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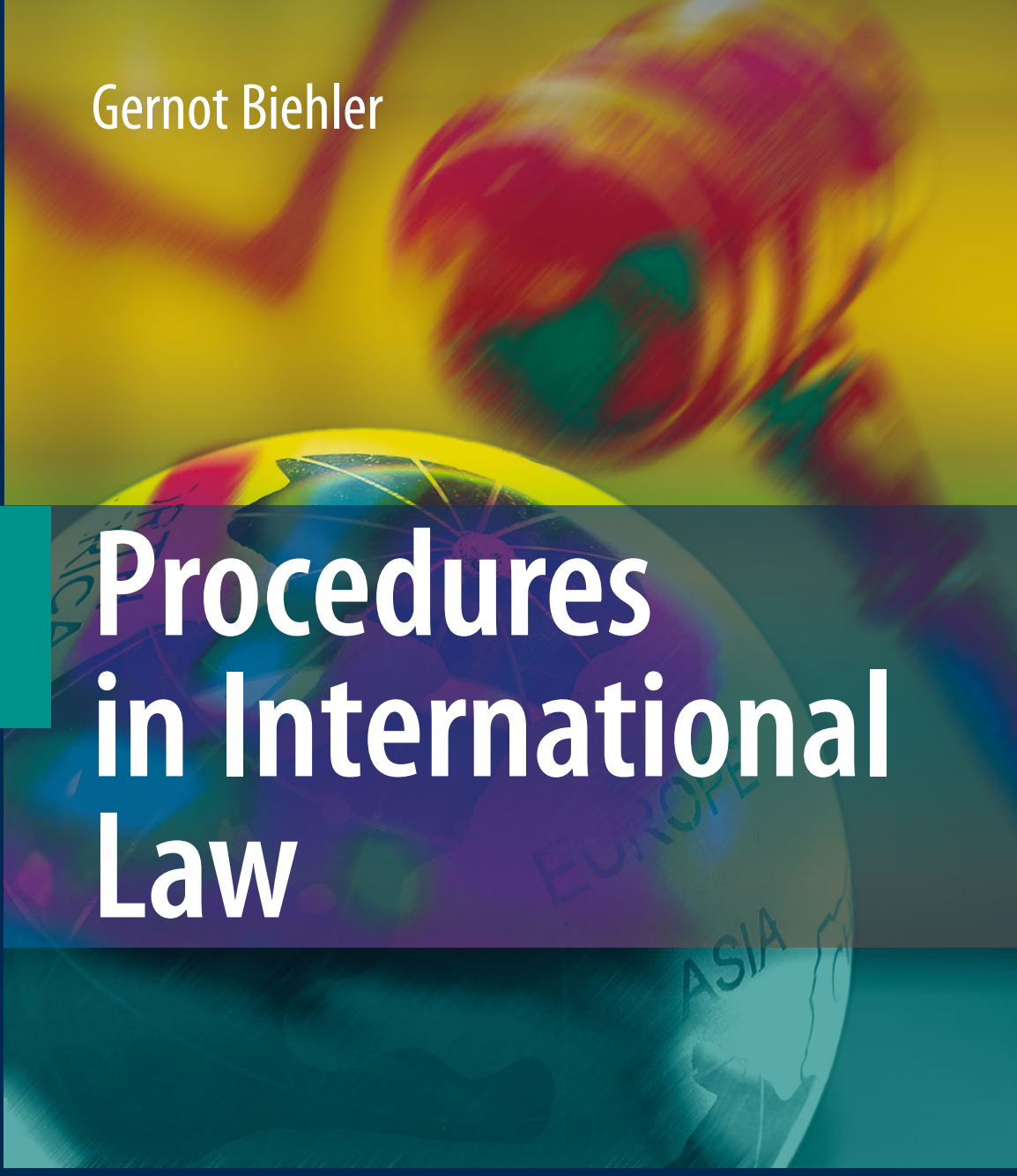

Procedures in International Law

Springer

Chapter 4

National Legal Procedures

The focus in this chapter is on those aspects of legal proceedings before national courts which in some way determine international law. On the one hand, national legal procedures are easy to assess; it is the national courts in the fixed hierarchical framework provided by the constitutional and procedural rules of each country which apply and determine both national and international law. Decisions of national and international courts are referred to together as providing a subsidiary means for the determination of the rules of law in Article 38.1.d of the ICJ Statute. They are further characterised in the context of international law by the PCIJ in the *Certain German Interests in Upper Silesia* case:[1]

> "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute activities of States, in the same manner as do legal decisions or administrative measures."

Legal decisions of courts are equated by the PCIJ with other activities of states, such as their laws and administrative measures. This clarifies that national decisions form part of the means by which each state expresses its will. In the words of Professor Mann: "A judgment, viz. a command conveyed through the courts, is not essentially different from a command expressed by legislative or administrative action."[2]

In view of the definition of international customary law given by Article 38.1.b of the ICJ Statute, decisions of national courts are in a favourable position to provide "evidence of a general practice accepted as law", as national decisions not only create a certain practice (*e.g*. in granting diplomatic immunity, assuming contentious jurisdiction or not) but provide with this practice the necessary acceptance as law, the *opinio iuris*, as this is exactly what courts pronounce on. Furthermore, they avoid the sometimes unpleasant experience of international courts and tribunals of not being able to ensure compliance with their decisions as sometimes the state parties concerned ignore these. Adherence and enforcement are a matter of course in relation to the decisions of national courts also in matters of international

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1 *Germany v Poland* [1925] PCIJ Ser A No. 7 p. 19.

2 F.A. Mann, "The Doctrine of Jurisdiction in International Law" in (1964) *Recueil des Cours* p. 73.

law and deserve no further mention. Therefore, the decisions of national courts in areas relevant to international law are in a most privileged position and merit the highest attention. This is expressed again by the PCIJ in the case concerning the *Administration of the Prince von Pless*:[3]

> "Whereas the Court does not consider it necessary to pass judgment upon the question of the applicability of the principle as to the exhaustion of internal means of redress in the present Order since, in any event, it will certainly be an advantage of the Court, as regards the points which have to be established in the case, to be acquainted with the final decision of the Supreme Polish Administrative Tribunal upon the appeals brought by the Prince von Pless and now pending before that Tribunal; and as the Court must therefore arrange its procedure so as to ensure that this will be possible. Whereas it is desirable that the Agent for the Polish Government should be enabled, when preparing his Counter-Case on the merits, to take these final decisions into account."

The PCIJ wished to determine what international law was only after the relevant state practice and *opinio iuris* had been clarified by the national court and did not want to pre-empt this stage. It is noteworthy that this regard for the relevant national decision was irrespective of any procedural necessity to exhaust local remedies, a matter which was not pronounced upon by the PCIJ in this case. However, it was clarified that "the Court must arrange its procedure" to take note of the national court's decision on the issue. This practice is suggested by the PCIJ to be the appropriate stance of international law towards national legal procedures addressing the relevant issues. It guards against discarding them as insignificant or inferior in relation to the determination of international law compared to activities of forums established under international law.

4.1 Jurisdiction

The first procedural step in any legal suit is the assumption of jurisdiction. This is the self assertion of the court's competence or power to decide the case brought before it by the applicant, claimant or appellant. In international legal terminology this judicial authority reflects the self assertion of power of one state concerning its territorial, temporal or subject matter reach. This is when international law comes in, phrased in the words of a senior English judge and scholar:[4]

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[3] *Germany v Poland* [1933] PCIJ Ser A/B No.52 of 4 February 1933 p. 9.

[4] Lawrence Collins, "Public International Law and Extraterritorial Orders" in *Essays in International Litigation and the Conflicts of Laws* (Clarendon, 1994) p. 99. Lord Justice Lawrence Collins as he now is, was one of the first solicitors (Partner of Herbert & Smith, London which was founded by Professor F.A. Mann) ever to become one of HM

> "It should not be necessary nowadays to demonstrate that the exercise of civil jurisdiction by national courts is subject to the constraints of public international law. It is true that terminology sometimes disguises the public international law element. When Kerr on Injunctions stated that the jurisdiction to order acts abroad is 'not founded upon any pretension to the exercise of judicial or administrative acts abroad[5]', or when Lord Justice Kerr said that there was no reason of international comity preventing worldwide Mareva injunctions from being granted,[6] they were saying that no breach of foreign sovereignty would be involved. Sometimes the reference to public international law is more explicit, as when Lord Donaldson MR confirmed that the Mareva injunction should not conflict with 'the ordinary principles of international law' and that, in particular, 'considerations of comity require the courts of this country to refrain from making orders which infringe the exclusive jurisdiction of the courts of other countries'."[7]

What is of interest in the procedures of national courts is their assumption of jurisdiction *vis à vis* other states' jurisdictions, that is to say the limits on jurisdiction resulting from the international or inter-state character of the proceedings.[8] Again in the words of Professor Mann: "It [civil jurisdiction] cannot claim international validity except if and in so far as it keeps within the limits which public international law imposes."[9]

Decisions determining the limits of a national court's jurisdiction also determine the limits of power asserted by one state towards other concerned states. Such determinations are state practice or "facts" as the PCIJ has phrased it. The basic rule of jurisdiction is that it is determined independently by every state's own rules, traditions and practices. It is a primary expression of any state's sovereignty and legal independence, which finds its only limits in the co-ordination with other states' jurisdictions.[10]

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judges in the Superior Courts of England, and is now in the Court of Appeal. He is a distinguished Scholar in the field and Fellow of Wolfson College, Cambridge.

5 *Kerr on Injunctions* (6th ed., Paterson, 1927) p. 11, a reference to *Lord Portarlington v Soulby* (1834) 3 My & K 104, 108.

6 *Babanft International Co. SA v Bassatne* [1990] Ch 13, 32 (CA).

7 *Derby & Co. Ltd v Weldon* (*Nos. 3 & 4*) [1990] Ch 65, 82 (CA).

8 Trevor C. Hartley, "The Modern Approach to Private International Law – International Litigation and Transactions from a Common-Law Perspective" in (2006) 319 *Recueil des Cours* p. 41.

9 F. A. Mann, "The Doctrine of Jurisdiction in International Law" in (1964) *Recueil des Cours* p. 73.

10 Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 46 *et seq*.

Such rules determining the assumption of jurisdiction and the exclusion of other jurisdictions can be exorbitant[11] or sometimes even extravagant in relation, for example, to individuals caught and detained abroad by the US military:

> "the individual shall not be privileged to seek any remedy or maintain any proceedings, directly or indirectly, or to have any such remedy or proceedings sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal."[12]

This assertion of executive power in this US order to the detriment of both national and foreign courts' jurisdiction exemplifies the fact that every state determines its own jurisdiction or reach of power independently.[13] Such assumptions of jurisdiction must lead to a conflict with other jurisdictions as any state which has an equivalent rule could make an incompatible claim to hear the case. It is the co-ordination of such claims which is of interest here as it is international law which co-ordinates the conflicting practices of states. The jurisdiction assumed in this US order refers to individuals caught and detained by the US military outside the territory of the United States. It reflects the origins of all jurisdictions which is the power to summon someone. The reverse of the usual understanding of habeas corpus, not as the Sovereign's grant to his subjects, but as a description of an individual in custody to the Sovereign "habeas corpus" would express this situation. All English speaking jurisdictions base the competence of their courts primarily on the presence of the defendant in their territory; as expressed by Justice Holmes: "the foundation of jurisdiction is physical power",[14] meaning sovereignty. Or as Chief Justice Warren puts it, all restrictions on the jurisdiction of courts "are consequences of territorial limitations on the power of the respective States."[15] From the international law perspective this is accepted as expressed by the PCIJ in *Lotus*:

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[11] See Article 3.2 and Annex I with a list of exorbitant jurisdictions "prohibited" under Regulation 44/2001, but accepted by the ECJ in *Krombach v Bamberski* (Case C-7/98); [2001] QB 709. See also Article 18 of the draft Hague Convention on Jurisdiction (which never came into force) with a comparable list of exorbitant assumptions of jurisdictions which are discouraged; http://www.hcch.net/upload/expl37e.pdf.

[12] US Presidential Order of 13 November 2001, for more extensive reference see Biehler, *op. cit*. p. 57 at footnote 31.

[13] Schack, Heimo, *Interntionales Zivilverfahrensrecht* (3rd ed., C.H.Beck, Munchen, 2002) p. 87, para. 186 "… jeder Staat zieht durch seine nationalen Regeln so viele oder so wenig Rechtsstreitigkeiten an sich, wie es ihm zweckmäßig erscheint. Diese Freiheit wird durch keine allgemeine Regeln des Völkerrechts eingeschränkt." ("Every state determines by its own rules how much or how little litigation it assumes and it thinks appropriate. This liberty is not limited by any general rule of international law").

[14] *McDonald v Mabee* 243 US 90 (1917).

[15] *Hanson v Denckla* 357 US 235 (1958).

> "The first and foremost restriction imposed by international law upon a State is that … it may not exercise its power in any form in the territory of another state … It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law."[16]

On this basis of this sovereign self determination of jurisdiction the co-ordination of jurisdictions in international law, for example, in the Brussels, Hague and Rome Conventions takes place. They set out a framework in certain areas but do not change the basic nature of national jurisdiction as a display of sovereign power. Beyond this very basic but still valid understanding of jurisdiction it is the more widespread procedural means affecting other jurisdictions such as service out of jurisdiction, enforcement of foreign decisions, application of foreign laws and any injunctive relief which may have extraterritorial effects. Inside the conventional framework it is in these more subtle fields that the judicial delineation of states' spheres of power evolve in national courts' decisions.

The procedures of national courts revolving around jurisdiction may be divided into different groups; fundamentally, there are two directions; either courts want to extend their jurisdiction in areas which may also be claimed by other jurisdictions or they limit their own jurisdiction in cases where general understanding might have expected them to assume it. The first group is procedurally determined by measures like service out of jurisdiction; orders and injunction with potential extraterritorial effect, for example, Mareva or Bayer injunctions or garnishee orders. The procedural means of the second group may be called jurisdictional avoidance techniques and these are related to immunity, prerogatives of the executive power, judicial restraint regarding foreign policy activities, act of state, comity between nations or courts or governmental act exceptions. Taken together they establish the sphere of power determined by the "state" practice of national courts both nationally and internationally. They pose special challenges for lawyers who may be confronted with international legal contexts before national courts. All procedural in nature, they predetermine the outcome of any case and are such a significant aspect of procedures in international law that they deserve special consideration here. Proceedings before domestic courts may be divided into a group which stretches the boundaries of the court's power and jurisdiction and another group which may be labelled as indicative of judicial restraint. Both groups of cases are usually not concerned with the direct application of international law but with determining the civil claims of individuals. It is their implicit effect on the jurisdictional delimitation between domestic and foreign jurisdiction which renders them international procedures relevant for international law at least as indicative of state practice.

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[16] *France v Turkey* "The Lotus" [1927] PCIJ (Ser A) No. 10 p. 18-19.

Other cases before national courts concern claims directly based on international law. These cases are interesting for international lawyers because of the merits of the decisions which determine the scope or existence of some part of international law. Both categories can come together when, for example, jurisdiction is determined by a national court by directly applying international law. This is so when national courts refrain from exercising jurisdiction because of immunities of the defendant based on international law, for example, because he is a head of state or a diplomat. However, it is worth noting that not only the direct application of international law by a national court will render its procedures international. This will also be the case where the direct claim is actually unrelated to international law but the procedure may have repercussions in other states and therefore becomes relevant for international law.

It makes sense to start with the procedural measures of national courts which potentially extend their jurisdiction into areas which may also be claimed by others. They usually please the claimant and frustrate the defendant as the restraint or avoidance techniques of national courts normally have this effect.

4.2 Interest in International Jurisdiction

Different national procedures provide different remedies. Selecting the forum which may assume jurisdiction and provide the best remedy in a case is an important issue for a lawyer advising clients. What is sometimes in a rather derogatory manner called "forum shopping" is the result of the fact that the sovereignty of states expressed in their exercise of jurisdiction is not fully co-ordinated. While co-ordination is progressing with EC Regulation 44/2001 (Brussels I Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters) and the Rome Conventions on contractual and non contractual obligations and several Hague Conventions mainly in arbitration and family matters, most fields of jurisdictional practice are not fully regulated by hard and fast rules but by the discretionary exercise of jurisdiction. In addition, even within conventional rules there is still some discretion exercised by the courts in relation to the assumption of jurisdiction. Therefore, the practice of assuming jurisdiction is relevant to practitioners as it is to international law in general.

