state. See Practical Handbook…, p. 71. An unsolved issue is, whether the principle of »negative reciprocity« applies, i.e., whether for example Slovenia can reject postal service from another state party to the Convention, if the latter state objected against postal service to be utilized in its territory. See Practical Handbook…, p. 73.

[4] See the Practical Handbook… (referring to case law of the courts in USA, France and Germany), p. 80.

[5] Plumex v. Young Sports NV, C-473/04, 9.2.2006.

[6] Zakon o pravdnem postopku, Official gazette, No. 26/1999.

[7] Leffler v. Berlin Chemie AG, C-443/03, 8.11.2005.

[8] Decision of the Ljubljana Court of Appeals No. III Cp 2979/2010 dated 15.12.2010. The court reasoned that »pursuant to the wording of the Regulation, requirements concerning language only apply in case of service through transmitting and receiving agencies«.

[9] See the view of the Commission in the case C-14/07 (Weiss), referred to in the Opinion of Advocate General Trstenjak delivered on 29 November 2008 (Par. 35).

[10] Ingenieurbüro Michael Weiss und Partner GbR v. Industrie- und Handelskammer Berlin, C-14/07, 8.5.2008. Partially different view was advocated in the opinion of Advocate General Trstenjak, delivered on November 29, 2007 (Par. 92, točka 2), who suggested that such an agreement would constitute a rebuttable presumption that the party understands the language (Par. 92.2).

[11] Either of these criteria determines the „domicile“ of the legal entity pursuant to Art. 60 of the Brussels I Regulation.

[12] Opinion of Advocate General Trstenjak delivered on 29 November 2008 (Par. 72) in case C-14/07 (Weiss).

[13] So Schlosser, Rn. 2 to art. 8 EuZVO. See also opinion of Advocate General Trstenjak delivered on 29 November 2008 (Par. 58) in the case C-14/07 (Weiss).

[14] See also opinion of Advocate General Trstenjak delivered on 29 November 2008 (Par. 74) in the case C-14/07 (Weiss).

[15] Ingenieurbüro Michael Weiss und Partner GbR v. Industrie- und Handelskammer Berlin, C-14/07, 8.5.2008.

[16] Ingenieurbüro Michael Weiss und Partner GbR v. Industrie- und Handelskammer Berlin, C-14/07, 8.5.2008. The ECJ did not accept the view of the Advocate General Trstenjak (Par. 91 of the opinion delivered on 29 November 2007) that the agreement of the parties in the given case amounted to an agreement concerning language of documents to be served in case of cross-border service.

[17] See e.g. the decision of the Austrian Supreme Court (OGH) of 7 October 2003, 4 Ob 188/03, published in Recht der Wirtschaft 2004, 223.

[18] The decision of the Austrian Supreme court dated 16.6.1998, cited by Ekart, Rijavec, p. 104.

[19] See e.g. the judgment of the Canton de Vaud Tribunal Cantonal, case 172/I, 23 April 2008, cited in Müller, Swiss case law in International arbitration, 2. Ed., Schulthess/Bruylant, 2010, p. 168.
[20] This view is taken in the opinion of Advocate General Trstenjak delivered on 29 November 2008 (Par. 85-91) in the case C-14/07 (Weiss).
[21] Such a reference was invoked by the Advocate General Trstenjak her opinion delivered on 29 November 2007 in the case C-14/07 (Weiss).
[22] See e.g. Article 19 of the UNCITRAL Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law on 21 June 1985.
[23] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Pursuant to Art. 3 of the Directive, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations, to the detriment of the consumer. The annex to the Directive contains an indicative and non-exhausitve list of terms, which may be regarded as unfair and point (q) of this annex refers to terms which have the object of effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy.
[24] Compare the decision of the Ljubljana Court of Appeals, No. 459/2009 dated 31.3.2010.
[25] Götz Leffler v. Berlin Chemie AG, C-443/03, 8.11.2005..
[26] Ingenieurbüro Michael Weiss und Partner GbR v. Industrie- und Handelskammer Berlin, C-14/07, 8.5.2008.
[27] The ECJ did not follow Opinion of Advocate General Trstenjak delivered on 29 November 2007, who suggested that the term »document« should be interpreted in broad sense and should cover annexes also. Thus in the view of the AG Trstenjak, article 8(1) of the Regulation should be interpreted as meaning that the addressee has the right to refuse acceptance of the document even if only annexes to the document to be served are not in the required language (Par. 92.1). She however suggested that in such case a translation of an extract of lenghty annexes to which the application expressly refers in order to substantiate the arguments therein could be sufficient (Par. 62-64).
[28] Official Gazette No. 45/2008.

References

Ekart A. & Rijavec V. (2010) *Čezmejna izvršba v EU* (Ljubljana, GV Založba).
Geimer, R. (2005) *Internationales Zivilprozessrecht, 5. Aufl.* (Köln, Otto Schmidt).
Hausmann, R. (2007) Problems of interpretation regarding the European Regulation on Service, *The European Legal Forum*, 1-2, pp. 8–19.
Hess, B. (2009) *Europäisches Zivilprozessrecht* (Heidelberg, CF Múller).
Landrove, J. C. (2006) European Convention on Human Rights' Impact on Consensual Arbitration: an Etat des Lieux of Strasbourg Case-Law and of a problematic Swiss Law Feature, in: Besson & Hotellier & Werro (Ed.) *Human Rights in the Centre* (Zurich, Schulthess), pp. 73-101.
Lindacher, W. (2001) Europäisches Zustellungsrecht, *Zeitschrift für Zivilprozess*, 114, pp. 179–195.
Mankowski, P. (2009) Übersetzungserfordernisse und Zurückweisungsrecht des Empfängers im europäischen Zustellungsrecht, *IPRax*, 2, pp. 180–183.
Permanent bureau of the HCPIL, Practical handbook on the operation of the Hague convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters, 3rd Ed., Den Haag, 2006

Rauscher, T. (2010) *Europäisches Zivilprozess- und Kollisionsrecht, 2010, EG-VollstrTitelVO, EG-MahnVO, EG-BagatellVO, EG-ZustVO2007, EG-BewVO, EG-InsVO* (München, Seillier).

Rijavec, V. (2007) Pomen sodb Sodišča ES za opredelitev pojma civilne ali gospodarske zadeve z mednarodnim elementom, *Podjetje in delo*, 32, pp. 1147-1163.

Rosenberg, L. & Schwab, K. H. & Gottwald, Peter (2004) *Zivilprozess, 16. Aufl.* (München, Beck Verlag).

Schlosser, P. (2003) *EU-Zivilprozessrecht, 2. Aufl.* (München, Beck Verlag).

Schlosser, P. (2007) Zustellung und Zustellungsersatz durch Parteieinverständnis? in: *Studia in Honorem Pelayia Yessiou–Faltsi* (Athens) pp. 611-623.

Sladič, J. (2005) Vročanje v civilnih in gospodarskih zadevah, *Podjetje in delo*, 2005(6-7), pp. 1131-1150.

Stadler, A. (2006) Ordnungsgemässe Zustellung im Wege der remise au parquet und Heilung von Zustellungsfehlern nach der Europäischen Zustellungsverordnung, *IPRax*, 2, pp. 116–123.

Sujecki, B. (2008) Die reformierte Zustellungsverordnung, *NJW*, 23, pp. 1628–1631.

Ude L. et al. (2005), *Pravdni postopek – zakon s komentarjem, 1. knjiga* (Ljubljana, GV Založba in ČZ Uradni list).

Taruffo, M. & Varano, V. (2011) *Manuale di diritto processuale civile europeo* (Torino, Giappichelli Editore)

Wautelet, P. (2006) *Service of Process in Europe*, Workshop ERA 9.11.2006 Trier materials, pp. 1–16.

Wilske, S. & Krapfl, C. (2006) Zur Qualität von Übersetzungen bei Zustellung ausländischer gerichtlicher Schriftstücke, *IPRax*, 1, pp. 10–13.

CROSS-BORDER CIVIL PROCEEDINGS IN THE EU
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The Abolition of *Exequatur* in the Proposal for the Review of the Brussels I Regulation

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ABSTRACT The paper discusses the European Commission's proposal of December 2010 for the abolition of the exequatur procedure in the Brussels I Regulation. The comparison between the currently applicable and the proposed new wording shows that the abolition of exequatur does not encompass the abolition of (all) grounds for refusal of enforcement in other Member States. The author analyses the differences between the current and the proposed text of the Regulation regarding the available legal remedies, as well as the grounds for refusal of enforcement that can be invoked by these remedies. Special attention is drawn to the difficult relationship between the minimizing of the obstacles to the "free movement of judgments" and the protection of human rights in cross-border enforcement.

KEYWORDS: • Exequatur • enforcement of foreign judgments,• recognition of foreign judgments • cross-border enforcement • Brussels I Regulation • Regulation No. 44/2001 • review of Brussels I Regulation • foreign judgments • judgments from other Member States

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1 Introduction

The review of the Brussels I Regulation[1] started with great ambition.[2] Even though many important modifications of the provisions of the Regulation are being proposed, it is possible to state that the abolition of *exequatur* (the declaration of enforceability), for all judgments in civil and commercial matters was the most important goal of this reform.[3] It was, however, questionable whether the abolition of *exequatur* would also entail the abolition of the grounds for refusal of enforcement, or, on the contrary, such grounds should remain and the possibility of invoking them be moved to the actual enforcement stage. In other words, should the Brussels I Regulation follow the pattern of the regulations of "the second generation", i.e. the regulations on the European Enforcement Order, the Small Claims Procedure, the Order for Payment, and Maintenance Obligations[4] and (almost)[5] completely abolish the verification of the judgment in the state of enforcement?[6] The European Union (hereinafter: the EU) was thus surely headed towards a more facilitated circulation of judgments in civil and commercial matters among the Member States, but was it to be a "free movement of judgments"?

The consultation process[7] revealed that it was (for the moment) too ambitious to try to achieve such "free movement", i.e. that judgments from other Member States would be enforced under the same conditions as domestic judgments. The authors emphasised that the abolition of every possibility of verification in the state where enforcement is sought (hereinafter: the state of enforcement) of a judgment issued in another Member State could cause problems, above all from the point of view of the protection of human rights and the protection of so-called weaker parties, i.e. consumers, employees, and the insured (See, e.g., Beaumont, Johnston, 2010: 249-279; Galič in: Galič, Betetto, 2011: 32-33; Oberhammer, 2010: 197-203; Schlosser, 2010: 101-104. *Contra* (under certain conditions): Schilling, 2011, 31-40, esp. p. 40).

In its proposition for the amended Regulation (hereinafter: the Brussels I bis Regulation)[8] the European Commission therefore proposed that a legal remedy be available in the state of enforcement enabling the defendant to invoke the violations of fundamental procedural rights (the co-called procedural public policy) that occurred in the process of issuing the judgment.[9] The public policy defence in the Brussels I Regulation has namely almost exclusively been applied to violations of fundamental procedural rights[10] which do and surely will occur also in the future.[11] It is also true that, at least for the time being, Member States do not always have the same view of the content of the fundamental procedural guarantees (See, e.g., CJEU, *Zarraga v. Pelz*, C-491/10 PPU, 22 December 2010).[12]

Following the Commission's proposal, *exequatur* proceedings should nevertheless be abolished. In this way, the term "abolition of *exequatur*" has gained a broad and a narrow sense, which have been, up to now and with regard to the above mentioned regulations, identical.[13] The broad sense encompasses the abolition of every verification of the judgment in the state of enforcement; the narrow sense describes only the abolition of the current obligatory proceedings of the declaration of enforceability, whereas the defendant can still demand the (limited) control of the judgment in the state of enforcement.

If the majority of judgments are encompassed by the mentioned proposition, the Commission proposes the preservation of *exequatur*, with a minor limitation of the grounds for refusal that can be invoked, for two groups of judgments: first, for judgments on non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, and second, for judgments in proceedings which concern the compensation for harm caused by unlawful business practices to a multitude of injured parties and which are brought by a state body, a non-profit making organisation, or a group of more than twelve claimants.[14] This exclusion is supposed to only be temporary.[15]

At the time of writing of this paper, the Commission's proposal is awaiting a first reading in the European Parliament (hereinafter: the EP), one of the two European legislatures, which is scheduled for February 2012.[16] In June 2011, the Committee on Legal Affairs of the EP delivered a Draft Report on the Commission's Proposal.[17] The Committee's vote is scheduled for January 2012. Additional amendments by members of Parliament were made publicly accessible in October 2011.[18] The Draft Report of the Committee for Legal Affairs and the later amendments show that the Commission's proposal will most probably be subject to extensive modifications. Concerning the abolition of *exequatur*, it is no exaggeration to state that these modifications go in the direction of minimizing the changes proposed by the Commission.

In the following chapters, we will deal with the following issues regarding the Commission's proposal for the abolition of *exequatur* in Brussels I bis Regulation: legal remedies in the state of origin of the judgment (hereinafter: the state of origin), legal remedies in the state of enforcement, the grounds for refusal of enforcement that can be invoked, the exceptional maintenance of *exequatur* regarding the two groups of judgments, the recognition of judgments from other Member States, the enforcement of judgments on provisional measures, the enforcement of authentic instruments and court settlements, as well as the difficult relationship between the abolition of *exequatur* and the protection of human rights, and, lastly, the impact of the "dogma" of mutual trust within the EU on the abolition of *exequatur*.

2 Legal Remedies in the State of Origin

Similarly as the Regulation on the European Enforcement Order and other regulations of the "second generation",[19] the proposal for the Brussels I bis Regulation provides the possibility for defendants to prevent the judgment from taking effect in other Member States if there were problems regarding the service of the instrument instituting the proceedings (a lack of service or insufficient time to prepare a defence) or if the defendant was unable to defend him/herself for reasons outside his/her control.[20]

However, the abolition of *exequatur* is not accompanied by the determination of minimum standards for service of the initial document in the proceedings, as is the case in the above mentioned regulations. It is true that a legal remedy able to sanction violations of common procedural standards is available in the state of enforcement; it would nevertheless be wise to prescribe unified rules regarding service as the crucial point in civil procedure so as to prevent violations of fundamental rights in an earlier stage of the procedure and not only in the enforcement state (Hess, 2011: 129).

In the EP Committee's June 2011 Draft Report, the inclusion of the proposed provisions on legal remedies in the state of origin of the judgment is judged to be redundant.[21] It is true that it would barely be compatible with the European Convention on Human Rights (hereinafter: the ECHR) if such a remedy did not already exist in the national law of each Member State. Nevertheless, given the importance of the right of the defendant to be able to defend him/herself effectively, such provision could have a declaratory and preventive effect, i.e. it could, even though redundant, accentuate the importance of appropriate provisions in national procedural laws, as well as protect such provisions from any national discussion on the narrowing of their protection.

A proposal by Andrew Dickinson should also be mentioned in this regard, according to which the enforcement proceedings in other Member States should be stayed if an application under Article 45 is filed in the state of origin (Dickinson, 2011: 8).

3 Legal Remedies in the State of Enforcement

Under the Brussels I bis Regulation, *exequatur* proceedings should be abolished. This means that a declaration of enforceability of a judgment issued in another Member State would no longer be necessary. The enforcement procedure under the national law of the state of enforcement can start immediately. However, the defendant can file an appeal in this state if he/she deems that his/her fundamental procedural rights have been violated in the proceedings in the state of origin. It is possible to contest the court decision on this appeal by filing a second appeal.[22]

The Commission thus opted for a different solution than in the regulations of "the second generation" which concentrate all legal remedies in the state of origin and, therefore, regulate some procedural questions, namely the service of the introductory document in the proceedings, in much detail.

Under the current version of the Regulation, the party seeking enforcement must first apply for a declaration of enforceability, which is a purely formal *ex parte* procedure,[23] consisting of establishing the existence of the necessary certificates. The decision on this application is served on both parties.[24] In the vast majority of cases (around 95%), the declaration of enforceability is granted.[25] Both parties can, however, file an appeal if they are not satisfied with the result.[26] The defendant can appeal if he/she deems that one or several grounds for refusal of the declaration exist.[27] The court will then decide, after hearing both parties, whether to uphold or annul the decision of the first instance court. A second appeal is possible against the decision on the appeal.[28]

The only substantial procedural difference between the text currently in force and the proposed new one is thus the abolition of the first phase of the proceedings, i.e. the assessment of the formalities, in which the defendant does not participate. Both (possible) appeals, i.e. the current (possible) second and third stages of the proceedings, namely are preserved.