4.3 Delineation in International Jurisdiction – General Principles

The limits of one country's assumption of legal authority or jurisdiction lie in the jurisdiction of another state or forum. It is the policy of the national forum to have regard to these limits which stem from practices and rules relevant in the field of international law both public and private as well as international procedural law. While national courts take note of conflicting jurisdictions, for example, when de-

ciding whether a claim may not be heard because of *forum non conveniens*, some rules of international law are now codified in Conventions which delimit national jurisdiction. Some of those procedural rules which are relevant to international law should be reviewed.

First, there is the principle of *lis pendens* in the international context. When litigation is pending before another forum the matter may not be entertained by a court. This is the directly opposite perspective from that taken by the doctrine of *forum non conveniens*. In the latter case the court considers whether another forum may be better suited to hear the case and if it thinks this is so will stay proceedings to give way to the other forum. Such a decision to stay proceedings because of *forum non conveniens* will take all the circumstances of the case into consideration. A court will make such a decision by using its full procedural discretion which allows for the most appropriate decision in the case. All possible considerations may be entertained but at the same time it is not too easy to predict an outcome due to the discretionary weighing of varied considerations by the bench.

The *lis pendens* rule takes the opposite approach in delineating different *forae* as it does not weigh any considerations of the appropriateness of the relevant *fora* but takes as the only and sole criteria for deciding which forum should yield to the other the fact that a matter is already pending before one of the *fora*. Based on the notion of the formal equality of states, sovereigns, jurisdictions and *fora* in international law as embodied in Article 2.1 of the United Nations Charter, it is a principle which lends itself easily to international agreements, conventions or treaties concerning jurisdiction and indeed forms part of these. As an extreme example if the court which is seised first assumes jurisdiction in an exorbitant way which it should not have done under any of the applicable rules,[17] nevertheless, the *lis pendens* rule as understood in international Conventions and Regulations would exclude any judicial review of this decision by a more appropriate or convenient forum.[18] Further, a judgment based on such a flawed basis of jurisdiction must even be enforced by the other state's courts under the Brussels I Convention. The court of another state cannot review the jurisdiction of the court of the state of origin of the judgment. This fundamental principle, which is set out in the first paragraph of Article 28 of the Brussels Convention, is reinforced by the specific statement, in the second phrase of the same paragraph, that the test of public policy may not be applied to the rules relating to jurisdiction.[19] While serving the idea of abstract equality of courts and countries and that no court should sit in judgment over the decisions of courts of another forum (but rather must enforce them blindly under conventional rules), justice in the case before the bench cannot be

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[17] Article 3.2 and Annex I of Regulation EC 44/2001 (Brussels I Convention on Jurisdiction and Enforcement).

[18] *Krombach v Bamberski*, ECJ (Case C-7/98) Judgment of 28 March 2000; [2001] QB 709.

[19] *Ibid.* at para. 31.

done to the same extent as under the *forum non conveniens* rule or any other discretionary system of national procedure.

The two approaches to potentially conflicting jurisdictions of courts reflect general concepts of law which may even be traced back to the two different kinds of Aristotelian justice. They represent the different ways in which legal procedures may tackle the issues here discussed. They all have their properties and characteristics and can be ultimately distinguished not least by the length, nature and depth of the reasoning in judgments which address the issue. Both approaches governing the delineation of judicial power reflect fundamental concepts applied in the international arena, however, their relationship to each other is not totally settled. While it may be fair to say that in Europe the *lis pendens* approach with its hard and fast character less amenable to the exigencies of the individual case is the more usual one not least because of the Conventions in the field, the failure of the intended Hague Convention on Jurisdiction and Enforcement some years ago[20] indicates that the opposite approach is prevalent on the global sphere, particularly in relation to the United States, Russia, China, India or the Antipodes, leaving room for discretion but unpredictability, judicial activism, legal conflicts and also exorbitant assumption of jurisdiction for ulterior purposes. Therefore, an educated understanding of jurisdictional approaches to international legal proceedings cannot yet be achieved by limiting oneself to one of the principles. Rather it is necessary to have regard to their interaction in international procedures on the merits.

4.3.1 The European Conventional Approach in Conflict

The *lis pendens* rule as the ultimate criteria for deciding jurisdictional conflicts is embodied in the Brussels I Convention which is for most of the member states now applicable as EC Regulation 44/2001.[21] It shows the procedural conflicts and approaches between competing concepts of national procedures allowing for the courts to have discretion in delineating themselves from other courts' jurisdictions. It is submitted that these conflicts show an ongoing procedural development significant for those seeking the most appropriate forum for a party in an issue as well as for international law determining the conventional and other limits of national judicial power. The *lis pendens* rule is intended to benefit the individual litigant and is also intended to serve the public purpose of avoiding a dispute between the courts of different countries as to which should hear the case.

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[20] Schack, Heimo, *Interntionales Zivilverfahrensrecht* (3rd ed., C.H.Beck, Munchen, 2002) p. 56, see Trevor Hartley and Masato Dogauchi, *Explanatory Report to the Hague Convention of 30 June 2005 on the Choice of Court Agreements*, http://www.hcch.net/upload/expl37e.pdf, p. 16 *et seq.*

[21] For details regarding the subtleties of its application regarding Denmark, or the EFTA-Lugano States Norway and Switzerland see Delany and MacGrath, *Civil Procedure in the Superior Courts* (2nd ed., Thomson Round Hall, 2005) p. 26 *et seq*., p. 60 *et seq*.; Layton & Mercer, *European Civil Practice*, Volume 1 (2nd ed., 2005) para. 13.018.

4.3.1.1 Application of the Convention

Article 21 of the Convention which is identical to Article 27 of the said Regulation provides that where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the courts first seised must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Once this occurs, it must decline jurisdiction in favour of that court. This is the *lis pendens* rule.

The leading case which addresses the inherent conflict between the two main procedural principles delineating competing national jurisdictions is *Owusu v Jackson*.[22] In 1997, the claimant, a British national domiciled in the United Kingdom, who had suffered a very serious accident while on holiday in Jamaica, brought an action in the United Kingdom for breach of contract against the defendant, who was also domiciled there. The claimant alleged that that the contract for letting a holiday villa, which provided that he would have access to a private beach, contained an implied term that the beach would be reasonably safe or free from hidden dangers. The claimant also brought an action in tort in the United Kingdom against several Jamaican defendants, including the owner and occupier of the beach. Another holidaymaker had suffered a similar accident two years previously and the action in tort against the Jamaican defendants therefore involved a contention that they had failed to take heed of the earlier accident.

The proceedings were commenced in England and were served on the first named defendant in the United Kingdom. Leave was also granted to the claimant to serve the proceedings on the other defendants in Jamaica and service was effected on the third, fourth and sixth defendants. All of these defendants applied for a declaration that the English court should not exercise its jurisdiction in relation to the claim and they argued that the case had closer links with Jamaica and that the Jamaican courts were a forum with jurisdiction in which the case might be more suitably tried. By order of 16 October 2001, the Deputy High Court Judge in England held that it was clear from *UGIC v Group Josi*[23] that the application of the jurisdictional rules in the Brussels Convention to a dispute depended, in principle, on whether the defendant had its seat or domicile in a contracting state, and that the Convention applied to a dispute between a defendant domiciled in a contracting state and a claimant domiciled in a non-contracting State. He held that in these circumstances the decision of the Court of Appeal in *In re Harrods (Buenos Aires) Ltd,*[24] which accepted that it was possible for the English courts, applying the doctrine of *forum non conveniens*, to decline to exercise the jurisdiction conferred on them by Article 2 of the Brussels Convention, was bad law. He found that as he had no power under Article 2 of the Protocol of 3 June 1971 to refer a question to the Court of Justice for a preliminary ruling to clarify this point, in the

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[22] *Owusu v Jackson*, ECJ (Case C-281/02) Judgment of 1 March 2005; [2005] QB 1.

[23] Case C-412/98 [2000] ECR I-5925, paras. 59 – 61.

[24] [1992] Ch 72.

light of the principles laid down in *Group Josi*, it was not open to him to stay the action against the claimant as he was domiciled in a contracting state. He also held that he had no power to stay the action against the other defendants, as the Brussels Convention precluded him from staying proceedings in the action against the first named defendant. He therefore held that the United Kingdom, and not Jamaica was the State with the appropriate forum to try the action and dismissed the applications for a declaration that the court should not exercise jurisdiction.

On appeal the Court of Appeal held that if Article 2 of the Brussels Convention were mandatory, the first named defendant would have to be sued in the United Kingdom before the courts of his domicile, and it would not be open to the claimant to sue him under Article 5(3) of the Brussels Convention in Jamaica, where the harmful event occurred, because that State was not another Contracting State. In the absence of an express derogation to that effect in the Convention, it was therefore not permissible to create an exception to the rule in Article 2. The claimant contended that Article 2 of the Brussels Convention was of mandatory application, so that the English courts could not stay proceedings in the United Kingdom against a defendant domiciled there, even if the English court took the view that another forum in a non-Contracting State was more appropriate. The Court of Appeal pointed out that if that position were correct it might have serious consequences in a number of other situations concerning exclusive jurisdiction or *lis pendens*. It added that a judgment delivered in England which was to be enforced in Jamaica against the Jamaican defendants would encounter difficulty in relation to certain rules in force in that country on the recognition and enforcement of foreign judgments. The Court of Appeal therefore decided to stay its proceedings and to refer the following questions to the European Court of Justice for a preliminary ruling:

> "1. Is it inconsistent with the Brussels Convention …, where a claimant contends that jurisdiction is founded on Article 2, for a court of a Contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State:
>
> (a) if the jurisdiction of no other Contracting State under the 1968 Convention is in issue;
>
> (b) if the proceedings have no connecting factors to any other Contracting State?
>
> 2. If the answer to question 1(a) or (b) is yes, is it inconsistent in all circumstances or only in some and if so which?"

It is useful to set out the history of the proceedings in some detail as all the relevant considerations had already been put before the national courts before the ECJ was seised of the matter. The main issue was that the claimant had not only sued the first named defendant but had also brought proceedings against a number of Jamaican companies in tort. Since the first named defendant was domiciled in

England, the English courts had jurisdiction over him under the Convention. However, the other five defendants were not domiciled in any member state of the Convention, therefore, jurisdiction depended on English law. The claimant submitted that the English court had jurisdiction over the Jamaican defendants as necessary or proper parties. As the accident had occurred in Jamaica and the evidence was there, the first named defendant thought that Jamaica would be the more appropriate forum. Further, a judgment by an English court against the Jamaican defendants would probably not be enforced in Jamaica. The outcome of English proceedings which would hold the first named defendant liable to the claimant but entitle him to an indemnity from the Jamaican defendants would necessitate new proceedings being brought in Jamaica with the possibility of a different outcome and irreconcilable judgments which would have been avoided by staying the English proceedings under the *forum non conveniens* rule.

The core of the decision can be summarised again in the words of the ECJ:[25]

> "Application of the *forum non conveniens* doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention."

The ECJ addressed all the concerns on the merits with brevity and unambiguous clarity:[26]

> "The defendants in the main proceedings emphasise the negative consequences which would result in practice from the obligation the English courts would then be under to try this case, *inter alia,* as regards the expense of the proceedings, the possibility of recovering their costs in England if the claimant's action is dismissed, the logistical difficulties resulting from the geographical distance, the need to assess the merits of the case according to Jamaican standards, the enforceability in Jamaica of a default judgment and the impossibility of enforcing cross-claims against the other defendants.
>
> In that regard, genuine as those difficulties may be, suffice it to observe that such considerations, which are precisely those which may be taken into account when *forum non conveniens* is considered, are not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in Article 2 of the Brussels Convention, for the reasons set out above."

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[25] Para. 41 of the judgment.

[26] Paras. 44-45 of the judgment.

The ECJ simply held it unnecessary to weigh the benefits of the conflicting approaches, contending that considerations on the merits of conflicting courts' jurisdictions are not relevant, and cannot be used to call into question the mandatory nature of the fundamental rule of jurisdiction of the Convention. Therefore, the rule of *forum non conveniens* and other national rules on jurisdiction may only apply under the Conventions and Regulation when no defendant is domiciled in any EU or EFTA State.

It is not only the *forum non conveniens* rule which comes into conflict with the *lis pendens* rule as applied by the ECJ. As with all discretionary procedural rules equitable remedies such as injunctive relief are particularly liable to come in conflict with the *lis pendens* principle. This was examined by the ECJ in the case of *Turner v Grovit.*[27] The claimant, alleging constructive dismissal, brought proceedings against the defendant in England, claiming two years' salary as compensation. Oppressively and abusively and with a view to frustrating the pending English proceedings, the defendant brought proceedings in Spain against the now unemployed claimant, alleging that his resignation had caused losses equivalent to eight years' salary. The Court of Appeal[28] saw the ploy for what it was and, in a judgment of unusual rhetorical force, ordered the defendant to stop his action, which he did. Why the Spanish court, seised of the matter second, had not already dismissed the action was not clear but the Court of Appeal, suspecting that the defendant was involved in something discreditable, seized the moment.

The House of Lords made a reference to the ECJ[29] asking whether this was consistent with the Convention, and received the answer which had been feared. The court declined to answer a question framed in the narrow terms of the reference. It ruled that anti-suit injunctions were prohibited by the Convention, even where the respondent was acting in bad faith and with a view to frustrating proceedings pending before the English courts.[30] The ECJ outlined that the Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another EU Member State, even where that party is acting in bad faith with a view to frustrating the existing proceedings. It went on to say that such an injunction constitutes interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention. That interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the party concerned, because the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court

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[27] (Case C-159/02) Judgment of 27 April 2004; [2005] 1 AC 101. See Briggs (2004) 120 LQR 529.

[28] [2000] QB 345.

[29] [2002] 1 WLR 107.

[30] Briggs "Anti-Suit Injunctions and Utopian Ideals" (2004) 120 LQR 529, 529-533.

of another Member State. This runs counter to the principle of mutual trust which underpins the Convention and prohibits a court, except in special cases occurring only at the stage of the recognition and enforcement of foreign judgments, from reviewing the jurisdiction of the court of another Member State.[31]

One nuance in the ECJ judgment which relates to the procedural nature of the injunction may be noted:[32]

> "Even if it were assumed, as has been contended, that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention (Case C-365/88 Hagen [1990] ECR I-1845, paragraph 20). However, that result would follow from the grant of an injunction of the kind at issue which, as has been established in paragraph 27 of this judgment, has the effect of limiting the application of the rules on jurisdiction laid down by the Convention."

4.3.1.2 General Comment on the Application of the Convention

This issue directly touches on the judicial authority of national courts and is commented on accordingly. Criticism of the attitude adopted by the ECJ is harsh: "The court insists, in the way of all intellectually insecure fundamentalists, that the whole of the truth can be derived from the mindless repetition of the words of what is now Article 23 of the Judgments Regulation. This nonsense is only lightly touched on, which is a pity."[33] These words from an Oxford Professor and leading authority in the field go as far as appropriate English can go and show the fundamental disagreements of principle.

The ECJ regards a predictable application of the Convention and Regulation as inherently superior to, and more desirable than a judicial approach taking into account all relevant aspects of the case. Codes of law are thought to represent a higher stage of civilisation – a better way of doing things – than the systems that were in force in those countries before the codes. As Hartley points out,[34] it is important to realise that for the ECJ and the continental European legal traditions a Convention or Regulation is not simply a wide-ranging piece of legislation. It em-

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[31] *Turner v Grovit*, ECJ (Case C- 159/02) Judgment of 27 April 2004; [2005] 1 AC 101 paras. 27 -28.

[32] *Ibid.* at para. 29.

[33] Adrian Briggs, "Jurisdiction and Arbitration Agreements and Their Enforcement" (2006) 122 LQR 155, 157.