The grounds given by the Commission for the abolition of the current first phase of *exequatur* proceedings is the fact that, in some Member states, such proceedings take quite a long time (the maximum duration was established to be four months) and can be quite expensive (up to EUR 4,000 in the United Kingdom).[29] It is impossible to deny that these problems would be solved if the declaration of enforceability were to be abolished. However, they could also be solved by encouraging Member states to shorten the proceedings by imposing a time-limit (and a sanction for not respecting it), as well as by imposing a limit on the cost of *exequatur* proceedings, if not even establishing a unified (relatively low) tariff on the EU level. For example, in Slovenia, the cost of the procedure following the application for *exequatur* is 25 EUR.[30]

However, the fact that the defendant can still file an application for the refusal of recognition or enforcement in the state of enforcement raises questions regarding the actual reach of the proposed reform and possibly generates problems. This application will namely have to be incorporated in the national enforcement procedures (Hess speaks about a "renationalization" of the verification of the judgment) (Hess, 2011:129), while national rules regulating the enforcement proceeding differ greatly. Some Member States, such as Slovenia and Austria, require a court decision "allowing" the enforcement to be carried out.[31] In Slovenia, the enforcement section at the local court allows enforcement on the basis of a final and enforceable court decision. The defendant can oppose the

enforcement on several grounds;[32] typically he/she will assert that the claim has already been satisfied. The new appeal under the proposed Brussels I bis Regulation would most likely be filed in the scope of such proceedings. Contrary to the current system where the *exequatur* procedure is an autonomous procedure separated from the enforcement and conducted by the district courts, the local court competent for enforcement would thus assess the existence of the grounds for refusal of enforcement.

This is already an option under the Slovenian national rules regarding the enforcement of foreign judgments where the assessment of the grounds for refusal of enforcement can take place in the phase of the "allowing" of enforcement if the creditor does not need the judgment to acquire *res iudicata* status in Slovenia (the so-called incidental recognition of a foreign judgment).[33] Nevertheless, this solution can be criticized: the difficult role of assessing the grounds for refusal of enforcement of a foreign judgment is namely scattered among the numerous lower courts, predominantly occupied by judges with lesser experience.[34] Regarding the new remedy under the proposed Brussels I bis which should protect (at least) procedural public policy, it is, however, of utmost importance that a uniform interpretation of this legal standard be achieved, not only within each Member State, but also within the EU as a whole (Cf. Hess, 2011: 129).

Furthermore, some Member States, e.g. Germany, do not provide for this preliminary stage of enforcement proceedings and enforcement starts directly, without a court decision allowing such.[35] The problem is that, in such states, the defendant will not be aware that the enforcement of a foreign judgment is being sought until the enforcement has actually already started. In the October 2011 EP amendments it was proposed that the "surprise effect" in such cases be mitigated by the obligation of the party seeking enforcement to serve on the debtor the certificate enabling the judgment to "circulate" among Member States at least fourteen days before the actual commencement of the enforcement ("before the date upon which the enforcement measure is sought").[36] This would certainly be a welcome novelty. To ensure the desired effect, such service should be conducted according to the so-called Service Regulation.[37] Such service should not be necessary only in cases where it would turn out that the certificate cannot be served, e.g. because the debtor has disappeared[38] (See also Dickinson, 2011: 7). Such cases are rare, but very problematic to deal with.[39]

4 Grounds for Refusal of Enforcement

It has already been emphasised that the abolition of *exequatur* in the Brussels I bis Regulation does not entail that it would be impossible to invoke certain grounds for refusal of enforcement in the state of enforcement. These are, however, more restricted than in the current version of the Regulation.

Regarding the Commission's proposal as regards the **public policy defense**, only violations of the procedural public policy could be sanctioned by a refusal of enforcement. In the current version of the Regulation, those are contained in Article 34/2 (a lack of service on a defendant who did not enter an appearance in the proceedings) and Article 34/1 (the "general" public policy protection clause)[40]. Attention must nevertheless be drawn to the fact that, contrary to the current version of the Regulation, the Commission's wording does not contain the word **"manifest"** regarding **breaches of fundamental procedural rights,** which can be sanctioned in the state of enforcement. It is possible to conclude there from that if the Commission's wording was adopted, the renewed Regulation would provide for greater protection of fundamental procedural rights than the current version. Such could also be the conclusion based on the fact that this new wording does not contain the term public policy, which implicitly entails that only very serious violations should be sanctioned. It is, however, true that also the mention of the "fundamental principles underlying the right to a fair trial" entails that only the most serious deficiencies will be sanctioned by the refusal of enforcement. In the October 2011 amendments, the Members of EP propose the reintroduction of the wording "manifestly contrary to public policy (*ordre public*)".[41]

Violations of the fundamental values of the state of enforcement arising from the substance of the judgment (the so-called substantive public policy) should, according to the Commission, no longer be protected, with the exception of judgments in privacy, defamation and collective redress cases. The Commission further proposes to eradicate all possibility of sanctioning violations of the rules on **jurisdiction** under the Regulation.[42] It should, however, remain possible, same as in the current version of the Regulation, to invoke the **irreconcilability** of the judgment with another judgment which has been issued in the state of enforcement or, under certain conditions, in another Member State or a third State.[43]

It seems that the EP will not uphold such restriction. In its June 2011 Draft Report, the EP Committee on Legal Affairs proposed an extension of the grounds for refusal of enforcement which could be invoked in the state of enforcement.

In the opinion of the EP Committee, the defendant should thus be able to invoke almost all grounds for refusal determined in the current version of the Regulation, except for violations of the rules on **jurisdiction**, which should be sanctionable only if they occur regarding the rules protecting consumers.[44] However, in the amendments from October 2011, the Members of EP proposed a further extension: judgments should not be enforced if there were violations of rules on exclusive jurisdiction, as well as on the protection of consumers, the insured, and employees.[45] It must be mentioned that this is even broader that the current version of the Regulation, which does not allow enforcement to be refused in the event of a violation of the jurisdiction rules protecting employees.[46]

Perhaps most importantly, the EP Committee proposes that the **substantive public policy** defence be reintroduced among the grounds for refusal.[47] The justification given for this amendment is short – the Committee considers that "a party should be able to challenge a decision in the Member State of recognition/enforcement, not only on fair trial grounds, but also on the grounds that recognition/enforcement would be manifestly incompatible with the public policy of that Member State". As will be shown in the chapter dealing with the protection of human rights and the abolition of *exequatur*, the substantive public policy contains (substantive) human rights and the (substantive) public policy defence is the most appropriate means for their protection in cross-border enforcement. It would also be remarkable that the Member States could not apply the public policy defence to prevent the "free movement" of judgments which are problematic from the point of view of their fundamental values, whereas they are entitled to do so in the case of the four fundamental freedoms, which undoubtedly hold the most eminent place in the EU legal order (See, e.g., Dickinson, 2011: 9). It is true that the contents of the public policy of each Member State are to a large extent the same, however, the CJEU authorises the states to include their proper fundamental values, if this does not contradict the common ones.[48]

5 The Exceptional Maintenance of *Exequatur*: Privacy, Defamation, Collective Redress

In the Commission's proposal, the procedural issues for the two groups of judgments which should be temporarily excluded from the general rule of the abolished *exequatur* proceedings are regulated the same as under the currently applicable Brussels I Regulation. Regarding the grounds for refusal of enforcement, it should, however, no longer be possible to invoke violations of the rules on the jurisdiction of the court of origin.

The consultation process namely showed that the Member States have different views regarding balancing between, on one hand, personality rights and the right to privacy and, on the other hand, the right of expression.[49] Therefore, the needed mutual trust does not yet exist and *exequatur* proceedings should temporarily be maintained, including the (substantive) public policy defence, which enables the refusal of enforcement if one of the cited human rights is considered to be violated.

Also, the regulation of the so-called class actions differs greatly between the Member States. Legal acts which enable class-actions are relatively new in some Member States and the law applicable thereto is not unified.[50] Especially, they have different regimes as to the effects of judgments issued following a so-called class action regarding the individual members of the represented group.[51] In Sweden and Italy such judgment only binds the individuals who have expressed their willingness to participate (the so-called "opt-in" system), whereas in

Portugal, Denmark, and the Netherlands the judgment is binding on all members of the group, except for those who have expressed their will not to participate ("opt-out").[52] *Exequatur* proceedings should therefore still be necessary. It should nevertheless be noted that the problems regarding the binding nature of such judgment could also be addressed by the legal remedy in the state of enforcement which the Commission proposes as a general rule for all judgments, i.e. the remedy enabling violations of fundamental procedural rights to be invoked.

There is, however, great doubt as to whether the final text of the Brussels I bis will differentiate judgments on the grounds of the object of these judgments. In its Draft Report, the EP Committee on Legal Affairs has already expressed its dissent regarding such differentiation.[53] This dissent must, nevertheless, not be interpreted as a rejection of the aforementioned concerns regarding these two groups of judgments. It should be understood in light of the other propositions of the Committee which aim at broadening the protection of the defendant for all judgments.