[34] Trevor C. Hartley, "The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws" (2005) 54 ICLQ 813.

bodies a different attitude towards the law, an attitude that tries to systematise the law through a hierarchy of principles that fit together to form a coherent whole. A limited number of generalised and abstract principles provide the foundation for a second level of more concrete principles. These in turn give rise to the legal rules applicable to individual cases. This system is easier to understand and explain. Moreover, gaps in the law can be filled by deriving new rules from existing principles, thus making the law more predictable. The *lis pendens/ forum non conveniens* conflict before the ECJ provides a clue to the fundamental difference of attitudes between common lawyers and civil lawyers, a difference that becomes apparent to anyone who takes part in international negotiations where lawyers from different parts of the world come together to negotiate international conventions on matters relating to international law or the conflict of laws. This difference is not simply a matter of wanting a legislative instrument with a rational, systematic structure. It is one whereby this element is regarded as more important than practicality and policy. Of course, civil lawyers are concerned with practicality and policy, just as common lawyers appreciate legislation with a systematic structure. The difference is one of priorities: civil lawyers are more concerned with the structure of the law, common lawyers with its operation. This difference of attitude feeds into the approach taken by civilian courts in the interpretation and application of private law. They often seem to regard adherence to principles as more important than a just and satisfactory result in the case at hand. One could say that the civilian approach is theory-driven, while the common-law approach is practice-driven. This attitude is apparent in the judgments of the ECJ, a predominantly civilian court, in the field of conflict of laws.[35]

Although it seems hard to contradict this criticism on the merits it would hardly change the course the ECJ has taken. The Court values the equal application of the Conventions, particularly the *lis alibi pendens* rule, without allowing for any review or evaluation by a national court of the circumstances of a case. The strong feeling that injustice has been perpetrated by the ECJ conveyed by the criticism will not be shared by the bench in Luxembourg. Upholding and developing a common European legal system with hard and fast rules taking precedence over competing considerations is the general direction which European law has taken since *Costa v ENEL*.[36] Reflecting the ancient categories of Aristotelian *iustitia distributiva* and *commutativa*, this is a conflict between different concepts of laws. It would certainly not suffice to see this conflict only as a conflict of common law approaches and Roman civil law, it is more. It is a conflict between the procedures of different courts decided by the application of Article 234 of the EC Treaty and

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[35] The criticism was phrased in these terms by Trevor Hartley, *ibid*, and by the same author, "The Modern Approach to Private International Law. International Litigation and Transaction from a Common Law Perspective" in (2006) 319 *Recueil des Cours* pp. 174-77, where he lists the background of the ECJ judges as evidence that the "ECJ is a civilian court" and its judges have little if any expertise in the field.

[36] ECJ (Case 6/64) [1964] CMLR 425.

the concept of superiority of the ECJ jurisdiction and EC law over national law, which is as well established as it is lacking any coercive persuasion or base. This is particularly so, as Article 10 of the refuted Constitutional Treaty provided such a base but never came into force.[37] Whether *lis pendens* or *forum non conveniens* or anti-suit injunctions or other procedural rules or laws should properly be applied comes down to the question of which court or forum will decide the matter; it is more a contest of authorities and power which is embodied in judicial procedures than a contest of reason or substantive law. This becomes admirably clear when the ECJ outlines in *Turner v Grovit*:[38]

> "Even if it were assumed, as has been contended, that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention."

It is generally accepted that procedure is entirely determined by the forum and forms the core of any judicial authority and power. The ECJ without arguing the case for the Convention on the merits against procedural assumptions of national courts merely establishes a hierarchy of rules which comes down to establishing a hierarchy of courts and setting itself on top: "national procedural rules may not impair the effectiveness of the Convention." That this core *dictum* of the ECJ is based on assumptions rather than reasoned becomes clear by turning it around: "the Convention may not impair the effectiveness of national procedural rules" would sound at least as persuasive given the longstanding history and the unanimous consent in relation to the superiority of national procedural law.[39] Far from

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[37] See from the international law perspective, Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 352.

[38] *Turner v Grovit*, ECJ (Case C-159/02) Judgment of 27 April 2004; [2005] 1 AC 101, para 29.

[39] See, for example, (German) *Reichsgericht* decision of 28 April 1900, Vol 46 RGZ 193, 199: "Für den deutschen Richter besteht kein Anlaß diese Grundsätze des englischen Aktionensystems in einem von ihm geführten Prozeß deswegen zur Anwendung zu bringen, weil die Verpflichtung an sich dem englischen Recht untersteht. Es ist zu unterscheiden zwischen dem Inhalt der Rechte und ihrer gerichtlichen Geltendmachung. Die Regeln, die in letzterer Beziehung im Ausland bestehen, sind für den deutschen richter, der nur sein heimisches Prozeßrecht anzuwenden hat, nicht maßgebend."

"There is no reason for the German judge to apply the principles of English law based on an actio limiting the right to specific performance only because the case is governed by English law. A distinction must be drawn between substantive laws and their realisation by the court. Foreign rules in relation to the latter are not relevant for the German judge, he only has to apply his own procedural laws." (Translation by the author).

suggesting that there are no reasons to be brought forward for the application of the conventional rules, the lack of reasoning by the ECJ admirably qualifies the judgments as a *decisio* in the ultimate sense; assumption of authority "*auctoritas non veritas facit legem*." This is the basis on which courts' procedures and jurisdictions operate and judging from this, the non-discretionary conventional system established by the ECJ, and accepted however grudgingly by the House of Lords will form a solid basis for the delineation of international procedures for some time to come. That development in this direction continues can be seen from the intentions of the EC, formulated in a recent summary, based on Article 65 of the EC Treaty:

> "Article 65
>
> Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:
>
> (a) improving and simplifying: the system for cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence; the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
>
> (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
>
> (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States."

The report reads:

> "For individuals and companies to be able to fully exercise their rights wherever they might be in the European Union, the incompatibilities between judicial and administrative systems between Member States will have to be removed. EU leaders acknowledged this and presented three priorities for action, mutual recognition of judicial decisions: better Crime victims' compensation and increased convergence in the field of civil law.
>
> What is the basic principle underlying judicial co-operation?
>
> The principle of mutual recognition is the cornerstone of judicial cooperation in both civil and criminal matters. The Justice and Home Affairs Council adopted on 30 November 2000, a programme of measures for implementation of the principle of mutual recognition

of decisions in civil and commercial matters. The final goal is that judicial decisions should be recognised and enforced in another Member State without any additional intermediate step, in other words, suppression of exequatur.

What has been done so far?

A number of legislative instruments have already been adopted

In the field of jurisdiction, mutual recognition and enforcement of judgments

- Brussels I Regulation concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
- a new Brussels II Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters, and parental responsibility, replacing Regulation Brussels II
- a Regulation relating to insolvency proceedings
- a Regulation creating a European enforcement order for uncontested claims

In the field of co-operation between the member States

- a Regulation relating to the service of documents in cross-border cases.
- a Regulation concerning the taking of evidence in civil and commercial matters

Furthermore, the Council adopted a decision establishing a European judicial network in civil and commercial matters. These instruments aim to improve the judicial cooperation in practice.

In the field of access to justice

- directive on legal aid for cross-borders litigants;
- directive relating to compensation to crime victims

Several green papers have also been published:

- a green paper on alternative dispute resolution
- a green paper on Injunctions of payment and procedures related to small claims
- a green paper on law applicable to contractual obligations

- a green paper on maintenance obligation
- a green paper on trans-national successions

And four proposals of the Commission are currently discussed in the Council:

- a draft regulation on the law applicable to non contractual obligations
- a draft regulation on creating a European order for payment procedure
- a draft directive on civil mediation
- a draft regulation establishing a European small claims procedure"[40]

There is no doubt that this trend will continue.

4.3.1.3 Effect of the European Conventional System

Unlike on the global scale, in Europe hard and fast predictable conventional principles will govern the delineation of the assumption of authority and jurisdiction by different courts. This certainly has merits and perils as has become clear. The great leap forward is that there are agreed bases of jurisdiction in most relevant disputes. This is somewhat undone by the *lis pendens* rule effectively rectifying even the most blatant disregard of these rules on jurisdiction as exemplified by *Krombach v Bamberski*.[41] This lack of judicial review in relation to national assumptions of even the most exorbitant jurisdictions, as in *Bamberski,* may not be upheld for all eternity. However, for the time being it is the prevalent system and must be taken at face value for what it is worth. All assumptions of power of any kind tend to behave as a law in themselves and would rather sanction the questioning of their basis than make it subject to argument and debate. Language, brevity and contents of the ECJ judgments discussed hint in this direction. As with the doctrine of the Holy and Undivided Trinity in the ancient Church the views of those that contest this will not be entertained. Let us then proceed on this assumption and see what it means for international legal procedures before national courts in Europe.

The primary effect is that the discretion of national procedure seemingly limited by conventional bases of clearly defined jurisdictional allocation in the Brussels and Rome Conventions is handed back to the national courts in a much stronger way when applying even exorbitant national bases of jurisdiction because other *fora* cannot judicially review this discretion but must even enforce judg-

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[40] See http://ec.europa.eu/justice_home/fsj/civil/fsj_civil_intro_en.htm (visited 16 April 2008).

[41] ECJ (Case C-7/98) Judgment of 28 March 2000; [2001] QB 709.

ments made on such flawed bases.[42] This almost perverse effect, which was certainly not intended by either the Brussels and Rome Conventions or the ECJ, but is now solidly established, makes it even more important to look very closely at the different bases of jurisdiction employed by the different national courts. The different procedural practices of assuming jurisdiction are ultimately relevant because they are not reviewable and are therefore sacrosanct under the tutelage of the ECJ. It is a licence to exorbitant judicial power which has been handed down by the ECJ which cannot be ignored. Assumption of judicial competency, power and jurisdiction is essentially discretionary, most clearly evidenced by the rule of *forum conveniens* and all the examples of exorbitant jurisdiction in the different national procedural orders,[43] and how self restraint, reason or arbitrary assumptions of jurisdiction will shape what is called establishing progressively an area of freedom, security and justice will now rest entirely with the procedural practices of national courts.[44] This leaves two tasks for the analysis of international legal procedures; first recognising state practice[45] in such unilateral assumptions of legal power. Secondly, that practice must progressively accept and deal with the perils and opportunities of what is usually described as forum shopping[46] or the Italian torpedo[47] in "an area of freedom, security and justice," where the ECJ took away national procedural shields to such practices.

4.3.1.4 National Bases and Choice of Jurisdiction

Only a lawyer who knows the details of national procedural practices in relation to the assumption of jurisdiction would be able to appropriately address the challenges for Europe in this area. Most areas of life are becoming more international; the internet is the prime example but whether tort, contracts or family matters are involved, the links to different legal orders and foreign forums are increasing. Trade in particular is international. In all these fields different laws may be involved and may serve as a connection to certain jurisdictions. This brings opportunities; opportunities to choose the jurisdiction where the interests of the parties are best served. This choice of jurisdiction is often referred to as "forum shopping". This phrase sometimes has a negative connotation hinting at potential misuses of forums not only motivated by promoting justice and the Italian Torpedo[48]

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[42] Trevor Hartley, "The Modern Approach to Private International Law. International Litigation and Transaction from a Common Law Perspective" in (2006) 319 *Recueil des Cours* p. 176 *et seq*. gives an impressive example.

[43] See EC Regulation 44/2001 Article 3.2 and Annex 1 for a list of same.

[44] Article 61 ECT.

[45] Article 38.1.b of the ICJ Statute "Practice accepted as law".

[46] Lynden, Baron Carel J.H. van, *Forum Shopping* (LLP London, 1998).

[47] Mario Franzosi, "Worldwide Patent Litigation and the Italian Torpedo" (1997) 7 EIPR 382.

[48] *Ibid.*

is a prime example in this context. However, this negative connotation is largely unjustified. Europe is bigger than one jurisdiction and the world is bigger than Europe, and opportunities should be explored when they are there. This is almost a duty for an international lawyer advising clients properly. Trade and shipping are the prime examples as cargoes will be loaded and discharged in many different countries. Thus, many jurisdictions will qualify for the taking of conservatory measures or the instituting of proceedings. The race to the courthouse[49] of the most suitable jurisdiction is the other catchword relevant under the ECJ's reading of the conventional *lis pendens* rule. Lawyers are mostly familiar with their own country's rules on jurisdiction and sometimes can make an educated guess about those in some neighbouring ones. For example, an Irish lawyer would be not be slow to pronounce on the English system and a German lawyer would probably assume that Swiss or Austrian rules would be fairly close to those that he is used to. However, this would not provide the overview necessary to decide whether there is jurisdiction in a particular country and what the advantages of going to the courts of such a country are. This may come down to considerations such as costs, the calculation of damages, the availability of a jury in civil matters,[50] language or which lawyers practice in the relevant area and should certainly not be ignored by the scholar who wants to assess how judicial power is allocated in states' practices in legal proceedings with an international link. The first prerequisite is to establish the rules for jurisdiction in the different countries. Then their usefulness in different contexts may be assessed. The practitioner may then decide where possible proceedings or measures may be started. The academic would then be able to tell where the international system in the Conventions which allocates jurisdiction has its potential strengths and weaknesses ("The Italian Torpedo") and envisage a suitable development. He would also see where the limits of one state's even exorbitant assumption of jurisdiction lie in the contained European conventional system which does not allow national courts to use their own procedural tools (*e.g.* anti-suit injunctions, garnishee orders, non-enforcement/registration of foreign judgments, *forum conveniens* etc.) to counter other countries' courts' jurisdiction creating an equilibrium still relevant on the global scale.

Therefore, it is sensible to discuss the different national laws of procedure and the legal practice of litigation which are foremost in the field of assuming jurisdiction. As substantive law demonstrates there are many similarities in the way in which problems are solved throughout the world. These similarities can be explained partly by historical reasons and partly because they are the result of a purposive harmonisation and unification in different fields of law. On the European and global levels of law-making, great importance is attached to the harmonisation of substantive law, as can be seen from the efforts of UNIDROIT, UNCITRAL and the Hague Conference. Notwithstanding the many similarities which exist in

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[49] Peter E. Herzog, "Brussels and Lugano, Should You Race to the Courthouse or Race for a Judgment?" (1995) 43 AJCL 379-399.

[50] For example, in Ireland.

many areas of substantive law, procedural law and in particular procedural practice show great differences of approach which vary from country to country. To a large extent procedural law and practice are purely national affairs: a state determines, for example, which procedures exist, the mechanics of those procedures, which evidence is admissible and the competencies of the judge in the litigation. Furthermore, procedural law and practice are often characterised by traditions which are centuries old, evidenced in gowned officials, wigs, old-fashioned and even archaic language. If procedural law and legal practice had no influence on substantive law, then there would be no necessity to exchange views on streamlining and achieving the degree of harmonisation sought by EC Regulations in the field. National procedural law and practice contribute to the realisation of substantive law. This makes it important in discussing procedural law and practice in an international context. In short, it is sensible to exchange views on different national procedural law and practice in Europe. Apart from this, it is simply entertaining to talk about this subject. It is frequently more fascinating to pay attention to the differences rather than focusing on the similarities, but for lawyers there is a further dimension to the problem because they try to apply procedural law in such a way as to ensure that the substantive law is being implemented to the greatest extent possible in the interest of their clients, a feature common to all national jurisdictions. Procedural law and practice may therefore not create any obstacles to achieving that end. It is extremely useful to learn from other countries how their legal systems solve problems.

4.3.1.5 Forum Selection Under the European Rules; Italian Torpedoes

It is the decision of the ECJ in *Gasser v MISAT*[51] which lays the ground for the present situation of forum selection in Europe. The facts of this case were at follows. For several years Gasser, the registered office of which was in Austria, sold children's clothing to MISAT, of Rome, Italy. On 19 April 2000 MISAT brought proceedings against Gasser before the *Tribunale Civile e Penale* (Civil and Criminal District Court) in Rome asking the court to find that it had not failed to perform the contract and to order Gasser to pay damages. On 4 December 2000 Gasser brought an action against MISAT before the *Landesgericht* (Regional Court) in Austria, to obtain payment of outstanding invoices. In support of the jurisdiction of that court, the claimant submitted that it was not only the court for the place of performance of the contract but was also the court designated by a choice-of-court agreement as the parties had concluded an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention. MISAT contended that, before the action was brought by Gasser before the *Landesgericht* it had commenced proceedings before the *Tribunale Civile e Penale di Roma* in respect of the same business relationship.

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[51] *Gasser v MISAT*, ECJ (Case C-116/02) Judgment of 9 December 2003; [2005] QB 1.

The Austrian court considered that this was a case of *lis pendens* since the parties were the same and the claims made before the Austrian and Italian courts were based on the same cause of action within the meaning of Article 21 of the Brussels Convention, as interpreted by the Court of Justice.[52] The Austrian court stayed proceedings and referred among others the following questions to the ECJ for a preliminary ruling according to Article 234 ECT:

> "May a court other than the court first seised, within the meaning of the first paragraph of Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [the Brussels Convention], review the jurisdiction of the court first seised if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Article 17 of the Brussels Convention, or must the agreed second court proceed in accordance with Article 21 of the Brussels Convention notwithstanding the agreement conferring jurisdiction?
>
> Can the fact that court proceedings in a Contracting State take an unjustifiably long time (for reasons largely unconnected with the conduct of the parties), so that material detriment may be caused to one party, have the consequence that the court other than the court first seised, within the meaning of Article 21, is not allowed to proceed in accordance with that provision?
>
> What course of action must the court follow if, in the circumstances of unreasonable delay it is not allowed to apply Article 21 of the Brussels Convention?"

The position of the intervening party, the United Kingdom, giving the background reasoning for the questions was stated by the ECJ in its judgment as follows:

> "61. The United Kingdom Government also considers that Article 21 of the Brussels Convention must be interpreted in conformity with Article 6 of the ECHR. It observes in that connection that a potential debtor in a commercial case will often bring, before a court of his choice, an action seeking a judgment exonerating him from all liability, in the knowledge that those proceedings will go on for a particularly long time and with the aim of delaying a judgment against him for several years.
>
> 62. The automatic application of Article 21 in such a case would grant the potential debtor a substantial and unfair advantage which would enable him to control the procedure, or indeed dissuade the creditor from enforcing his rights by legal proceedings.

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[52] *Gubisch Maschinenfabrik,* ECJ (Case 144/86) [1987] ECR 4861.

63. In those circumstances, the United Kingdom Government suggests that the Court should recognise an exception to Article 21 whereby the court second seised would be entitled to examine the jurisdiction of the court first seised where

(1) the claimant has brought proceedings in bad faith before a court without jurisdiction for the purpose of blocking proceedings before the courts of another Contracting State which enjoy jurisdiction under the Brussels Convention and

(2) the court first seised has not decided the question of its jurisdiction within a reasonable time.

64. The United Kingdom Government adds that those conditions should be appraised by the national courts, in the light of all the relevant circumstances."

The ECJ held:

"51. … It is clear from the wording of Article 21 of the Convention that it is for the court first seised to pronounce as to its jurisdiction, in this case in the light of a jurisdiction clause relied on before it, which must be regarded as an independent concept to be appraised solely in relation to the requirements of Article 17 (see, to that effect, Case C-214/89 *Powell Duffryn* [1992] ECR I-1745, paragraph 14).

52. Moreover, the interpretation of Article 21 of the Brussels Convention flowing from the foregoing considerations is confirmed by Article 19 of the Convention which requires a court of a Contracting State to declare of its own motion that it has no jurisdiction only where it is seised of a claim which is principally concerned with a matter over which the courts of another contracting State have exclusive jurisdiction by virtue of Article 16. Article 17 of the Brussels Convention is not affected by Article 19.

53. Finally, the difficulties of the kind referred to by the United Kingdom Government, stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause are not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose.

54. In view of the foregoing, the answer to the second question must be that Article 21 of the Brussels Convention must be inter-

> preted 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."

Despite the clear presentation by the United Kingdom of the problems caused by such an interpretation of the Convention the ECJ confirmed its strict reading. Article 21 of the Brussels Convention 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. No considerations of delay or vexatious intent may be entertained. It has been commented that the ECJ has thus restored the torpedo power.[53] The now well established notion of a torpedo was introduced in this context in an article by Mario Franzosi.[54] He was one of the first commentators who analysed the fact that the Conventions have made it possible to litigate before a judge of an EU/EFTA member state the infringement of a patent registered in another state with the effect that a judge subsequently seised in the country where the patent is registered does not have jurisdiction under the European rules. This is possible as several jurisdictions allow an action to be commenced seeking a declaration of non-infringement which gives the potential infringer/defendant in an intellectual property case the chance to seize a court before he is actually sued by the patent holder. He recognised that the fundamental rule of domicile in Article 2 of the Brussels Convention is that:

> "Subject to the provisions of this Regulation,[55] persons domiciled in a contracting State shall, whatever their nationality, be sued in the courts of that state …"

This permitted, for example, an Italian defendant to be sued in Italy for violations not only of an Italian patent but also of a French, Greek or Danish patent, as the case may be. It is also possible in some EU states to sue someone for an alleged violation of a patent registered outside the EU. Beyond that there are many other connecting factors which may give rise to national jurisdiction under the Convention. This is expressed most clearly in relation to provisional measures according to Article 31 of the Convention/Regulation which reads:

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[53] Pierre Veron, "ECJ Restores Torpedo Power" (2004) International Review of Industrial Property and Copyright Law 17.

[54] Mario Franzosi, "Worldwide Patent Litigation and the Italian Torpedo" (1997) 7 EIPR 382.

[55] Regulation 44/2001 introduces the word "Regulation" instead of "Convention", however, without substantial change; Regulation and Convention are used interchangeably here, as the Convention still survives the Regulation for reasons of no relevance here (see point 22 of the Preamble to the Regulation) and the word Convention also encompasses the Lugano Convention which contains similar provisions to the Brussels Convention/ Regulation with regard to Iceland, Norway and Switzerland.

> "Applications may be made to the Courts of a Member State for such provisional, including protective measures as may be available under the law of that state, even if, under this Regulation, the courts of another member State have jurisdiction as to the substance of the matter."

Franzosi's concern was that an accused patent infringer may start an action in the EU member state of his domicile, asking the court for a declaration of non-infringement of patents registered in other countries both European and beyond. There is no doubt that according to Article 21 of the Convention this action for a declaration would make it impossible for the patentee to sue for infringement in any other EU member state. The existence of litigation in one member state makes it impossible to litigate on the same subject in other European states. If the accused infringer selects a country where the judicial system is excessively slow this may postpone any decision on the merits for a very long time which may be of great economic advantage to him but could amount to a denial of justice to the patent holder. If an action is, for example, brought before a slow-moving Italian court seeking a declaration that there is no violation of patents registered in European countries all European judges must refrain from exercising jurisdiction of their own motion under the *lis pendens* rule of the Convention. Exhaustion of remedies before first instance courts, the court of appeal and the supreme court may take some time not only in Italy. This explains the possibility of subverting the system with actions for declarations of non-infringement in a slow moving country which is a serious challenge to European judicial co-operation. The Italian courts have been notoriously condemned by the ECtHR in Strasbourg for delays amounting to denial of justice. As the ECtHR outlined this Italian practice "reflects a continuing situation that has not yet been remedied."[56] Before the ECtHR in 2000 more judgments were given against Italy on this one question than the combined total of all other judgments against all other European states on all questions.

Gasser v MISAT has shown that it is not only patent infringement which is liable to be served a judicial torpedo under the Convention. International sales and exclusive jurisdiction agreements were the issues in that case and it may be assumed that few areas would be immune from this kind of stalling forum selection. As this is a subject of great practical and academic interest stretching from national to European and international law, how it works today, what it means for international procedural law and what remedy may be envisaged should be elaborated upon.

Gasser was applied in *JP Morgan Ltd v Primacon AG*[57] which shows how an agreement to the exclusive jurisdiction of the English courts may be undermined by tactical proceedings in another EC country. In this case the German firm, Primacon AG, applied for a stay of English proceedings brought by the bank JP

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[56] *Ferrari v Italy* ECtHR, 28 July 1999, para. 21.

[57] *JP Morgan Ltd v Primacon AG* [2005] EWHC 508 (Comm); [2005] 2 Lloyd's Rep 665.

Morgan Ltd. The proceedings concerned a loan facility agreement which was specifically governed by English law and contained an exclusive jurisdiction clause in favour of the courts of England. Primacon had borrowed under the loan facility and had failed to pay interest pursuant to the agreement. It commenced proceedings in Germany in breach of the jurisdiction clause alleging that the agreement was immoral. The evidence indicated that the German proceedings were commenced to frustrate any attempt by JP Morgan Ltd to seek appropriate relief in the English courts. JP Morgan then issued three sets of proceedings in England. Primacon challenged the jurisdiction of the English court on the basis that the German courts were first seised of proceedings involving the same cause of action. It sought a stay of the English proceedings, relying on Articles 27 or 28 of Council Regulation 44/2001.

The English High Court held that it was difficult to see how the German courts could find that they were entitled to exercise jurisdiction in the face of the exclusive jurisdiction clause. However, the proceedings initiated by JP Morgan Ltd would be stayed until the German courts had determined their own jurisdiction.[58] The implications of the ECJ's interpretation of the Regulation were illustrated in the *Primacom* case. A facility agreement gave exclusive jurisdiction to the English courts. Without warning, the borrower started proceedings in Germany seeking a declaration that certain terms of the agreement were unenforceable. The bank then started proceedings in England. The English judge said that in Germany there is a right of appeal, which could result in considerable delay before a final decision on jurisdiction was reached. The judge also commented that delay was advantageous to Primacom, and appeared to be one of its objectives. Nevertheless, where the English proceedings covered the same ground as the German litigation, the judge felt obliged to halt them while the German courts decided on whether or not they had jurisdiction. Subsequently the German courts decided at first instance that they did not have jurisdiction to hear the case, but a good few months had passed by then. The matter settled before any appeal. However, it shows that there is a risk of debtors using the principle established by the judgment in *Gasser* and confirmed in *Primacon* to avoid their obligations in financial disputes by initiating actions in courts other than those specified in the jurisdictional agreement between the parties in order to cause delay (the Italian torpedo).

The difficulty with these decisions is that this reading of Article 27 of the Regulation denies the national court which is closest to the case, for example, because of a choice of court or of law agreement (prorogation) between the parties any power to determine its own jurisdiction until the courts of the country first seised eventually decline to proceed. It is the inability of the party surprised (usually the creditor) by the other party's (usually the debtor) pre-emptive strike to sue in the named court. This creates both judicial and commercial uncertainty which can be considerable because of, for example, delays, not only in the Italian courts,

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[58] The summary only covers the facts which are relevant here. In the case some other proceedings were not stayed.

which would automatically bar any hearing of the case on the merits in any other court possibly for a long time even if it turns out that the court first seised has no jurisdiction as in *Primacon*.[59] Even the fact that this delay may be a denial of justice within the meaning of Article 6 ECHR does not change the outcome. Practitioners and parties to a case should carefully take note when selecting a forum. Knowledge of jurisdictional bases in different European forums may help as suggested above.

One could analyse the issue by asking whether conflicts of jurisdictions should be resolved by applying the "proper law" regardless of outcome ("conflicts justice"), or rather by directly aiming for the proper substantive outcome regardless of law ("material justice"). The ECJ has opted for "conflicts justice", a somewhat principled approach which does not take the material effects of its reading of Article 27 of the Regulation into account as it is suggested that the ECJ would not like to have created the "Italian Torpedo" in *Gasser*. However, it did. As already mentioned above one procedural remark of the ECJ judgment in *Turner v Grovit*[60] may provide a clue:

> "Even if it were assumed, as has been contended, that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention (Case C-365/88 Hagen [1990] ECR I-1845, paragraph 20). However, that result would follow from the grant of an injunction of the kind at issue which, as has been established in paragraph 27 of this judgment, has the effect of limiting the application of the rules on jurisdiction laid down by the Convention."

Here, the ECJ does not take the qualification of the measure (an anti-suit injunction "*ad personam*" was at issue before the English courts which is considered a procedural measure taking precedence over the applicable law on the merits as part of the *lex fori proceduralis*) but the material outcome into consideration. It takes the potential material effect abroad (as for example in *Turner* the ECJ took account of the effect of the measure in Spain) into consideration rather than the fact that the appropriate legal qualification of the measure is procedural. This is exactly the opposite approach to that which it displays in all the cases when applying Article 27 of the Regulation, which is also procedural law, without regard to the material outcome (which is the "Italian Torpedo"). This shows that the intent in the decisions of the ECJ is to give the widest possible effect to European rules

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[59] Richard Fentiman "Jurisdiction Agreements and Forum Shopping in Europe" (2006) Butterworth's Journal of International Banking and Financial Law 304.

[60] ECJ (Case C- 159/02) Judgment of 27 April 2004, para. 29; [2005] 1 AC 10.

even when determining national procedural law and practices rather than aiming for the proper substantive outcome ("material justice"). This touches directly on the judicial authority of national courts which is mostly defined by their procedures, their *lex fori proceduralis,* which usually trump all other conflicting laws, particularly the proper law of the case, the *lex causae*. The legal authority of national versus European jurisdiction *in rebus proceduralibus* is engaged here. It is a contest of judicial authority or of judicial domination that is seen here rather than a coherent qualification and application of the appropriate or proper law both material and procedural. The reasoning behind the decision of the ECJ not to allow national procedural pre-eminence of national *fora,* usually so well established in the law of all nations is as follows:

> "It should be noted, however, that the application of national procedural rules may not impair the effectiveness of the Convention. As the Court has held, in particular in its judgment of 15 November 1983 in Case 288/82 Duijnstee v Goderbauer [1983] ECR 3663, a court may not apply conditions of admissibility laid down by national law which would have the effect of restricting the application of the rules of jurisdiction laid down in the Convention ."[61]

The reference of the ECJ to *Duijnstee v Goderbauer*[62] refers to para. 18 in its judgment there:

> "In the present case, both an interpretation according to the law of the contracting state whose courts have jurisdiction under Article 16.4 and an interpretation according to the *lex fori* would be liable to produce divergent solutions, which would be prejudicial to the principle that the rights and obligations which the persons concerned derive from the Convention should be equal and uniform."

This is not a principled approach to the *lex fori* or the proper law applicable to the case but rather an approach which has regard to the equal and uniform application of the Convention which seems to be the ultimate reason for the ECJ not allowing for the national *lex fori proceduralis* in the context of what is now Article 27 of the Regulation. The result of the cases decided by the ECJ such as *Gasser, Turner* and *Primacon* is exactly the opposite. The effect of these decisions is not that "the rights and obligations which the persons concerned derive from the Convention should be equal and uniform" when applied by the national courts in Europe under the Convention but national procedural differences such as for example, the differing time frames of Italian courts can now be taken advantage of in a much stronger way than would be the case without the Convention where the different procedural laws of the national courts were able to provide some checks and bal-

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[61] *Kongress Agentur Hagen v Zeehage BV*, ECJ (Case 365/88) Judgment of 26 January 1989, para. 20.

[62] (Case 288/82) [1983] ECR 3663.

ances. The differences of the national procedures in Europe are given much greater strength and effect.