We agree with the opinion that all judgments should be subject to the same regime (Same also Dickinson, 2011: 6), under the condition that this common regime enables the rejection of judgments violating fundamental substantive and procedural (including jurisdiction) rules. There is, furthermore, one important additional reason for a unified regime: in both groups of judgments which should still be subject to *exequatur*, the protection of specific human rights is at issue, i.e. the different views of the Member States on these human rights. But important differences in the interpretation of the human rights protected by common European acts – the ECHR and the EU Charter on Fundamental Rights[54] – which form a part of the so-called European public policy (See, e.g., Kramberger Škerl, 2011c: 461-490), is surely not welcome and should be overcome rather than accepted. Other important argument supporting the rejection of a different regime for the two groups of judgments is that there are other legal fields where considerable differences in the assessment in different Member States occur, as, e.g., the punitive damages in torts and many others (A. Dickinson, 2011: 8, 9). To recognize a special status only to two of these "delicate" fields is thus inappropriate.

6 Recognition

It must be emphasised that the term *exequatur*, despite its original meaning relating only to enforcement,[55] has come to be used for the recognition and enforcement of judgments alike. Under the current version of the Brussels I Regulation, judgments are recognized *ipso iure*, i.e. without special intermediary proceedings. However, if the question of recognition is raised as a principal or incidental question in proceedings, an interested party can apply for the judgment to be recognised under the same conditions and following the same procedure as

those regarding enforcement.[56] It can therefore be questioned what the practical importance of *ipso iure* recognition is if a special procedure is always needed when a party wishes to avail him/herself of the judgment, or in other words, whether the recognition really occurs *ipso iure*. The situation is similar under the proposed Brussels I bis Regulation. The legal remedies available to the party opposing the enforcement are also available to the party opposing recognition.[57] The wording of the Commission's proposal is somewhat unclear regarding the irreconcilability of judgments. The possibility of invoking this ground for refusal is namely placed in the subsection concerning enforcement and not in the subsection containing the "Common Provisions" on legal remedies.

De lege ferenda, it would be envisegable, following the example of Article 21/3 of the Brussels II bis Regulation,[58] to provide for proceedings for the non-recognition of a judgment, so as to enable the party which deems that the judgment cannot take effect in other Member States to attain legal certainty regarding this issue.

7 The Provisional, Including Protective Measures

Under the Brussels I Regulation, provisional measures can be ordered by the court which has jurisdiction as to the substance of the dispute, but also by the courts in other Member States if these states are sufficiently connected to the dispute.[59] However, by the judgment in the famous *Denilauler*[60] case, the (now) Court of Justice of the European Union (hereinafter: the CJEU) excluded the measures ordered in non-contradictory (*ex parte*) proceedings from the system of facilitated cross-border enforcement under the Brussels I Regulation, so that the national rules apply, which, as a rule, do not allow the enforcement of such measures if ordered by a foreign court. In the *Maersk* case of 2004, the CJEU extenuated the condition regarding the contradictory nature of the provisional measure: the judgment ordering a provisional measure can circulate between Member States even if it was delivered *ex parte* if the defendant could appeal against the judgment before the application for *exequatur* was filed.[61]

Numerous (and the most efficient) provisional measures are ordered without the defendant's participation. Furthermore, time is of the utmost importance regarding such measures. If such decisions cannot "circulate" and a special provisional measure must be applied for in each Member State where the effects of such measure are sought, the time in which the object of the measure could still be protected can expire and the claim remain unsecured. On the other hand, it is true that Member States provide for very different provisional and security measures so that the cross-border enforcement of such measures can present important difficulties. Despite the condition of the close link between the Member State where the measure is sought and the dispute, the danger of abuse persists, namely in the event the party applies for a measure in another Member State for the sole reason that such measure could not be ordered in the Member State where the

proceedings as to the substance are being conducted, and afterwards demands the enforcement of the determined measure in the latter Member State.

The Commission's proposal contains a solution which restrains the currently applicable regime. The Brussels regime of facilitated enforcement should namely only be applicable to the measures ordered by the court which also has jurisdiction as to the substance of the dispute; the criterion of the real connection between the Member State and the dispute thus becomes irrelevant. Similar as in *Maersk*, automatic enforcement should also be possible for "the measures ordered without the defendant being summoned to appear and which are intended to be enforced without prior service of the defendant, if the defendant has the right to challenge the measure subsequently under the national law of the Member State of origin".[62]

This rule does not affect the jurisdiction of the courts not having jurisdiction as to the substance of the matter to order provisional measures, under the condition of the real connecting link between the Member State and the dispute. Article 36 of the Proposal even broadens this jurisdiction to the disputes where the courts of any other state or arbitral tribunals have jurisdiction as to the substance.[63] However, such measures will not have any cross-border effects under the Regulation.

The proposed Article 66 must also be mentioned in this regard. It namely authorises the competent authority in the state of enforcement to adapt the measure which is not known in this state "to one known under its own law which has equivalent effects attached to it and pursues similar aims and interests".

8 Authentic Instruments and Court Settlements

The Commission proposes the abolition of *exequatur* also for authentic instruments and court settlements, which should be subject to the same regime as the judgments. For the time being, the EP Committee on Legal Affairs has not made any comment on this matter.

Part of the doctrine, however, is critical about the extension of the regime applicable to judgments also to authentic instruments, being that the current regime under the Brussels I Regulation is already deemed too liberal (Dickinson, 2011: 8). It is true that, since the court is not involved in making an authentic instrument, it might be too generous to let these instruments take effect automatically in all Member States, without any prior verification by the court in the state of enforcement. However, it is interesting to note that even the existence of an *exequatur* procedure does not guarantee the intervention of a court in the state of enforcement. This is the case in Germany, where notaries are competent for issuing declarations of enforceability for authentic instruments.[64]

The situation is surely different regarding court settlements where, by definition, a court is implicated already in the state of origin. Therefore, we have no reservations regarding court settlements being subject to the same regime as judgments.

9 The Abolition of *Exequatur* and the Protection of Human Rights

The abolition of the verification of a foreign judgment before its recognition or enforcement in another Member State is problematic from the point of view of the protection of human rights. As such judgments do not actually produce effects at the moment when they are issued, but rather at the moment when they are enforced or recognized in view of obtaining some rights, that is also the moment when the consequences of violations of human rights occur. This is true regarding substantive and procedural human rights alike.

For more than a decade, the European Court of Human Rights (hereinafter: the ECtHR) has firmly taken the standpoint that states are liable for violations of human rights committed by a foreign state in the process of issuing a judgment if they give effect to such judgment, i.e. if they recognize or enforce such judgment.[65] States thus have to prevent such judgments from becoming effective on their territory and the application of the public policy exception is the most common means to fulfil this obligation.

All EU Member States are parties to the ECHR and the EU itself, on the basis of the Lisbon Treaty, is to soon accede to the ECHR. EU legal acts will then be subject to the scrutiny of the ECtHR. The Lisbon Treaty also elevated the EU Charter on Human Rights to the EU primary law level. The CJEU will thus have jurisdiction to determine whether the regulations abolishing *exequatur* are compatible with the human rights guaranteed by the Charter.[66]

Both organisations, the Council of Europe and the EU, are thus devoted to the protection of human rights, it is true, however, that the fundamental values of these two organisations are not always identical. Among other things, the EU places much greater importance on the cross-border "movement of judgments" than the Council of Europe.[67] Problems arising from these differences can occur already in applying the current Brussels I Regulation, since the Regulation's requirement of a "manifest" breach of public policy can be interpreted as a lower standard of protection than the one instituted by the ECtHR in the *Pellegrini*[68] case. Additionally, weighing between the protection of human rights and the protection of (other) fundamental principles of the EU law can lead a judge from an EU Member State to be less eager to refuse (or enable) the enforcement of a judgment from another Member State than he/she would be had he/she not had to consider the latter (For more on this question, see Kramberger Škerl, 2011c: 475 et seq).[69]

Naturally, even bigger problems than regarding the Brussels I Regulation can arise from the application of the regulations abolishing *exequatur* without providing for any remedy for the protection of human rights in the state of enforcement. In the *Zarraga* case[70], the CJEU had to balance between the right to be heard of a child in a child abduction case and the free movement of judgments on the return of the child, guaranteed by Article 42 of the Brussels II bis Regulation. The Court could not decide differently but to let the latter prevail, since the obligatory power of the Regulation's provision would otherwise be at stake in all future cases, but we can sense from the motives of the Court's ruling that the Spanish court had not actually protected the child's rights adequately. The CJEU deemed that the existence of remedies in the state of origin suffices. It would be interesting to obtain the opinion of the ECtHR on this question.