This is even so when all the courts concerned eventually agree about the appropriate law and forum under the Convention as was the case in *Primacon*, where ultimately there was no disagreement between the relevant German and English courts. The enhanced pre-eminence of national procedural law established by the ECJ may nevertheless cause divergent results which are interesting. The German court held in *Primacon* that English law would apply to the case according to the agreement between the parties which contained a choice of law clause held by the court to be binding. Therefore, in principle the same law applies irrespective of which court rules on the matter in any member state. However, this applies only to the *lex causae*, the law governing the issue before the court which was English law. However, the procedural rules of the court seised first stay German, which is the *lex fori proceduralis*. The rules of public policy form part of the latter and it was alleged in *Primacon* that they may not allow for interest rates as high as those agreed between the Morgan bank and Primacon in their lending arrangements. Indeed the German public policy exception as embodied in Article 6 of the German Introductory Law to the Civil Code (EGBGB) provides for stricter limits in relation to high interest rates, while English law would give more leeway to party autonomy than most civil law jurisdictions. Although this difference is one of degree and not of any fundamental difference between the legal orders, it matters when these different ideas of legal limits are applied to such extraordinarily high sums as in *Primacon*. Therefore, even when applying English law on the merits, the German court would apply different legal limits to the high interest rates agreed between the parties than the English courts, a procedural feature well known from the different calculation of damages by different *fora* even when applying the same laws. Also the validity of forum choices made by the parties may be assessed differently by different courts in different countries. It may be concluded that *Gasser* triggers the necessity of some sophistication in forum selection temporally and spatially, even if all the courts concerned work properly and no undue delay or other inappropriate adverse circumstances are involved.

4.3.2 The Effect of the European Approach Beyond Europe

The European approach exemplified in *Gasser* must be seen rather as an assumption of authority than a system solving issues of competing jurisdictions. However, it will have spill over effects which should be briefly reviewed.

The decision in *Owusu* has been outlined at some length and it has become clear that the English courts were bound to assume subject matter jurisdiction under the Convention although they would not have done so without it but stayed the proceedings on the basis of *forum non conveniens* in favour of the Jamaican courts,[63]

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[63] *Owusu v Jackson* [2002] EWCA Civ 877, see the trial judge's decision.

bearing in mind that most defendants, the *locus delicti commissii*, the place of the performance of the contract and the availability of evidence would suggest the Jamaican courts were the more appropriate forum. If the defendant Jackson were held liable to Owusu but was entitled to indemnity from the Jamaican defendants, he would have to bring new proceedings in Jamaica to enforce the English judgment with the possibility of a different outcome. The assumption of English jurisdiction in conflict with the "better" forum of Jamaica was entirely based on the ECJ's reading of Article 2.1 of Regulation 44/2001; without it the claim would have been inadmissible before the English courts.

In *Samengo-Turner v Marsh & McLennan*[64] the English Court of Appeal in its decision of 12 July 2007 applied the rationale of the ECJ's ruling in *Turner v Grovit* in relation to an anti-suit injunction against parallel proceedings in a New York court. The facts were as follows. Samengo appealed against a decision to refuse an anti-suit injunction to restrain proceedings against them in New York by the respondent companies. Samengo and the other claimants were individuals domiciled in England who had been employed as reinsurance brokers by the respondent. They had given notice to terminate their contracts of employment with a view to going to work for a competitor of their employer. The New York proceedings were started a month later and were founded on the terms of an incentive award granted to Samengo under a bonus agreement under which they assumed obligations to repay the award if they engaged in detrimental activity and to provide information to enable the company to determine whether they had complied with the terms of the award. Samengo claimed that the New York proceedings related to their contracts of employment and had been brought by their employer so that the provisions of Article 20 of Regulation 44/2001 required the proceedings to be brought only in the courts of their domicile. The English High Court disagreed and also rejected an alternative ground to the effect that the New York proceedings should be restrained because they were unconscionable, vexatious and oppressive.

The appeal was allowed because Samengo's bonus agreements did relate to their contracts of employment for the purposes of Article 18. The employer could only have sued in England to enforce the terms of Samengo's employment. The Regulation was concerned with the allocation of jurisdiction. This construction gave effect to the objectives of the Regulation.

The New York court had already rejected a challenge to its jurisdiction because of an exclusive New York jurisdiction clause in the bonus agreements. The English Court of Appeal held that the exclusive jurisdiction clause agreed between the parties had to be disregarded under Article 21.1 of the Regulation which reads: "The provisions of this section may be departed from only by an agreement on jurisdiction: 1. which is entered into after the dispute has arisen; …" as the jurisdiction agreement was concluded in connection with the employment contract and a bonus agreement well before the dispute arose.

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[64] *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723.

Anti-suit injunctions are a primary means of delineating spheres of jurisdictions between different states. This strong means applied by the English Court of Appeal against the jurisdiction of the New York court, which was based on the prorogation of the parties through the exclusive jurisdiction clause, is quite remarkable. Unlike the exclusive jurisdiction clause in *Primacon* where Germany and the United Kingdom were part of the EC and parties to the Convention and bound by its *lis pendens* rule as understood by the ECJ, the exclusive jurisdiction clause in favour of the New York courts related to a jurisdiction unconcerned with the provisions of the EC Regulation. The strict application of the provisions of the Regulation (here Article 21.1) by the English court amounts to a formal and strict prohibition on a forum choice by the parties in the context of employment contracts. Such prohibition of a forum choice may have a meaning if the employee must be protected against undue domination by his employer. However, this cannot always be assumed when the contracts of employment of stockbrokers working in the City of London and the New York Stock exchange with incomes far exceeding a million per annum who want to work for competitors are at issue. The reverse situation may even become conceivable. The English court decided that "Section 5 [of the Regulation regarding employment contracts] applies to all employees irrespective of any particular need for protection."[65]

The decision of the English court has taken on board the hard and fast approach of the ECJ when applying the rules of the Convention in disregarding the exigencies of the case before it. The Regulation in its Preamble outlines under recital 13: "In relation to … employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provided for." With this the Regulation contains an authoritative determination of the motives of its section 5; to apply it "irrespective of any particular need for protection," as the English court did, would not meet the meaning of the conventional rules.

Further, the application of the Regulation to delineate the jurisdiction of Member States in relation to non member states is not provided for. The Preamble of the Regulation clarifies in recital 15: "In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States." Constant references to the Member States and the internal market as the object of the Regulation are made in its preamble. The only mention of anything going beyond the territory of the Member States is in recital 25: "Respect for international commitments entered into by Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties." Read together with recital 26 which states: "The necessary flexibility should be provided … in order to take account of the specific procedural rules of the Member States" the English court's anti-suit injunction on the basis of Article 21.1 of the Regulation against the New York court seems less persuasive. It may well be argued that the delineation of jurisdiction with states not

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[65] *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, para. 35.

subject to the Regulation or Convention is not engaged by the rules of those instruments. To maintain, for example, that Article 20.1: "An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled" could arguably be put forward to bar US jurisdiction for someone employed in the United States and resident there, is hardly conceivable. This would give the Convention a territorial outreach which it was not intended to have and one which it would not be able to maintain, as this would incur conflicting judgments almost as of necessity and would work against any of its original motives**.** All the rules in section 8 of the Regulation are phrased so as to exclusively regulate the jurisdiction of Member States only. The very few provisions which do not contain explicit reference to Member States, for example, Article 29, which provides that: "Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court" should clearly not oblige any court in Europe to stay proceedings under the Convention because, for example, a New York court found that it has exclusive jurisdiction. This is exemplified by the decision of the English Court of Appeal in *Samengo*:

> "The New York court cannot give effect to the Regulation and has already decided in accordance with New York law on conventional grounds that it has exclusive jurisdiction." [66]

The English court obviously did not consider applying the literal reading of Article 25 to the New York proceedings although the wording would have allowed it to do so. Other provisions such as Article 21.1 were, however, applied to the New York proceedings and the exclusive jurisdiction agreement on which it was based assuming that it was "statutorily" bound by it.[67] This inconsistent application and non-application results in a global outreach of the Convention to the New York court's jurisdiction without giving the New York proceedings a status under Article 25. This result is neither supported by international law nor would it be expedient to achieve any reasonable delineation with non Member States' jurisdictions.

It may be concluded that the English courts learned hard but fast how to apply the Convention as interpreted by the ECJ.

4.4 The Global System

The English Court of Appeal applied the rules of Council Regulation (EC) 44/2001 in *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd,*[68] a case dealing with employment matters, to the issue of an anti-suit injunction to restrain

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[66] *Ibid.* at para. 43.

[67] *Ibid.* where there is a reference to the "claimant's statutory rights".

[68] [2007] EWCA Civ 723.

the applicant from continuing proceedings before the New York courts. The main basis of the injunction was Article 21.1 of the Regulation/Convention which invalidates the *forum prorogatum* agreed between the parties. In order to review the global system beyond the EU Conventions' territorial reach the proceedings in this case before the New York District Court should provide a good introduction. The different perspectives of the American and European court show how delineation of jurisdiction is effected by the courts in the global arena beyond Europe. This is probably most informative about international law seen as judicial practice and *opinio iuris* in the international realm as the New York court's practice in this field is not predetermined by any international treaty like the EU Conventions and Regulation.

It is obvious that the New York court would not apply Article 21.1 of EC Regulation 44/2001. It would not even do so if it concluded that English law was applicable and considered Article 21.1 to be part of English law to be applied by the English courts. This is because the prohibition of a forum choice, a *forum prorogatum*, by the parties to an employment contract concluded prior to the actual employment conflict is a procedural provision determining jurisdiction of the court. However, the power to determine its own jurisdiction will not be yielded by any court to another country's legal rules and the New York court would not take the English court's determination of its jurisdiction but would rather apply its own *lex fori proceduralis*. The competence to determine its jurisdiction is the core of any court's procedural law and will be applied autonomously.

Unsurprisingly, the US District Court for the Southern District of New York reasoned[69] that the forum selection clause was applicable. The clause provided that the parties

> "irrevocably submit to the exclusive jurisdiction and venue of any state or federal court located in the County of New York for the resolution of any dispute over any matter arising … Moreover … (ii) waive, to the extent permitted by law, any objection to personal jurisdiction or to the laying of venue of any action or proceeding … in the forum stated …, (iii) agree not to commence any such action or proceeding in any forum other than the forum stated in this Section."

Furthermore, a choice of law clause stipulated New York law as the proper law of the contract. The clause stated: "Notwithstanding anything to the contrary (except with regard to Schedule II.D, if applicable[70]), this Agreement shall be governed by

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[69] *Guy Carpenter, Marsh & McLennan v Samengo-Turner et al.,* opinion and orders of 29 June 2007, No. 07 Civ. 3580 (DLC) before Denise Cote J (Slip Copy, 2007 WL 1888800).

[70] Although Schedule II.D contained a non exclusive prorogation clause of the English courts in some respects not relevant here, it stipulated in the significant part: "The remainder of this Agreement will continue to be governed by the laws of the State of New York."

the laws of the State of New York, without regard to conflicts or choice of law rules or principles."

The New York court maintained that even if the defendant had argued that the court lacked personal jurisdiction over him or should grant his *forum non conveniens* motion despite the applicable forum selection clause, such an argument would fail. Parties can consent to personal jurisdiction by means of a forum selection clause, and forum selection clauses are routinely enforced where, first, the clause was "reasonably communicated to the parties" and secondly, the clause was not "obtained through fraud or overreaching," and thirdly, there has been no clear evidence that "enforcement would be unreasonable and unjust." The court did not find that any of these criteria were met and they were not even put forward by the defendant. Under New York law, the interpretation of an ambiguous forum selection clause is a question of law for a court to decide as it did with a predictable outcome.

Two unmitigated assumptions of jurisdiction must be aligned and the English court did this by issuing an anti-suit injunction prohibiting the defendants from continuing the New York proceedings. However, has the English court "won" the battle by creating a precedent which can be applied in future? Was there any discernible law applied to the delineation of the New York and English jurisdictions by the English Court of Appeal? This would presuppose that the rules applied could also work the other way around. Imagine that the New York court orders the defendant to discontinue English proceedings after the English courts have already assumed jurisdiction under a forum choice agreement which is valid under English law but is not recognised in New York because it is found to be at variance with some procedural provision of the forum which is very specific to it and has no equivalent in English procedures. Obviously, the English courts would not hold the defendant to such an anti-suit injunction.

It is submitted that the English decision in *Samengo* does not develop any rules which provide for a proper delineation of jurisdictions which could be generally applied. Therefore, from the perspective of international procedures, it may be seen as an assertion of judicial power in the tradition of the ECJ's reading of the European Convention/Regulation in *Turner v Grovit*,[71] *Primacon*[72] and *Gasser*[73] which certainly does not purport to be an appropriate rule in relation to the New York and other courts outside the reach of the Regulation. It may cause conflicting judgments and orders, judicial unpredictability not only in economic but in employment and other relations internationally and in the worst case create a judicial conflict and may eventually result in things being taken out of the judges' hands. As *Samengo* shows, judicial conflicts are not a matter of the past. They are fought with procedural weapons and only those able to handle them may succeed when

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[71] [2005] 1 AC 101.

[72] *JP Morgan Ltd v Primacon AG* [2005] 2 Lloyd's Rep 665.

[73] *Erich Gasser GmbH v MISAT* Srl (Case C-166/02); [2005] QB 1.

caught off guard by "unfriendly" judicial orders assuming authority from abroad. It is in relation not least to the US that this is a subject to be aware of, while in Europe the Regulation, *Turner v Grovit* and the *lis pendens* rule guarantee that judicial conflicts are matters of the past traded in for Italian Torpedoes and the like which will now be fairly established in the common market. To look beyond it means first to realise that there are no conventional rules delineating jurisdiction between different states like the Conventions and Regulations in Europe. The global project of the Hague Conference of International Private Law on Jurisdiction and Enforcement was meant to create a Convention providing for rules on accepted standards, and frowned on bases of jurisdictions,[74] *lis pendens* and recognition which started in the 1990s. However, it eventually only produced a choice of forum convention which has currently just one member state which is Mexico.[75] This total failure to agree on a global basis of jurisdiction and the lack of any ensuing recognition of judgments must be admitted to be the current state of affairs in the field. Although there are Hague Conventions in special areas such as matrimonial affairs and child abduction, there is no globally applicable convention which could inform states and courts how to solve jurisdictional conflicts such as that which arose in *Samengo*. Therefore national court practice which forms state practice and *opinio iuris* relevant for international customary law under Article 38.1.b of the ICJ Statute must be identified in order to ascertain the customary rules of international law in the field (if there are any) and how international legal procedures may address the issue on the global level.

The English decision sheds interesting light on the granting of its anti-suit injunction:

> "An anti-suit injunction is not a remedy to be dispensed lightly, particularly where the defendants sought to be restrained have brought proceedings in courts of high repute in a friendly foreign state. The injunction of course is directed at the litigating party and not the court. The premise for the remedy is that this party should not be

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[74] The so called white, grey and black bases of jurisdictions, see for the latter "exorbitant" bases Article 18 of the Draft Hague Convention which matches generally the list in Article 3.1 and Annex 1 of Regulation 44/2001.

[75] The Hague Convention on Choice of Court Agreements of 30 June 2005; membership status on the website of the Conference www.hcch.net (visited last 25 April 2008). I had the privilege to participate in the negotiations at an earlier stage when the prospect of a global jurisdictional convention was still vivid among the states. It is suggested that US lawyers (*inter alia* El Fagan) lobbied against it successfully as such a convention may have limited US courts' jurisdiction to their detriment. This was after the idea of a global convention was initially strongly supported if not initialised by the US informed by Professor von Mehren and its Ministry of Justice. See J. Talpis and N.Krnjevis, "The Hague Convention on Choice of Court Agreements of 30 June 30 2005: The Elephant that Gave Birth to a Mouse" (2006) 13 (1) Southwestern Journal of Law and Trade in the Americas 1.

> litigating in that court and so the principles of comity are not offended by granting an injunction which does no more than require that party to comply with his legal obligations and ensure for the claimant that he does so. Although this is the correct analysis, one can understand why not everyone would see the situation in quite this way which is why the court should always be cautious before granting such relief."[76]

Indeed, "one can understand why not everyone would see the situation in quite this way"[77] which would apply particularly to the other court seised which is the New York one. In addition, any court should be cautious before granting relief which is meant and directed to interfere with jurisdiction of foreign courts. The idea that the injunction is directed only to the litigant and not to the court is an entirely national perspective which would not be accepted by the foreign court concerned. The desired effect of the injunction is, however, to discontinue foreign proceedings to the benefit of the domestic court's jurisdiction. This is done through a court order *ad personam* which means to order someone to do or not to do something in another jurisdiction. Therefore, from a strictly territorial perspective the litigant may be considered an agent of the court issuing an anti-suit injunction as he carries out what this court orders with intended effects beyond the territorial limits of this court's jurisdiction. This raises the question of whether under international standards and laws a court of one country may order those subject to its own jurisdiction to perform acts in other jurisdictions or whether this may be considered an illegal interference with the foreign court's and country's jurisdiction. When the English Court of Appeal concluded that "the court should always be cautious before granting such relief" they may have had this in mind.

Before going into litigation practice relevant to this point the question of whether there is an overarching principle barring orders which seek to affect foreign jurisdictions must be clarified. The idea that such an order works only *ad personam* in relation to a person subject to the jurisdiction of the court issuing such an anti suit injunction does not give an answer in relation to the other jurisdiction. This is easily established if we imagine that, for example, in *Samengo* the New York court reciprocates with an anti suit injunction against the English proceedings. Then there is a deadlock with no solution visible. The litigant subject to the jurisdiction *ad personam* of both courts would be held hostage by the unmitigated contradictory assumptions of jurisdiction of different courts. Whatever he does he would necessarily violate the order of one court by adhering to the order of the other court. What he actually does in practice may boil down to the question of which court could issue the harsher sanctions to coerce the litigant to adhere to its orders and not to those of the other court. Whether he has the more vulnerable assets in one or other territory or where his public reputation is more of an issue

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[76] *Samengo-Turner v J & H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, para. 40.

[77] *Ibid*.

may eventually decide to which court's order someone yields. This is certainly not a solution in principle but possibly may be in practice. This kind of ultimate conflict of jurisdictions is rarely encountered in practice as courts and litigants would usually try to avoid it. However, it is neither unknown nor insignificant to state and judicial practices. It is this conflict which shows the need for a solution which would inform all judicial steps regarding potential foreign competing claims of jurisdiction. It is this ultimate conflict which shows the problem best and accepting both competing courts' perspectives as equally significant would eradicate any kind of "escaping the real issue solutions" like referring to the *in personam* nature of equitable remedies (for example, anti suit injunctions) and neglecting with it the intended international legal effect on foreign jurisdictions.

Therefore, this "ultimate" clash or conflict of jurisdictions should be revisited to better understand its nature and envisage solutions which work satisfactorily in both directions. It must be remembered that such conflicts are related to the states' sovereignty, independence and "competency to competency".[78] States conceive themselves as the ultimate arbiters not subject to any coercion from outside**.** This also applies exactly to the self determination of their courts' jurisdiction which is the core of the *lex fori proceduralis*. The self conception of states and their courts as sovereign and competent to independently determine their own reach of power and jurisdiction (outside applicable Conventions and Regulations) does not allow for a higher authority to determine or co-ordinate the jurisdiction of courts of different countries. Therefore, it is submitted that there is no overarching rule delineating competing jurisdictions globally. From the perspective of international law, which is meant to co-ordinate different countries' claims to power, this is unsatisfactory. As Oppenheim writes:[79]

> "Failing that superior legal order, the science of law would be confronted with the spectacle of … States, each claiming to be the absolutely highest and un-derived authority."

Neither for States nor for courts would the traditional notions of sovereignty, competency or (judicial) power facilitate an acceptance of a higher legal rule to address the conflict of jurisdictions between different forums. These notions are developed in a national context and neither suited nor meant to help international co-ordination which is international law. Jurisdictional conflicts are usually addressed by either side with a reference to their own national legal order and notions. The English court's elaboration that its anti suit injunction to discontinue the New York proceedings is "of course … directed at the litigating party and not the [New York] court,"[80] is an example of this. This perspective entirely rooted in na-

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[78] See Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 31.

[79] Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law* (9th ed., Longman, Harlow, 1992) p. 38.

[80] *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, para. 40.

tional law and national concepts cannot provide a solution acceptable to both jurisdictions and does not allow for any reference to any rule perceiving both competing jurisdictions as equal.

Oppenheim writes further:

> "… it is only by reference to a higher legal rule in relation to which they all are equal, that the equality … of a number of sovereign States can be conceived."[81]

To take the other side as seriously as your own is the start of the solution. Some cases where the jurisdictional conflict was brought to a higher level, so that the foreign court reciprocated with adverse procedural means, for example issuing orders conflicting with those issued by the other country's court, should be presented. It is only then that the nature of the jurisdictional conflict is brought to a stage to require a solution.

In *X AG v A Bank*[82] the English High Court had to deal with conflicting injunctions of the English and American courts. The plaintiffs had successfully brought an action against the defendant, an American bank with a branch in London, seeking a declaration that the defendant owed the plaintiffs secrecy and confidence in respect of their banking accounts with the London branch and on 19 November and 20 December 1982 secured an injunction restraining the defendant from passing any account information to the head office in New York. However, on 11 January 1983, the US District Court for the Southern District of New York subpoenaed the American defendant to produce exactly this account information. The subpoena was addressed to the A bank for attention of "[a]ny officer or authorised custodian of records" and it commands the person addressed to attend before the "Grand Inquest of body of the people of the United States of America for the Southern District of New York to testify and give evidence in regard of an alleged violation"[83] of US law, such violation involving, *inter alia*, the evasion of taxes. The New York order (subpoena) elaborated that the bank had been subpoenaed to produce the account information and had failed to produce that maintained in its London branch as a result of a restraining order of the English High Court there, and went on to say:

> "and upon representation that it is necessary for the better enforcement of said Grand Jury subpoena, and the (N.Y.) court being satisfied that the production of the documents requested by the subpoena is necessary in the best interests of justice and the Grand Jury investigation, it is hereby ordered and adjudged that [the bank] produce all the documents … Relating to any accounts [of the defendants] maintained in its London, England, branch."

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[81] Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law* (9th ed., Longman, Harlow, 1992) p. 38.

[82] [1983] 2 All ER 464.

[83] [1983] 2 All ER 464. New York court order quoted at p. 470.

The predicament in which the bank in consequence found itself is obvious. The New York court's subpoena order was binding on it and requested the bank to produce the documents. On the other hand there was an injunction of the English High Court prohibiting the bank from obeying this New York subpoena. It is not only that the US and English courts assumed jurisdiction in the same matter and that they held that on the merits their own laws should be applicable, meaning that US or English law respectively would be applied as *lex causae*. The issuing of contradictory orders or injunctions "*ad personam*" against the same bank according to their *lex fori proceduralis* brings the underlying issue to light; this is the ultimate jurisdictional conflict on the global level and there is no preconceived abstract rule to settle the issue.

Leggatt J for the English High Court argued the case for the English law and anti suit injunction admirably. This author agrees with his arguments and it may be added that the US Court's order is ultimately meant to help US public aims such as tax and competition/anti-trust interests which would usually not be entertained by foreign courts or jurisdictions under the "revenue exception".[84] On the other hand the New York court's approach is well reasoned too; the head office of a bank in New York is certainly obliged to adhere to the laws under which it is incorporated and situated including the court orders issued there. The head office of a bank or company may certainly order branches to do something, for example, to send documents to its head office. A branch of a company has no legal independence from its head office unlike a subsidiary incorporated in a different country. Therefore, it is not far fetched that the New York Court would use this dependency of the London branch of the bank on its head office in New York to subpoena it to obtain the desired documents from the branch in London. The situation before the English court shows this; the bank as a defendant before it obviously intended to comply with the New York court's order and accept the necessary breach of confidentiality or secrecy under English law in relation to its customers in London incurred by this order. Therefore, these customers instigated the English counter proceedings successfully barring the bank from doing so.

Although the conflicting decisions of the courts reflect the different territorial reaches of jurisdiction they do not lend themselves to detecting a rule which goes beyond this very basic insight. In addition, a strictly territorial perspective would not meet the realities faced by international banks and their multinational corporate customers. As with a shared river between different countries the need to cooperate is obvious and no one state's perspective can be held isolated as the final answer. However, as long as there is no co-operation or agreement no ready made solution is at hand. Particularly, there is no obvious advice for the bank on how to deal with conflicting orders "*ad personam*" from different jurisdictions in which it

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[84] *Bank of Ireland v Meeneghan* [1994] 3 IR 111. For extensive treatment of the public law exception or revenue rule see Anatol Dutta, *Die Durchsetzung öffentlichrechtlicher Forderungen ausländischer Staaten durch deutsche Gerichte* (Mohr & Siebeck, Tübingen, Germany, 2006).

has business interests and assets and is, therefore, vulnerable. The *X AG* case is one of the few which displays this ultimate jurisdictional conflict openly and contains explicit argument on it. Courts and countries usually try to avoid getting to this point and use many techniques to do so which will be examined *infra*. However, only the perspective of this jurisdictional conflict makes clear what purpose such procedural means which try to avoid this conflict have, for example government interventions, *amicus curiae* briefs, act of state or prerogatives. There is a wide range of options between an abstract and "blind" rule which solves such a conflict, like the *lis pendens* rule as applied by the ECJ, and the mere acceptance of some territorial limits as the ultimate limit of any court's and country's power.

Before turning to them, another well known case decided at exactly the same time as *X AG* shows the same jurisdictional conflict in a different context. The Krupp Mak Maschinenbau GmbH, a German company with business interests in the US, was sued for alleged bribery when selling engines. Krupp banked with Deutsche Bank, a German bank with branches in the US. Deutsche Bank was subpoenaed by a US court to present banking information regarding Krupp's accounts which were confidential according to the applicable German law governing the banking relationship between Krupp and Deutsche Bank. The Court order (*subpoena duces tecum*) was addressed to the Deutsche Bank head office in Frankfurt/Germany and its branch offices in Kiel and New York. Failure to obey the order could have resulted in fines and imprisonment according to US law.[85] Krupp secured a restraining order from the Landgericht Kiel based on the bank's secrecy and confidentiality clause in its contract with Krupp enjoining the bank from producing the documents maintained in Germany. Failure to honour the restraining order was made punishable by the German court by a fine of up to DM 500,000 or imprisonment.

The German court reasoned that injunctive relief must be granted to prevent Deutsche Bank from revealing account information falling within the scope of bank secrecy under German law. Krupp's right as a depositor with the bank to secrecy and confidentiality could only be impaired by a lawful order issued by competent German courts or authorities. The court went on to say that it did not share the defendant's (Deutsche Bank) view that orders of American authorities, and the judicial decisions confirming the subpoenas, were tantamount to orders or decisions issued by German authorities or courts. It elaborated further that it was not called upon to review or even to criticise the opinion of the US Court and abstained from any evaluation of that opinion. It accepted the opinion of the competent judge in the US as a fact and merely decided what effect, if any, the opinion had on the legal relationship between the parties under German law. Deutsche Bank's contention that its failure to produce the requested information and documents could be regarded by the American court as contempt, and be punished as such, was not persuasive. Since the defendant was only following the command of

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[85] *In Re Grand Jury 81-2* Order of the District Court for the Western District of Michigan of 9 June 1982, see statement of facts, Judgment of the Landgericht Kiel, Germany of 30 June 1982, English translation in 22 ILM 740 (1983).

a German court which, in turn, was based on the valid banking contract between the parties, it was hard to conceive for the German Court that an American court would consider behaviour in obedience to a German court's order as contemptuous of an American court order or of American prosecuting authorities.

It is submitted that this statement of the German court is a reference to the idea of sovereign equality of states in international law,[86] their jurisdictions and courts, and the territorial reach of their powers. *X AG* and *Krupp* have common features; they not only represent the ultimate judicial conflict and address it from both sides of the equation but both have a bank with branches or head offices as well as assets in either jurisdiction as the object of the original court orders. The parties were then barred from complying with this original court order by the foreign courts which issued a contradictory order. Obviously, the courts on either side assumed that they could enforce their orders irrespective of the orders of conflicting foreign courts. In *Krupp* the US court eventually ordered "that the Deutsche Bank AG shall take any necessary steps to comply fully and completely, within 30 (thirty) days of the date of this order, with the subpoena served upon its New York branch on February 18, 1982".[87] It is interesting to look at how the US court in *Krupp* reacted when confronted by Deutsche Bank with the German court order and some arguments as to why it should comply with it.[88]

The bank argued before the US court that it did not have *in personam* jurisdiction over the head office of the Deutsche Bank in Germany where the documents requested were situated. This position is summarised in a memorandum produced in the proceedings:[89]

> "We have found no case that supports the proposition that this court has the power by virtue of subpoena served on its New York branch office to compel Deutsche Bank, an alien non-party to the instant grand jury investigation, to produce records located in Germany which pertain wholly to the Bank's transactions in Germany with a German customer. With regard to the matters being investigated by the grand jury, Deutsche Bank has not had any contact with the United States. This Court should not find in the incidental presence of a Deutsche Bank branch in New York a ground for the assertion of power to compel production of documents unrelated to its New York branch."

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[86] Article 2.1 of the Charter of the United Nations: "The Organisation is based on the principle of the sovereign equality of all its Members."

[87] *Re Grand Jury 81-2* Order of the US District Court for the Western District of Michigan, Northern Division, Case No. M 82-2 MISC of 10 June 1982 judgment of Douglas W. Hillman J, 22 ILM 742**,** 751 (1983).

[88] *Re Grand Jury 81-2* Opinion and Order of the US District Court for the Western District of Michigan, Northern Division, Case No. M 82-2 MISC. of 10 June 1982 judgment of Douglas W. Hillman J, 22 ILM 742, 751 (1983).

[89] 22 ILM 742, 743 (1983).

It argued that under German Law (§§ 93, 404 AktG) it is unlawful to disclose any business secret and that failure to comply with this law would expose the Deutsche Bank manager to prosecution and civil liability in Germany.

Further, it suggested that a feasible alternative to the subpoena directed against the bank might be that the US court issue letters rogatory[90] seeking the assistance of the German courts to secure the desired material as only a German court's order could release the bank from its obligation of banking secrecy concerning documents in Germany (§ 404 AktG).

Commenting on this suggestion the US court outlined:

> "The gist of this argument is that consideration of international comity and diplomacy require that the sought after documents be pursued through 'regularised intergovernmental channels of international judicial assistance which enable the governmental authorities to seek evidence abroad with a minimum of infringement on national sovereignty, i.e. letters rogatory."

However, the US court did not seem too impressed and addressed the three arguments which were jurisdiction, the German Law and court order and alternative international judicial assistance in a very clear manner which is worth presenting as it possibly represents a judicial attitude regularly encountered in such a situation of international judicial conflict. It is a perspective based in its national law and does not take the international law view of an objective bystander in relation to the conflicting assertions of jurisdiction as essentially equal.

On its jurisdiction to order documents from Germany:[91]

> "… the maintenance by Deutsche Bank of an active branch office in New York provides sufficient evidence that the bank 'purposefully avails itself of the privilege of conducting activities within the … (United States) …, thus invoking the benefits and protection of its laws.'[92] Therefore, since the bank has deliberately and continually operated within the jurisdiction of the US, this court may exercise jurisdiction over the bank in order to enforce American law … In short, the bank's argument that the records in Germany are beyond the jurisdictional reach of these subpoenas and the orders of this court ignores the continuous and systematic presence of the Bank in the United States and attempts to dodge the obligation that presence imposes upon the bank with respect to American law."

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[90] International Legal Assistance under the Hague Convention on Evidence (Rechtshilfe nach dem Haager Beweisübereinkommen).

[91] *Re Grand Jury 81-2* Opinion and Order of the US District Court for the Western District of Michigan, Northern Division, Case No. M 82-2 MISC of 10 June 1982 judgment of Douglas W. Hillman J, 22 ILM 742, 745 (1983).

[92] The court refers to *Hanson v Denckle* 357 US 235, 253 (1958); *Bersch v Drexel Firestone, Inc* 519 F 2d 974 (2nd Cir 1975).

On the conflicting German court order based on German law obligations of banking secrecy:[93]

> "… recent case law from a wide variety of American courts reflects movement toward a general rule that a witness may not refuse to comply with a subpoena merely because compliance may subject him to sanctions in foreign countries."[94]

And on the German government:[95]

> "Neither am I convinced by the bank's representation that the German government has taken such a position against disclosure of the records. If indeed the German government has taken such a position, it has done so without the benefit of hearing the United States' reasons for seeking the records, and I have no doubt that being fully informed, the German officials would have given their customary respect to the legitimate efforts of the American government to enforce its criminal laws."