As has already been indicated, the lack of protection of "substantive", i.e. non-procedural, human rights is problematic in the Commission's proposal for the Brussels I bis Regulation. Without a general public policy defence it is namely impossible to sanction breaches of fundamental human rights which are not of a procedural nature.

Logically, the next question is the following: could a Member State be convicted by the ECtHR for violating human rights if it recognised or enforced, on the basis of the above mentioned EU acts, a foreign judgment flawed by violations of human rights? The situation is problematic since, on one hand, for the time being, the EU is not yet party to the ECHR, so the victim can only start proceedings before the ECtHR against the states (both of origin and of enforcement) – and not against the EU – which adopted the disputable act, and, on the other hand, the state of enforcement *must* apply EU law to determine whether the judgment from another Member State must be enforced or not and can therefore not avoid the recognition/enforcement of such judgment if the conditions from these acts are fulfilled.

The famous ECtHR *Bosphorus*[71] case must be mentioned in this regard. In this case, the Court held that states are not liable for violations of the ECHR arising out of their obligations as members of international organisations, if, first, they had no discretion in fulfilling this obligation, and second, the organisation in question generally ensures the protection of human rights equal to that of the ECHR. As to the second condition, the ECtHR held that the EU does meet the required standard of protection of human rights. Given the condition of a lack of discretion in fulfilling the obligations under the EU acts, the "Bosphorus test" only applies to regulations which do not provide for a remedy able to prevent enforcement in the event of a violation of the human right at issue. Such is the case with regulations that do not provide for any verification in the state of enforcement, as well as regulations whereunder the allowed verification does not

encompass violations of the human right at issue. This would be the case in the event of a violation of substantive human rights if the Commission's proposal for the Brussels I bis Regulation is adopted. Furthermore, in *Bosphorus*, the ECtHR determined an important exception to the mentioned "amnesty": it namely does not apply if there was a manifest deficiency in the protection of human rights in the case at issue. This criterion will have to be determined on a case-by-case or at least state-by-state basis.[72] If, e.g., the *Zarraga* case clearly fulfils the first two criteria, it is not certain whether we could discard "the exception of a manifest deficiency".

10 The Abolition of *Exequatur* and Mutual Trust between Member States

In addressing the abolition of *exequatur* one cannot avoid some thoughts on mutual trust, which is supposed to be the basis for the planned abolition of *exequatur* and for the rapid (some say "hyperactive") (Galič in: Galič, Betetto, 2011: 27, 31) progress on the path to the free movement of judgments.[73]

It is true that each different treatment of foreign judgments in comparison with domestic ones entails a certain distrust towards the former. If the verification of foreign judgments includes the possibility to invoke the indefinable public policy defence, this brings with it also a certain unpredictability.[74] However, there is, in our opinion, a lack of a causal link between the possible verification of judgments from other Member States and the existence of mutual trust between these states: the entire abolition of the verification of judgments from other Member States would not achieve rapprochement and mutual trust between states, the same as the maintenance of this verification would not ruin this trust if it currently existed.[75] Perhaps even the contrary is true: the more safeguards there are, the more courageous steps we are willing to take. Mutual trust should furthermore also include the trust that courts of other Member States will not abuse of their powers within the verification process and will, on the contrary, help the state of origin to fully protect the common fundamental values. The proposed remedy in the state of enforcement is therefore a step in the right direction.

Mutual trust should grow naturally, on the basis of actual respect for the common values of all the Member States. The fear that the preservation of the possibility of the verification of judgments coming from other Member States would permit or even encourage Member States to protect their special, partial interests is unnecessary since the use of the mechanisms provided for in EU acts is supervised by the CJEU and, to some extent, by the ECtHR, which both keep a vigilant eye on the harmonious, if not unified, practice in this field.

It must also be mentioned that, to the best of our knowledge, no international organisation facilitates the cross-border effects of judgments to the extent of

abolishing every possible verification in the state of recognition and enforcement. Even federal states such as the U.S. and Canada allow for a judgment originating in another federal unit to be refused effect on the grounds of the public policy defence (Schlosser, 2010: 102, 103). This can probably not be interpreted as a sign of a lack of mutual trust between the federal units, but more as a necessary precaution in the process of a judgment taking effects in another legal environment.

The steps towards the "free movement of judgments" in the EU should therefore be taken slowly and with much precaution. Mutual trust should not be presupposed, but encouraged by political, legal and practical measures on an everyday basis.

11 Conclusion

The idea of abolishing *exequatur* is not new and has already been incorporated in several EU acts. They have often been presented as a first step towards the general abolition of *exequatur*. However, it is impossible to deny that in each of the fields where *exequatur* is abolished and no legal remedy (except that of the irreconcilability of judgments) is available in the state of enforcement, such shrinking of the debtor's rights is justified by the special characteristics of each of those fields: in child abduction cases, by the need to proceed as rapidly as possible; in payment orders, by the fact that there is very little possibility that the judgment would be successfully objected to (as well as the fact that the unified procedural rules have to be applied in issuing the judgment); in small claims procedures, by the smaller importance of the claim (and again the unified proceedings); in maintenance, by the need for rapid action and the weaker position of the maintained person. These specifics outweigh, to some extent, the special protection of the debtor in the state of enforcement.

There are, however, no such special reasons to deny the debtor all legal remedies in the state of enforcement when dealing with "normal" judgments in civil and commercial matters. Thus, the Commission's proposal for a legal remedy in the state of enforcement can only be welcomed, although it is, in our opinion, too narrow in allowing only fair trial considerations to be invoked. It seems that the EP will demand the inclusion of at least several other grounds for refusal of enforcement, if not all of those existing in the current text of the Regulation.

The only important procedural difference in comparison to the text currently in force will be the abolition of the *ex parte* proceedings for the assessment of formal requirements for the enforcement of judgments. Being that a legal remedy in the state of enforcement will exist, judgments will not "circulate freely", i.e. judgments issued in other Member States will still (possibly) receive different treatment than domestic ones. In light of the statistics[76] which show that a large

number of proceedings for the declaration of enforceability end in this first phase, i.e. the defendant does not oppose the enforcement, this is a positive change.[77]

Regarding the grounds for refusal of enforcement, violations of fair trail guarantees are sure to be sanctioned (upon the defendant's application), but it would, in the opinion of many (See, Beaumont, Johnston, 2010: 262-264, 276-278; Schlosser, 2010: 101-104; Oberhammer, 2010: 201-202), to which we also adhere, be better to guard the public policy defense covering procedural and substantive public policies alike. The substantive public policy exception is namely the (only) means for the protection of substantive human rights under the ECHR and the EU Charter of Fundamental Rights as well as of the EU (and national) mandatory rules. Even though the violations of the substantive public policy have not often been invoked and even more rarely actually sanctioned by a refusal of enforcement,[78] this is not a reason to abolish this ground for refusal. The rare use of this notion is more proof of the correct approach of the judges who reserve this "last weapon" for the most serious cases. And such cases will also occur in the future; it would be unrealistic to think the opposite. That the states parties to the ECHR violate this Convention is being proved on a daily basis in the case-law of the ECtHR. The possibility to sanction violations of the substantive public policy enables judges to intercept thoroughly unacceptable judgments, and, as has been pointed out (See, e.g., Pabst in: Rauscher (ed.), 2010: 71; Galič in: Galič, Betetto, 2011: 33), can also play a preventive role. Furthermore, the public policy exception has, in the times of European integration, become more of a promoter of the common values than a legal institution that divides, especially since the two European courts keep an eye on the correct application of this notion (Muir Watt, 2001: 539, 543, 544; Basedow, in: Jobard-Bachellier and Mayer (eds), 2005: 65; Poillot Peruzzetto, 2002. 7; Kramberger Škerl, 2011c: 489 et seq). Forcing Member States into awkward situations (*mutatis mutandis*, see the *Zarraga* case), and shifting the burden of sanctioning such violations to the ECtHR does not seem appropriate.