The court then goes on to weigh up the German and American conflicting legal interests:[96]

> "… the court is not insensitive to the German interest in bank secrecy. However, there are significant American interests at stake in this case, namely the enforcement of American criminal law and the proper functioning of federal grand juries. … In short, I am convinced that the US' interest in enforcing its criminal laws outweigh any countervailing interests or hardship asserted by the bank."

On the alternative procedure to the subpoena, which would have involved issuing letters rogatory to seek German judicial assistance, the court held:[97]

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[93] *Re Grand Jury 81-2* Opinion and Order of the US District Court for the Western District of Michigan, Northern Division, Case No. M 82-2 MISC of 10 June 1982 judgment of Douglas W. Hillman J, 22 ILM 742, 747 (1983).

[94] The court refers to *Societe Internatioanle v Rogers* 357 US 197 (1958); *US v Vetco Inc* 644 F 2d 1324 (9th Cir 1981)*; SEC v Banca Della Svizzera Italiana* Fed Sec L Rep (CCH) 98; 346 (SD NY 1981); Note Ordering Production of Documents from Abroad in violation of Foreign Law (1964) 31 Chi L Rev 791.

[95] *Re Grand Jury 81-2* Opinion and Order of the US District Court for the Western District of Michigan, Northern Division, Case No. M 82-2 MISC of 10 June 1982 judgment of Douglas W. Hillman J, 22 ILM 742, 747 (1983).

[96] *Re Grand Jury 81-2* Opinion and Order of the US District Court for the Western District of Michigan, Northern Division, Case No. M 82-2 MISC of 10 June 1982 judgment of Douglas W. Hillman J, 22 ILM 742, 748 and 749 (1983) with further reference, *inter alia*, to *US v First National City Ban*k 396 F 2d 897 (2nd Cir 1968).

> "Certainly, this alternative is available to the United States. It seems, however, that letters rogatory are much less desirable than the subpoena. … the United States has chosen subpoena as the preferred method of obtaining the records. I am satisfied that method is both lawful and proper."

The conclusion "that the Deutsche Bank AG shall take any and all necessary steps to comply fully and completely, within thirty (30) days of the date of this order, with the subpoena served" does not seem surprising.

The *X AG* and the *Krupp* cases may be taken as examples of the ultimate conflict of jurisdictional claims in international relations between different courts. They do not offer solutions of a sufficiently general nature to work in both directions. Further, it is submitted that up to the present time there is no solution available which can definitively settle such conflicts. However, the courts show certain tendencies which suggest how to deal with and approach competing claims of foreign jurisdictions. It is the manner in which those courts which are exposed to such jurisdictional conflict approach it which may indicate solutions for settling the issues. This is treated here fairly extensively given the relatively small number of cases of direct judicial confrontation of competing courts' injunctions and orders. However, the essential issue is the same in all cases of extension of power, jurisdiction or competency into the realm of what is claimed by another state to be its power, competency or jurisdiction irrespective of whether it is judicial, legislative or executive activity which is involved. All measures which have intended or unintended extraterritorial effects like competition measures, anti trust laws, claw back statutes, securities legislation and numerous injunctions like anti-suit or international garnishee orders issued by national authorities or courts face the same basic problem. The great variety of forms in which this "ultimate" international conflict of courts or jurisdictions appears often disguises rather than clarifies the actual problem. However, it is possible to see this ultimate judicial conflict as the core issue between national and international law and procedure which advocates a closer examination.

The German Court (*Kiel Landgericht*) in *Krupp v Deutsche Bank*, 30 June 1982; 22 ILM 740 (1983) indicated that it would accept the opinion of the US court as a fact and merely decided what effect, if any, the opinion had on the legal relationship between the parties under German law. This is a territorial approach with a reference to international legal equality of states and their courts in that the German court observed that orders of American authorities and the judicial decisions confirming the subpoenas were not tantamount to orders or decisions issued by German authorities or courts. It is a categorical approach more related to the perceived status of courts, countries and their decisions than the subject matter of the

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[97] *Re Grand Jury 81-2* Opinion and Order of the US District Court for the Western District of Michigan, Northern Division, Case No. M 82-2 MISC of 10 June 1982 judgment of Douglas W. Hillman J, 22 ILM 742, 749 (1983).

issue before the court. This thinking is closer to public international law and its strict territorial limitations of sovereignties. It could be equally applied to every competing jurisdictional claim or measure with extraterritorial effect irrespective of the subject matter at issue. Vocabulary like "violation of territorial sovereignty and independence" could be employed.

The US court opined differently. No reference to any kind of abstract delineation of courts' international jurisdiction or state powers is to be detected; rather there are many references to US national law. The answer to Deutsche Bank's contention that the court lacked jurisdiction over its head office in Germany was given only with reference to US rules assuming jurisdiction over it because of the Deutsche Bank branch in New York not mentioning that this US national base of jurisdiction is internationally considered as exorbitant[98] as indicated by Deutsche Bank when outlining that its branch in New York has no business relation to Krupp or any of the issues relevant to the case. Hints to international comity and diplomacy and that the sought after documents be pursued through regularised intergovernmental channels of international judicial assistance do not receive any consideration. The strong hint given by Deutsche Bank relating to the German government's intervention is not accorded any significance either; the US court has no doubt that being fully informed, the German officials would have given their customary respect to the legitimate efforts of the American government to enforce its laws. This suggestion may not go down too well with the German officials intervening in the proceedings as it labels their intervention as ill informed and disrespectful to American legal interests. It simply accords them no relevance nor does it accord any to international law arguments. It is the perspective of national law displayed as the only relevant law. The US court balances German banking secrecy laws with American interests concluding that US interest in enforcing its criminal laws outweigh any countervailing German interests. This is in sharp contrast to the German court's assessment of the US court's order which is taken as "fact" and not commented upon. While the German court's thinking categorically requires it to abstain from any evaluation of the US court's opinion, as it is in the realm of another sovereign not to be reviewed, the US court weighs German banking secrecy as well as the German court order with its own interests in the enforcement of US laws. American law retains with this a much more flexible approach, considering any abstract categories based on sovereign equality of courts and countries only as possibly minor criteria in evaluating the conflict, and favours a balancing of interests looking at the merits of the case.[99] These two approaches have obviously developed from different backgrounds. The US Restatement, Conflicts of Laws reads:

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[98] See Article 18 of the Hague Draft Convention on Jurisdiction and Enforcement.

[99] This is the approach so admirably outlined for conflicting areas of law by Andreas Lowenfeld, "Public Law in the International Arena; Conflict of Laws, International Law, and Some Suggestions for their Interaction" in (1979) 163 *Recueil des Cours* pp. 315 – 428.

> "A state can exercise jurisdiction through its courts to make a decree directing a party subject to the jurisdiction of the court to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed."[100]

In *SEC v Minas de Artemisa*[101] relying on this section, the court modified a subpoena requiring the production in Arizona (US) of corporate books located in Mexico, since compliance would have required a violation of Mexican law. As modified, the subpoena ordered the corporation to apply to Mexican fiscal authorities for permission to remove the books, or, in the alternative to require the corporation to allow the SEC to copy the books in Mexico, thus avoiding a violation of Mexican law. This old US practice reflects, for example, the current "Baltic formula" used by English courts when issuing Mareva (or asset freezing) injunctions whereby they place any extraterritorial order at the discretion of the local foreign courts.[102] However, in the US this limitation on its courts' powers was rejected by the US Supreme Court in *Societe Internationale v Rogers*.[103] This litigation is most interesting in itself and the procedural handling of the case even more so as it is highly politicised as it challenges the massive US confiscations of Swiss property as enemy property (although Switzerland was neutral in World War II). This challenge, however, was not entertained by the US courts as certain material requested by the court could not legally be delivered under Swiss law to serve the US proceedings.[104] The argument of the Supreme Court is interesting:

> "… to hold broadly that petitioner's failure to produce the … records because of fear of punishment under the laws of its sovereign precludes a court from finding that the petitioner had 'control' over them, and thereby from ordering their production, would undermine congressional policies made explicit in the 1941 amendments … Rule 37 is sufficiently flexible to be adapted to the exigencies of particular litigation. The propriety of the use to which it is put depends upon the circumstances of a given case, and we hold only that accommodation of the Rule (37 on Civil Procedure) in this instance

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[100] US Restatement, Conflict of Laws, para. 94 (1934).

[101] 150 F 2d 215 (9th Cir 1945).

[102] *Bank of China v NBM LLC* [2002] All ER 717; *Baltic Shipping v Translink* [1995] 1 Lloyd's Rep 673.

[103] 357 US 197 (1958).

[104] Although it was found that there was no collusion between the plaintiff and the Swiss authorities prohibiting the production of the documents under Swiss penal law, it was held that the plaintiff had control (although the court admitted that he had not) over the documents and upon non-production the claim was dismissed under Rule 37 (b)(2) of the Federal Rules of Civil Procedure.

> to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing this production order."[105]

It was not just fear of prosecution under Swiss law which made the plaintiff fail to produce the documents in the US court. It was the constructive seizure of the documents in Switzerland by the Swiss Government to make sure that the plaintiff would be unable to produce the documents in the US in violation of Swiss law which barred the Swiss party from complying with the US Court's order.

Not accepting the German barring court order in *Krupp* nor the seizure of the document by the Swiss government in *Societe Internationale* as justification for non-compliance with the US court orders indicates the wide discretion US courts assume in weighing all circumstances, including political exigencies, to come to a conclusion less informed by doctrines of international law than by staying firmly rooted in national legal thinking.[106]

Some try to find rules to solve the "ultimate" jurisdictional conflict. Two approaches may be readily identified each associated with either the European (German and English) or American courts in the cases discussed; on the one hand a fine and abstract delineation of jurisdiction based on the international law principle of the sovereign equality of states and their courts favourably expressed in an abstract "blind" rule equally applicable to either side of the equation and inclined to favour international judicial co-operation (letters rogatory) over unilateral procedural means with extraterritorial effects. Or, on the other hand, a focus on the substantive issue before the court where every aspect may be taken into consideration and weighed up with a wide discretion and where foreign illegality in respect of a court order is only one among many other factors but not necessarily the decisive one. The first approach is found in the Brussels and Hague Conventions and is centred in international law. Such principles were formulated recently by the American Law Institute together with UNIDROIT.[107] Principle 28 applying the *lis pendens* and *res judicata* doctrines internationally and Principle 31 indicating International Judicial Co-operation as the standard form of production of evidence from abroad speak with a clear voice. They still need to be endorsed by judicial practice. This is necessary in order for them to claim persuasive authority not least within the American jurisdiction. Needless to say, this is still to be achieved.

The other alternative more favoured by American courts is centred around national law, less rule based and so is less predictable in outcome, however, it takes

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[105] 357 US 197, 204-206 (1958).

[106] Further elaboration with many references in Anonymous, "Limitations on the Federal Power to Compel Acts Violating Foreign Law" (1963) 63 Col L Rev 1441; Anonymous, "Ordering Production of Documents from Abroad in Violation of Foreign Law" (1963-64) 31 U Chi L Rev 791, summing up at p. 810, footnote 79 that actions taken by American Courts faced with these problems have also not been consistent reflecting the use of discretion.

[107] ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (CUP, 2006).

the issue before the court into consideration as well as an unlimited number of aspects which may be weighed up by the judge. Certainly, all the conflicting foreign court orders, laws and governmental interventions will be taken into consideration, not as a conclusive basis for any decision but just as additional factors to be assessed in the court's judicial discretion drawing intensely on principles associated with the pre-emptive public force of the national *lex fori proceduralis* in the conflicts of laws. This approach is inclined but not bound to favour national considerations on the merits and execute them internationally if possible. It is certainly very flexible and the outcome of the *X AG* or *Krupp* cases in the real world shows this. Both were settled with diplomatic help and intervention saving faces[108] but left any legal procedural principles as uncertain as before. Using discretion in not pursuing its own orders in the face of foreign illegality or compulsion would draw on ideas of comity among courts or states and other notions known from international law and relations as they justify a court practice which would be different if no foreign law or state with competing jurisdiction existed. This is necessarily the realm of international law although remaining firmly within the framework of the court's national procedure and discretion. The procedural means employed by a court in yielding some jurisdiction to the benefit of other jurisdictions based on international legal aims are fairly established. They will be discussed in the following chapter.

A very current incident may indicate how unpredictable any exercise of jurisdiction may be. One of the most senior private bankers of UBS, the world's leading wealth manager, has recently been detained by authorities in the United States as a "witness" in an investigation into whether the Swiss bank helped American clients to evade US tax obligations.[109] He was not charged himself with any offence but was being under a "material witness warrant" in connection with a US Department of Justice investigation. It may be assumed that any advice and any account information the Swiss banker has given to US customers would be subject to Swiss banking confidentiality and secrecy. In Switzerland violation of banking secrecy is a crime.[110] Therefore, the move to arrest a leading Swiss banker in the

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[108] See for the *Krupp* case Bertele, *Souveränität und Verfahrensrecht, eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiction im Verfahrensrecht* (Tübingen Mohr & Siebeck, 1998) p. 524, with an abundance of reference material from the US, French, German, English and Swiss courts in this area in the book.

[109] According to the *Financial Times,* 7 May 2008, p. 1 "Top UBS Banker Held in US Tax Probe" it is Martin Liechti, a Swiss national, resident and domiciled in Switzerland, responsible for customers from America in the Zurich based UBS.

[110] Article 273 Schweizerisches Strafgesetzbuch/ Swiss Penal Code: "Whoever attempts to obtain a trade or business secret in order to disclose it, or whoever discloses such a secret to a foreign official or private organisation, or to a foreign business firm, or to their agents, shall be punished with imprisonment. … The judge may also levy a fine." See also Article 47 Swiss Banking and Business Secrecy Act which provides equally for imprisonment and fines in case of divulging information which is professionally secrecy.

US as a witness to provide information which most probably would be a crime to release under Swiss law which is most likely to be the proper law of the banking contract (*lex causae*), is exactly the ultimate jurisdictional conflict again. This time the banker travelling through Miami was physically arrested although not charged with an offence by the US authorities. This may be compared to the situation faced by Deutsche Bank in *Krupp* where the bank was ordered to disclose information by the US court as a witness rather than as an accused but coerced by a material subpoena to do so against the prohibition of the German law applicable to the information and documents situated in Frankfurt in Germany. The initial regard that the US authorities have for the Swiss jurisdiction's limits on disclosing banking secrets to foreign authorities will be probably comparable to the regard they had for the German legal limits in *Krupp*. It will be very much informed by the US court's *lex fori proceduralis* which includes the "material witness warrant" and less by any procedural means in favour of the Swiss law which may claim to be more closely connected to the banking relationship between UBS and its customers in Zurich. To focus on Martin Liechti who will very likely be asked by the US authorities to reveal information which is confidential according to his native Swiss law shows this ultimate jurisdictional conflict possibly even better than the cases presented earlier which concern legal personalities rather than a natural person. His release and the solution of the underlying jurisdictional conflict will depend on the ingenuity of his and UBS' lawyers and the support of Switzerland in making it clear that the "foreign compulsion doctrine" sometimes applied by US courts,[111] should be applied here too. However, the decision in *US v Field*[112] shows that any prediction is premature.

In *US v Field* the US Court of Appeal was faced with a very similar challenge. Field, a Canadian citizen, was the managing director of Castle Bank and Trust Company (Cayman) Ltd, located in Georgetown, Grand Cayman Island, British West Indies. The British West Indies is a Royal Crown Colony of the United Kingdom. The colony, however, has autonomy and its own banking secrecy laws distinct from those which apply in England.

On 12 January 1976, Field, while in the lobby of the Miami International Airport, was served with a subpoena directing him to appear before a grand jury on 20 January 1976. During his testimony, Field was asked several questions concerning his activities on behalf of Castle and its clients. Field, however, refused to answer these questions on the ground that to do so would be a violation of the bank secrecy laws of the Cayman Islands.