Similar is true regarding the most important rules on jurisdiction: the rules on exclusive jurisdictions and the rules protecting the weaker parties. Excluding even those in the Brussels I bis Regulation could prove to be counterproductive, as these rules are important also outside the concrete legal relationship between litigants, namely for the development of the common market, the effectiveness of proceedings, and state interests. Even if the practical importance of grounds for refusal concerning violations of the rules on jurisdiction has been considered minor,[79] the preventive role of such provisions should not be neglected.[80]

Studying the Commission's proposal regarding the cross-border effects of judgments and considering the currently available echoes from the EP, the step towards the "free movement of judgments" will be much smaller than might have been thought at the beginning of the review process. In light of this it is not

negligible that much effort has been invested in the preparation of the reviewing process, and much effort will have to be invested in the actual application of the modified rules, first by national legislators (the incorporation of the new legal remedy in the state of enforcement) and then by practitioners, desperate in the face of the constant flow of novelties in the field of European civil procedure. The advice given by Professor Oberhammer: "If it ain't broke, don't fix it!" (Oberhammer, 2010: 200) should probably be followed more often by the authors of the new legislation. It is, however, undoubtedly positive that a wide debate has been conducted, not only on the political level, but above all among the legal scholars who have contributed many important findings, views, and ideas regarding the possible regulation of this complex legal field. These are as important now as they will be in any future reforming processes.

Notes

[1] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012 , 16 January 2001, pp. 0001 – 0023.

[2] For an overview of the conducted studies, see the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 21 April 2009, COM(2009) 174 final (hereinafter: the EC Report), pp. 2-3.

[3] See, e.g., Hess, Pfeiffer, Schlosser, *Study JLS/C4/2005/03, Report on the Application of Regulation Brussels I in the Member States*, September 2007, <http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf>, accessed on 30 December 2011, No. 630 et seq.; the Stockholm Programme – an Open and Secure Europe Serving and Protecting Citizens, OJ C115, 4 May 2010, No. 3.1.2.; Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Brussels, 21 April 2009, COM(2009) 175 final, p. 2 et seq.; For an overview of the political processes and acts which were at the basis of the reviewing of the provisions of the Brussels I Regulation on the cross-border effects of judgments, see, e.g., A. Galič in: A. Galič, N. Betetto, *Evropsko civilno procesno pravo* [European Civil Procedure], GV Založba, 2011 (hereinafter: Galič, Betetto), pp. 17-23.

[4] Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L143, 30 April 2004, pp. 0015-0039; Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L199, 31 July 2007, pp. 0001-0022; Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L399, 30 December 2006, pp. 0001-0032; Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L007, 10 January 2009, pp. 0001-0079. The latter abolishes the *exequatur* for the judgments issued in Member States bound by the Hague Protocol (Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations) <http://www.hcch.net/index_en.php?act=conventions.text&ci

d=133>, accessed on 30 December 2011, which was adopted by the Hague Conference on Private International Law and was first ratified by the EU on 8 April 2010. For these judgments, a special review in the state of origin is possible on the basis of Article 19; however, no such legal remedy is available in the state of enforcement.

[5] Under the mentioned regulations it is still possible to invoke, in the state of enforcement, the irreconcilability of judgments. See Article 21/1 of the Regulation on the European Enforcement Order, Article 22 of the Regulation on the European Order for Payment, Article 22/1 of the Regulation on the European Small Claims Procedure, and Article 21/2 of the Maintenance Regulation, all cited *supra* No. 4.

[6] It should be emphasised that the procedural guarantees regarding the service of the initial document in the proceedings are of particularly great importance in these regulations, only the verification of compliance to the EU standards is left to the state of origin, leaving the state of enforcement with the sole role of an "enforcement assistant" without any controlling competences. (See, e.g., Pabst in: Rauscher (ed.), 2010, No. 14 and authors cited there).

[7] For an overview of the consultation process, see the Impact Assessment, Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), Brussels, 14 December 2010, SEC(2010) 1547 final (hereinafter: the Impact Assessment), No. 1.4.

[8] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition of judgments in civil and commercial matters, COM(2010) 748 final, Brussels, 14 December 2010 (hereinafter: the Proposal). For an overview (in Slovenian) of the proposed novelties, see Kramberger Škerl, 2011a: 17-19.

[9] This is in line with the predominant importance of the right to be heard in the EU human rights context (For more on this, see Storskrubb, 2008: 87-91).

[10] The EC Report, No. 3.1.

[11] See, e.g., German BGH, 26 August 2009, XII ZB 169/07, where the enforcement of a Polish judgment on maintenance obligation was refused because the alleged father was condemned to pay maintenance for a child only on the basis of the allegations of a *hear-say* witness, the defendant's allegations were, however, completely ignored by the court. Even though the initial document in the proceedings was duly served, there was obviously a breach of the right to be heard. Schilling argues that the maintenance obligation can be detached from the decision on paternity and thus recognized and enforced in Germany as a simple pecuniary judgment. Schilling, p. 38. In this sense also German BGH, 14 February 2007, XII ZR 163/ 05, and French Cour de cassation, Civ. 1re, 12 July 1994, No. 92-17.461-E. The French Cour de cassation, e.g., judged that the French public policy was infringed where a default judgment contained no reasons and no additional documents were presented enabling the French court to know the reasons of the foreign judgment: Civ. 1re, 28 November 2006, No. 04-19031, and Civ. 1re, 22 October 2008, No. 06-15577.

[12]The application of Article 42 of the Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ L 338, 23 December 2003 (the Brussels II bis Regulation) was at the centre of this affair. Interestingly, the Brussels II bis was in fact the first EU act abolishing the *exequatur* in two specific areas (return of a child and rights of access).

[13] The abolition of *exequatur* in a broad sense of the word was probably also the goal the EU wanted to achieve regarding all judgments, before the consultation process revealed that

the grounds for refusal could and should, at least to some extent, be separated from the procedure of granting the *exequatur*. See, e.g., Oberhammer, 2010: 200.

[14] Article 37/3 of the Proposal.

[15] Three years after the entry into force of the modified Regulation the Commission shall submit to the EP, the Council and the European Economic and Social Committee a report reviewing the continuing need to maintain the *exequatur* for these judgments. Article 37/4 of the Proposal.

[16] For the progress of the legislative procedure, see EP, Legislative Observatory, <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=EN&procnum=COD/2010/0383>, accessed on 29 November 2011.

[17] Draft Report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (COM(2010)0748 – C7-0433/2010 – 2010/0383(COD)), Rapporteur Tadeusz Zwiefka, 2010/0383(COD), 28 June 2011 (hereinafter: EP Draft Report, June 2011).

[18] Committee on Legal Affairs, AMENDMENTS 59 – 120, Draft report Tadeusz Zwiefka (PE467.046v01-00), 2010/0383(COD), 19 October 2011, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-473.813+04+DOC+PDF+V0//EN&language=EN>, accessed on 5 December 2011 (herein after: EP Amendments, October 2011).

[19] *Supra* No. 4.

[20] Article 45 of the Proposal. See, e.g., Article 19 of the Regulation on European Enforcement Order, cited *supra* No. 4.

[21] Amendment 33 regarding Article 45 of the Proposal: EP Draft Report, June 2011.

[22] Article 46 of the Proposal.

[23] Articles 38-41 of the Brussels I Regulation.

[24] Article 42 of the Brussels I Regulation.

[25] The Impact Assessment, p. 12.

[26] Article 43 of the Brussels I Regulation.

[27] It is unclear whether, deciding on appeal, the court's assessment is restricted to the grounds for refusal invoked by the defendant, or else the court can also verify the existence of other grounds, especially the contrariety to public policy (For more on this question, see Kramberger Škerl, 2008 (not published): 329-331).

[28] Article 44 of the Brussels I Regulation.

[29] The Impact Assessment, p. 13.

[30] Article 9.1.1 of Zakon o sodnih taksah (ZST-1) [Court Fees Act], Official Gazette RS (hereinafter: OG RS) No. 37/2008, with further amendments.

[31] In Slovenia: *sklep o izvršbi*, Article 44 of Zakon o izvršbi in zavarovanju [Enforcement and Securing of Civil Claims Act], OG RS No. 3/2007 (consolidated version), with further amendments (hereinafter: ZIZ); in Austria: *Exekutionsbewilligung*, regulated in Articles 3-16 of Exekutionsordnung [Enforcement Act].

[32] Article 55 of ZIZ.

[33] Article 108/6 of Zakon o mednarodnem zasebnem pravu in postopku [Private International Law and Procedure Act], OG RS, Nos. 56/1999, 45/2008.

[34] A similar solution can be found in the Austrian implementation of the *exequatur* procedure under the Brussels I Regulation, where the same (lower) courts decide on the *exequatur* and the application for enforcement (For details, see Ekart, Rijavec, 2010: 77).

[35] The court simply issues an "enforceable judgment", i.e. a copy of the judgment followed by a declaration of enforceability (*Vollstreckungsklausel*). See Article 724 of the German Zivilprozessordnung [Civil Procedure Act]. The enforcement can be opposed to by an autonomous legal remedy called opposition to enforcement (*Vollstreckungsgegenklage*). For (the difficulties in) the combining of the national rules on enforcement and the ones from the Brussels I Regulation see, e.g., Ekart, Rijavec, 2010: 142-146.
[36] Amendment No. 114 regarding Article 40 of the Proposal (filed by Diana Wallis), in: EP Amendments, October 2011.
[37] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ L 324, 10 December 2007, pp. 0079 - 0120.
[38] Amendment No. 114 regarding Article 40 of the Proposal (filed by Diana Wallis), in: EP Amendments, October 2011.
[39] The Service Regulation namely does not apply where the domicile of the defendant is unknown (Article 1/2). Thus, national legislations apply (For more on the national rules on this matter, see, e.g., Kramberger Škerl, in: Dahlberg (ed.), 2011b: 121-145).
[40] For the case-law of the CJEU regarding the protection of fundamental procedural rights via the "general" public policy defense from the Brussels Convention and Brussels I Regulation, see CJEU, *Krombach*, C-7/98, and CJEU, *Gambazzi*, C-394/07 (For an analysis of this case-law, see, e.g., Kramberger Škerl, 2011c: 468–474; Beaumont, Johnston, 2010: 253 et seq). Since the judgment in *Krombach*, Article 34/2 of the Brussels I Regulation has actually become redundant (see, e.g., Pataut in: Ancel et al. (eds.), 2008: pp. 386–90).
[41] EP Draft Report, June 2011, Amendment 34 regarding Article 46/1 of the Proposal.
[42] It is interesting to mention that no review of the jurisdiction of the court in the state of origin is permitted under Article 24 of the Brussels II bis Regulation either.
[43] Article 43 of the Proposal.
[44] The emphasising of the consumer protection is understandable being that the "well-being" of the consumer is the final goal of the free market (see, e.g., Grilc, 2011: 120), which is historically the most important goal of the EU.
[45] EP Amendments, October 2011, Amendment 107 regarding Article 46/1 (filed by T. Zwiefka).
[46] Article 35/1 of the Brussels I Regulation. It is unclear why rules protecting the employee are not included in this article. One possible explanation is that the reference to the new Section 5 of the Regulation was omitted by mistake when transforming the text of the Brussels Convention, which did not especially protect the employees, into the Regulation.
[47] EP Draft Report, June 2011, Amendment 34 regarding Article 46/1 of the Proposal.
[48] See, e.g., CJEU, *Krombach v. Bamberski*, C-7/98, 28 March 2000, and CJEU, *Renault v. Maxicar*, C-38/98, 11 May 2000.
[49] The introductory text to the Proposal, pp. 6-7.
[50] The Impact Assessment, p. 17.
[51] For an analysis of the regulation of collective actions in the Brussels I Regulation see: Hess, 2010: 116-121.
[52] The introductory text to the Proposal, p. 7.
[53] Draft Report, June 2011, Amendment 35 et seq.
[54] Charter of Fundamental Rights of the European Union, OJ C364/1, 18 December 2000.
[55] The Latin word *exequatur* means: "Let him execute." or "He may execute."
[56] Articles 33/2 and 33/3 of the Brussels I Regulation.
[57] Articles 45 and 46 of the Proposal.

[58] Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ L338, 23 December 2003, pp. 0001-0029.
[59] Article 31 of the Brussels I Regulation. The condition of the real connecting link is found in the CJEU judgment in *Van Uden v. Deco-Line*, C-391/95, 17 November 1998.
[60] CJEU, *Denilauler v. SNC Couchet Frères*, 125/79, 21 May 1980. For the application of this rule to the Brussels I Regulation, see, e.g., the judgment of the German Federal Supreme Court from 21 December 2006, No. IX ZB 150/05.
[61] CJEU, *Mærsk Olie & Gas A/S v. Firma M. de Haan en W. de Boer*, C-39/02, 14 October 2004, paras. 50-52.
[62] Article 2.a) of the Proposal.
[63] For the extension to the disputes for which an arbitral tribunal has jurisdiction as to the substance of the matter, see already CJEU, *Van Uden v. Deco-Line*, C-391/95, 17 November 1998.
[64] Annex No. II to the Brussels I Regulation, relating to Article 39/1 of the Regulation (See also Ekart, Rijavec, 2010: 78).
[65] See especially ECtHR, *Pellegrini v. Italy*, 20 July 2001, Reports of Judgments and Decisions 2001-VIII (For an analysis of the ECtHR case-law on this matter, see, e.g., Kramberger Škerl, 2011c: 467 et seq).
[66] Article 263 of the TFEU. See also: CJEU, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 314/85, 22 October 1987. (In this sense also Pabst in: Rauscher (ed.), 2010, Nos. 41, 42; and Hess in Mansel et al. (eds.), 2004: 350, 357–58).
[67] One must not, however, deduce from the above mentioned that the ECtHR is insensitive to the argument of promoting judicial co-operation between states in the field of the enforcement of judicial decisions. Since the *Hornsby* judgment (ECtHR, 19 March 1997, Reports 1997-II), the right to enforcement of a judgment is, namely, a part of the right to fair trial. For the liability of states for *not* recognizing a foreign judgment, see the recent judgments in *Wagner* (ECtHR, 28 June 2007) and *Negrepontis-Giannisis* (ECtHR, 3 May 2011).
[68] ECtHR, *Pellegrini v. Italy*, 20 July 2001, Reports of Judgments and Decisions 2001-VIII.
[69] For a general analysis of the relationship between human rights and the fundamental freedoms of the EU (see Perišin, 2006: 69-98; and Grilc, 2011:117-139).
[70] CJEU, *Zarraga v. Pelz*, C-491/10 PPU, 22 December 2010.
[71] ECtHR, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, 30 June 2005, Reports of Judgments and Decisions 2005-VI.
[72] Since the ECtHR has decided that a remedy is only efficient if the body deciding on the remedy is independent from the one that issued the original decision, Schilling argues that the *Bosphorus* protection only applies if the remedies against the issuing body provided for in the regulations have a devolutive effect. Schilling, p. 40. The author specifically refers to the European Enforcement Order Regulation and the Maintenance Regulation, both cited *supra* No. 4.
[73] Thoroughly on the question of mutual trust in European Civil Procedure, see, e.g., Galič in: Galič, Betetto, 2011: 29-33.
[74] In spite of this fact, the authors emphasize the role of the public policy defense in diminishing or regulating inconsistencies and competition between the national legal orders (See, e.g., Picheral, 2001: 21).
[75] Pabst speaks of the so-called *petitio principii* (begging the question), where the goal to be achieved is supposed to exist already, so as to serve as a basis for the abolition of *exequatur* (Pabst in: Rauscher (ed.), 2010: Nos. 15 and 16).

[76] The Impact Assessment, p. 12.
[77] This change is the more positive the longer the *exequatur* proceedings take in a specific Member State and the more costly they are.
[78] EC Report, p. 4. Francq cites an Italian decision establishing a breach of public policy where one party was obliged to fulfil a distributorship agreement which had not been authorised under Italian law (Francq in: Magnus, Mankowski (eds.), 2007: 34).
[79] The EC Report, p. 4.
[80] The possibility of refusing the enforcement because of the violation of certain rules on jurisdiction is, lastly, in line with the Treaty on the Functioning of the European Union, consolidated version, OJ C115, 9 May 2008, pp. 47 et seq.: (Dickinson, 2011: 10). As to the possible abuses, we can, e.g., imagine the temptation of the "stronger" parties to try to circumvent the protective provisions: if they succeed in the state of origin, they will no longer be able to be sanctioned in the state of enforcement; if they fail, no real harm will occur.

References

Treaties, Legislation:

- Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L012, 16 January 2001, pp. 0001 – 0023 *(cited as: the Brussels I Regulation)*;
- Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L143, 30 April 2004, pp. 0015-0039;
- Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L199, 31 July 2007, pp. 0001-0022;
- Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L399, 30 December 2006, pp. 0001-0032;
- Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L007, 10 January 2009, pp. 0001-0079;
- Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations <http://www.hcch.net/index_en.php?act=conventions.text&cid=133>, accessed on 30 December 2011;
- Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition of judgments in civil and commercial matters, COM(2010) 748 final, Brussels, 14 December 2010;
- Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ L338, 23 December 2003, pp. 0001-0029 *(cited as: the Brussels II bis Regulation)*;
- Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No. 1348/2000, OJ L324, 10 December 2007, pp. 0079 – 0120;

- Charter of Fundamental Rights of the European Union, OJ C364, 18 December 2000, pp. 1 et seq.;
- Treaty on the Functioning of the EU, consolidated version, OJ C115, 9 May 2008, pp. 47 et seq. *(cited as: TFEU);*
- Zakon o izvršbi in zavarovanju [Enforcement and Securing of Civil Claims Act], Official Gazette of the Republic of Slovenia No. 3/2007 (consolidated version), with further amendments;
- Zakon o mednarodnem zasebnem pravu in postopku [Private International Law and Procedure Act], OG RS Nos. 56/1999, 45/2008;
- Exekutionsordnung (Austria), consolidated version < http://www.jusline.at/Exekutionsordnung_(EO).html>, accessed on 10 January 2012;
- Zivilprozessordnung (Germany), consolidated version < http://www.gesetze-im-internet.de/zpo/>, accessed on 10 January 2012.

Reports, Studies, Political Statements:

- European Parliament, Committee on Legal Affairs, Draft Report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (COM(2010)0748 – C7-0433/2010 – 2010/0383(COD)), Rapporteur Tadeusz Zwiefka, 2010/0383(COD), 28 June 2011 *(cited as: EP Draft Report, June 2011)*;
- Committee on Legal Affairs, AMENDMENTS 59 – 120, Draft report Tadeusz Zwiefka (PE467.046v01-00), 2010/0383(COD), 19 October 2011, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-473.813+04+DOC+PDF+V0//EN&language=EN>, accessed on 5 December 2011 *(cited as: EP Amendments, October 2011)*;
- Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 21 April 2009, COM(2009) 174 final *(cited as: the EC Report)*;
- B. Hess, T. Pfeiffer, P. Schlosser, *Study JLS/C4/2005/03, Report on the Application of Regulation Brussels I in the Member States*, September 2007, < http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf>, accessed on 30 December 2011;
- Stockholm Programme – an Open and Secure Europe Serving and Protecting Citizens, OJ C115, 4 May 2010;
- Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Brussels, 21 April 2009, COM(2009) 175 final;
- Impact Assessment, Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), Brussels, 14 December 2010, SEC(2010) 1547 final *(cited as: Impact Assessment)*.

Articles, Monographies:

- Basedow, J. (2005) *Recherches sur la formation de l'ordre public européen dans la jurisprudence*, in: Jobard-Bachellier, M.-N. & Mayer, P. (eds), Le droit international privé: esprit et méthodes: Mélanges en l'honneur de Paul Lagarde (Paris: Dalloz), pp. 55-74;
- Beaumont, P. & Johnston, E. (2010) *Can* exequatur *be abolished in Brussels I whilst retaining a public policy defense?*, *Journal of Private International Law*, 6(2), pp. 249-279;
- Dickinson, A. (2011) *The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) ("Brussels I bis" Regulation)*, Sydney Law School Legal Studies Research Paper, No. 11/58, published by the European Parliament, Directorate-General for Internal Policies;
- Ekart, A. & Rijavec, V. (2010) *Čezmejna izvršba v EU* (Ljubljana: GV Založba);
- Galič, A. & Betetto, N. (2011) *Evropsko civilno procesno pravo* (Ljubljana: GV Založba);
- Grilc, P. (2011) *(Razvoj) razmerja med temeljnimi pravicami in svoboščinami ter temeljnimi ekonomskimi svoboščinami in pravili o konkurenci v pravu EU*, Zbornik znanstvenih razprav Pravne fakultete Univerze v Ljubljani, pp. 117-139;
- Hess, B., (2011) *Die Reform der EuGVVO und die Zukunft des Europäischen Zivilprozessrechts*, IPrax, 2, pp. 125-130;
- Hess, B. (2010) *Cross-border Collective Litigation and the Regulation Brussels I*, IPrax, 2, pp. 116-121;
- Hess, B. (2004) *EMRK, Grundrechte-Charta und europäisches Zivilverfahrensrecht*, in: Mansel, H.-P. et al. (eds.), Festschrift für Erik Jayme (München, Sellier), pp. 339-359;
- Kramberger Škerl, J. (2011a) *Predlog spremembe uredbe Bruselj I: nov korak k učinkovitejšemu evropskemu sodnemu prostoru*, Pravna praksa, 4, pp. 17-19;
- Kramberger Škerl, J. (2008) *L'ordre public international dans la reconnaissance et l'exécution des jugements étrangers – Etude comparée : Slovénie, France, Union européenne*, Ph.D. thesis (Poitiers, Ljubljana: (not published)) ;
- Kramberger Škerl, J. (2011b) *The service of court documents on persons with unknown residence: a comparative analysis with an emphasis on Slovenia*, in: M. Dahlberg (ed.), Party autonomy - Civil procedural views on party autonomy, Franz Klein, EU law and more (Uppsala: Iustus Förlag), pp. 121-145;
- Kramberger Škerl, J. (2011c) *European Public Policy (with an Emphasis on the* Exequatur *Proceedings)*, Journal of Private International Law, 7(3), pp. 461-490;
- Magnus, U. & Mankowski, P. (eds.) (2007) *Brussels I Regulation* (München: Sellier);
- Muir Watt, H. (2001) "*Evidence of an Emergent European Legal Culture: Public Policy Requirements of Procedural Fairness under the Brussels and Lugano Conventions*" Texas International Law Journal, 36, pp. 539 et seq.;
- Oberhammer, P. (2010) *The Abolition of* Exequatur, IPRax, 3, pp. 197-203;
- Pataut, E. (2008) *Notifications internationales et règlement 'Bruxelles I',* in : Ancel, J.-P., et al. (eds.), Vers de nouveaux équilibres entre ordres juridiques, mélanges en l'honneur de Hélène Gaudemet-Tallon (Paris: Dalloz), pp. 377-395.
- Perišin, T. (2006) *Interaction of Fundamental (Human) Rights and Fundamental (Market) Freedoms in the EU*, Croatian Yearbook of European Law and Policy, No. 2, pp. 69-98;

- Picheral, C. (2001) *L'ordre public européen, Droit communautaire et droit européen des droits de l'homme* (Aix-en-Provence : Centre d'études et de recherches internationales et communautaires (CERIC), Université Aix-Marseille);
- Poillot Peruzzetto, S. (2002) *Ordre public et loi de police dans l'ordre communautaire*, Comité français de droit international privé, 28 March 2002, <http://www.peruzzetto.eu/art/ordrepublic-loipolice-comitedip-plan.pdf>, accessed on 6 January 2012;
- Rauscher, T. (ed.) (2010) *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR* (München: Sellier);
- Schilling, T. (2011) *Das* Exequatur *und die EMRK*, IPrax, 1, pp. 31-40;
- Schlosser, P. F. (2010) *The Abolition of* Exequatur *Proceedings – Including Public Policy Review?* IPRax, 2, pp. 101-104.
- Storskrubb, E. (2008) *Civil Procedure and EU Law, A Policy Area Uncovered* (Oxford: Oxford University Press).

Case-Law

- CJEU, *Zarraga v. Pelz*, C-491/10 PPU, 22 December 2010;
- CJEU, *Gambazzi v. DaimlerChrysler*, C- 394/07, 2 April 2009;
- CJEU, *Krombach v. Bamberski*, C-7/98, 28 March 2000;
- CJEU, *Van Uden v. Deco-Line*, C-391/95, 17 November 1998;
- CJEU, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 314/85, 22 October 1987;
- CJEU, *Denilauler v. SNC Couchet Frères*, 125/79, 21 May 1980 ;
- ECtHR, *Negrepontis-Giannisis v. Greece*, 3 May 2011, accessible in HUDOC database < http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (only in French);
- ECtHR, *Wagner and J. M. W. L. v. Luxembourg*, 28 June 2007, accessible in HUDOC database ;
- ECtHR, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, 30 June 2005, Reports of Judgments and Decisions 2005-VI;
- ECtHR, *Pellegrini v. Italy, 20 July 2001*, Reports of Judgments and Decisions 2001-VIII;
- ECtHR, *Hornsby v. Greece*, 19 March 1997, Reports of Judgments and Decisions 1997-II;
- (German) BGH, 26 August 2009, XII ZB 169/07;
- (German) BGH, 14 February 2007, XII ZR 163/ 05;
- (German) BGH, 21 December 2006, IX ZB 150/05;
- (French) Cour de cassation, Civ. 1re, 22 October 2008, No. 06-15577;
- (French) Cour de cassation, Civ. 1re, 28 November 2006, No. 04-19031;
- (French) Cour de cassation, Civ. 1re, 12 July 1994, No. 92-17.461-E