The Court of Appeal held that Mr Field, although a Cayman Island resident and Canadian national and therefore a non resident alien in the United States could be subpoenaed while accidentally present in the United States to testify before a grand jury investigating the possible tax law violations of others, even though the

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[111] Discussed by Leggatt J in *X AG v A Bank* [1983] 2 All ER 464.

[112] 532 F 2d 404 (5th Cir 1976).

very act of testifying might subject him to criminal prosecution in the country of his residence for violating that country's (Cayman Islands) bank secrecy laws. To back up his case Mr Field submitted an affidavit by an expert on Cayman law that stated that he could be subject to criminal punishment for answering the questions before the grand jury. The affidavit, moreover, stated that the bank examiner of the Cayman Islands could require Mr Field to state whether he had testified before the grand jury. If Mr Field refused to answer the questions of the bank examiner, he would be subject to a criminal penalty of up to six months imprisonment. The US government as appellant in the proceedings did not contest that Mr Field in testifying before the grand jury would subject himself to criminal prosecution in the Cayman Islands, his place of employment and residence.

Mr Field's second contention was that as a matter of international comity the US court should refuse to enforce the subpoena. It was suggested that an appropriate accommodation between the law of the United States and that of the Cayman Islands must lead the US court, exercising its discretion, to decline enforcement. Mr Field argued that nations should make every effort to avoid the situation present here, where one nation requires an act that the other nation makes illegal.[113]

In refuting these arguments the US court reasoned that the decision to be made required a balancing of all the several varied factors in determining whether the United States' or the Cayman Islands' legal command would prevail. It starts with a reference to Section 40, Restatement (2nd) of the Foreign Relations Law of the United States, which reads:

> "Limitations on Exercise of Enforcement Jurisdiction where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state."

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[113] See *United States v First National City Bank* 396 F 2d 897 (2nd Cir 1968) Restatement (2nd), Foreign Relations Law of the United States, s 40 (1965).

The first and most important factor to be considered according to the US court was the relative interest of the states involved. The United States sought to obtain information concerning the violation of its tax laws. On the other hand, the Cayman Islands sought to protect the right of privacy that is incorporated into its bank secrecy laws. The Cayman Government position appeared to be that any testimony concerning the bank would violate its laws. Therefore, either the United States or the Cayman interest had to give way, a state of affairs which represents the ultimate jurisdictional conflict between countries.

In deciding which of the irreconcilable laws should give way to the other the US court outlined the significance of the US legislation and the right of the grand jury to obtain information needed. It concluded that to defer to the law of the Cayman Islands and to refuse to require Mr Field to testify would significantly restrict the essential means that the grand jury had of evaluating whether to bring an indictment.

In the balancing process regarding the foreign (Cayman Islands) law it was noted that the US allows wide discretion to investigatory bodies in obtaining information concerning bank activities.[114] There could be no question that Mr Field would be required to respond to the grand jury's questions if this was solely a domestic case. An important factor in the reasoning of the US court was the practice of foreign states. It went on to say that in the United Kingdom such evidence can be obtained.[115] One sentence should be quoted here: "Indeed, even the Swiss government, which is notorious for protecting the privacy of financial transactions, might provide under certain circumstances to the United States information concerning Swiss banks." [116]

However, the latter quotation makes reference to a clause of the Swiss US treaty on Mutual Assistance in Criminal Matters of 1973. Irrespective of the fact that most probably this treaty would not apply to the case here the US court in *US v Field* made reference to the special provisions of the treaty concerning organised crime in Article 6. In the definition of organised crime in Article 6.3.b of the Treaty one criteria is that the group threatens or "commits acts of violence or other acts which are likely to intimidate and are punishable in both States," and whatever may be said about any international banking activity[117] the gist of the issue is

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[114] *United States v Miller* 425 US 435 (1976).

[115] See *Clinch v Inland Revenue Commissioners* [1974] 1 QB 76; *Williams v Summerfield* [1972] 2 QB 512.

[116] See Note (1974) 15 Harv Int'l LJ 349, 359 which makes reference to a US Swiss treaty on Mutual assistance in Criminal Matters of 25 May 1973.

[117] The US court in *US v Field* was not slow to qualify foreign banking quite unfavourably (pp. 408-409): "Secret foreign bank accounts and secret foreign financial institutions have permitted a proliferation of 'white collar' crimes; have served as the financial underpinning of organized criminal operation in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally and purchase gold; have allowed Americans and others to avoid the law and regulations governing securities and

that the activities in question were certainly not "punishable in both States". Without that double criminality provision very close limits apply under Article 7.2.c requiring that the concerned person may be successfully prosecuted resulting in "imprisonment for a sufficient period of time so as to have a significant adverse effect on the organised criminal group." This qualifies the indeed exceptional provision of the Treaty in Article 8.4 which reads:

> "Provisions in municipal law which impose restrictions on tax authorities concerning the disclosure of information shall not apply to disclosure to all authorities engaged in the execution of a request under paragraph 2 of Article 7."

US v Field again shows the balancing process which takes account of various aspects of jurisdiction but does not allow for any categorical delineation of jurisdiction associated with arguments of international legal equality of countries and their jurisdictions or of the comity of courts.

An even more current incident which illustrates the jurisdictional conflict issue is the *Turner*[118] case. US officials investigating alleged bribes in a Saudi arms deal subpoenaed Mike Turner, the chief executive of BAE Systems, Britain's biggest military contractor, and his colleague on their arrival in the United States at George Bush International Airport in Houston, Texas, on 12 May 2008. The summonses were part of a US Justice Department investigation of bribery charges related to a large arms deal in Britain involving a series of warplane sales to Saudi Arabia agreed in the mid-1980s and valued at up to $80 billion. The Serious Fraud Office in the United Kingdom dropped an inquiry into the deal in December 2006 after then Prime Minister Tony Blair said the probe threatened national security. In June 2007, the company said that it had been notified that the US Justice Department had begun investigating BAE's compliance with anti-bribery laws, including in relation to dealings with Saudi Arabia. The US Justice Department had no comment to make about the issue of the subpoenas according to a department spokesperson. A BAE spokesperson said that he could not confirm or deny British media reports that personal electronic devices belonging to Mr Turner and his colleague, including laptops, had been seized and examined before they were allowed to continue their trip. They were not prevented from entering the United States and

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exchanges; have served as essential ingredients in frauds including schemes to defraud the United States; have served as the ultimate depository of black market proceeds from Vietnam; have served as a source of questionable financing for conglomerate and other corporate stock acquisitions, mergers and takeovers; have covered conspiracy to steal from the US defence and foreign aid funds; and have served as the cleansing agent for 'hot' or illegally obtained monies. The debilitating effects of the use of these secret institutions on Americans and the American economy are vast. It has been estimated that hundreds of millions in tax revenues have been lost. HR Rep No. 91-975, 91 Cong 2d Sess 12 (1970), U.S. Code Cong & Admin News 1970, p. 4397."

[118] See *Financial Times* and *Reuters* Reports of 18 May 2008.

according to media reports Mr Turner was detained for a period of half an hour and has since returned to Britain.

Most current is a decision of the Italian Court of Cassation of June 2008 which exemplifies the risks of "blind" recognition and enforcement of other European countries' decisions. The Rome Court of Cassation approved a writ relating to the property of Germany in Italy after proceedings on 6 May 2008 in a decision of early June 2008. If Berlin refuses to pay damages for acts by the German Forces during World War II, assets such as the Villa Vigoni, which overlooks lovely Lake Como in Italy which is the property of Germany and part of its cultural policy (Goethe Institute) could be seized, sold and the money given to the plaintiffs as a result of the Greek court's damages ruling over an incident in Distomo, Greece in 1944.[119] The Greek judges had awarded the victims' relatives nearly €29 million ($45 million) in the 1990s, but Berlin declined to pay. A bid to seize the German cultural office in Athens, the Goethe Institute, was subsequently prohibited by the Greek government as Article 923 of the Greek Civil Procedural Code requires the consent of the Greek government before any seizure of foreign states' property may take effect. This authorisation was denied by the Greek Minister of Justice. However, such a clause does not exist in the Italian Code of Civil Procedure nor is it known in many other procedural codes.

The Distomo plaintiffs then decided to ask Italian courts to enforce the Greek ruling and succeeded. The Rome judges declared the Villa Vigoni as security for the debt. Normally, sovereign immunity prevents precisely what the Greek and Italian courts have ordered: individuals suing a foreign state in their own courts. As the rationale for any kind of state immunity is that States can only be sued in relation to their state activity (*actae de iure imperii*) before international tribunals.

So what happens if Italian judges do enter a damages finding against Germany in the end? Could the Villa Vigoni be put on the block in an auction? Could the Rome branch of the Goethe Institute be boarded up and put on the market? It is very hard to predict what will happen. Immunity may not save Germany from paying any more as the Rome Court of Cassation did not apply immunity in its most recent decision. The preceding decision of the Greek court of Levadia in Distomo[120] was upheld. The Greek Supreme Court composed of 51 judges sitting found an emerging customary rule containing a tort exception to state immunity with a territorial nexus to the forum. It accepted the formulation contained in the European Convention on State Immunity as customary, although Greece was not a member to the Convention but Germany was. The Court arrived at this result after a thorough review of all available instruments on state immunity, most of them in draft form at the time, as well as of the case–law of other jurisdictions, mainly the

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[119] *Kalogeropoulos et al. v Germany* Court of Livadia decision 137/1997, confirmed by the Areos Pagos (Areopag, Greek Supreme Court) decision of 4 May 2000 *Germany v Prefecture of Voiotia*, case 11-2000 reported in 49 Nomiko Vlma 2000, 212-229 and ILDC 287

[120] Biehler, *Auswärtige Gewalt* (Mohr & Siebeck Tübingen, 2005) p. 308 *et seq.* gives an comprehensive account of the case.

United States. The strong dissenting opinion, led by Chief Justice Matthias, reached the opposite conclusion, namely that no such custom exists.

The possible enforcement in Italy of the Greek judgment unenforceable in Greece by the Rome court under the European rules of recognition is an example of inconclusive proceedings in international law. The Greek decision which cannot be executed in Greece because of the lack of Greek governmental assent under Article 923 of the Greek Procedural Code may be possibly executed in Italy. The unusual harshness of the original Greek decision not granting immunity to Germany may well have been triggered by the Greek judges' knowledge of the necessary governmental assent making any embarrassment of their own government in its international relations impossible when it does not wish to execute the judgement. To avoid embarrassment in international relations is also one of the main aims of sovereign immunity. The applicants in the Greek case were well advised to leave Greece where the decision may not be enforced for Italy, where the enforcement may be obligatory under the applicable rules. Particularly, Article 1 sentence 2 and Preamble consideration No. 9 of the Rome II Convention/Regulation on Non-Contractual Obligations which seem to explicitly exempt such cases from its remit does not do so if a court holds that the tortious acts in question are not done "de iure imperii". This is exactly what the Rome court and the majority of the Greek court reasoned. The Greek *lex fori proceduralis* is local and although the Greek Article 923 may have informed the Greek judges in their judgment on the merits it has no effect in Italy. Under the Rome II Convention it is doubtful that Italian courts could apply immunity when asked to enforce the Greek judgment even if they wished to do so. It is arguable that the Italian Courts are not to review the denial of immunity by the Greek Courts in their enforcement procedures. A remedy may be to apply the full Greek law including the Greek Civil Procedural Code although it forms part of the Greek *lex fori proceduralis* which is under the traditional understanding only locally applied. In this case courts should not decide "blindly" otherwise the "Italian Torpedo" gets an ever enhanced meaning as already foreshadowed in *Ferrini v Germany*.[121]

4.5 Basis of Jurisdiction in Different Countries

4.5.1 Jurisdiction

National bases of jurisdiction may be significant to both academics and practitioners. To know which court will admit which application and why is the start of all legal proceedings. It is the individual forum's rule on jurisdiction which both enables successful forum shopping and to appropriately answer such moves from the

[121] Italian Court of Cassation decision of 11 March 2004, (2004) 87 Rivista di Diritto Internazionale 539; comment Andrea Bianchi in (2005) 99 AJIL 242, 248.

other side. To be aware that, for example, applications for negative declarations (as a first procedural step to forum shopping, some injunctive relief or countermeasures) will be entertained by Irish or Italian but not by Greek or German courts could be useful.

Considering the immense significance of the approaches of different countries to jurisdiction, it is surprising that there is no full compilation of the different bases of jurisdictions available yet. Only some hints in, for example, Annex 1 of the EC Regulation 44/2001 on exorbitant bases of jurisdiction of EC member states can be found. However, the national bases of foreign jurisdictions both European and others are still quite difficult for any lawyer to ascertain. The following compilation is a step in this direction. It will help to provide an initial idea beyond the rules embodied in EC regulations. Where cross border civil proceedings are being initiated, issues such as jurisdiction and choice of law were formerly covered by the 1968 and 1982 Brussels Conventions. In the same way that rules of service within the EU are now laid down in EC Regulation 1348/2000, Regulation 44/2001 now provides rules on jurisdiction.

The general bases on which courts will accept jurisdiction, however, remain those that have evolved over time through conventions, treaties and custom. In Europe the Rules of the EC Regulation 44/2001 shape the approach to international litigation. The main basis of jurisdiction is Article 2.1 of EC Regulation 44/2001 which reads:

> "Subject to this Regulation, persons domiciled in a Mamber state shall, whatever their nationality, be sued in the courts of that Member State."

Domicile as defined autonomously by EC law remains the primary ground of jurisdiction and this is reflected in Article 2 of Regulation 44/2001.

This main rule is subject to exceptions in Article 5 *et seq*. of the Regulation (Brussels II). In Article 23 of Regulation 44/2001 and in all other national laws on national jurisdiction the choice of the parties concerning the court, the *forum prorogatum*, takes precedence over the general rule of jurisdiction but for the exclusive or mandatory bases of jurisdiction. As this is a common feature of all jurisdictions discussed in this section it is not any more mentioned when discussing the national rules on jurisdiction.

In addition, the EC Regulation 864/2007 (Rome II) on non-contractual obligations which will enter into force on 11 January 2009 provides in Article 14 for the *lex prorogatum*, the law chosen by the parties, and in Article 4.2 for the law of the place of the habitual residence of the parties to take precedence over the general rule in Article 4.1 which is to apply the law of the country in which the event giving rise to the damage occurred irrespective of the countries in which indirect consequences of the event may have occurred. This rule is remarkably different from the rules applied in most countries according to their national law which is the *lex loci delict commissii*. Except for Denmark (see Article 3 of EC Regulation 44/2001

and Preamble consideration No. 40 of EC Regulation 864/2007) both Conventions/Regulations will have decisive effects for the Courts of the EC and EFTA Member States. However, national bases of jurisdiction remain relevant for two main reasons.

Primarily, the strict "blind" application of the recognition rules in Europe guaranteed by the ECJ, for example, in *Krombach v Bamberski* ensures that national (even exorbitant) assumptions of jurisdiction based on outlawed (Article 3.2, Annex 1 EC Regulation 44/2001) national law will remain enforceable and even strengthened by the compulsory recognition/enforcement rules of the EC Regulation. This is one reason to be familiar with those provisions beyond the rules of EC law. This defies the intention of Article 3.2 which provides that certain rules of national jurisdiction, which are listed in Annex 1, cannot apply to persons domiciled in a Member State and who are being sued in the courts of another Member State. These include provisions allowing jurisdiction to be founded on a variety of circumstances apart from domicile. It refers, for example, to the rule in the United Kingdom, which enables jurisdiction to be founded on the document instituting the proceedings having been served on the defendant during his temporary presence in the UK, the presence within the UK of property belonging to the defendant or the seizure by the plaintiff of property situated in the UK. It also covers Paragraph 23 of the German *Zivilprozessordnung* (Code of Civil Procedure), which contains a similar provision relating to property and Articles 14 and 15 of the French *Code Civile*, which identify contractual obligations entered into in France with a French national as a basis for jurisdiction. The bases of exorbitant jurisdiction in national laws are mentioned here. The most significant application of the national rules of jurisdiction combined with the EC Regulation's *lis pendens* rule is the application for a negative declaration at a court with certain procedural specificities symbolised by the "Italian Torpedo". To deal with those challenges may only be possible with due regard to the national bases of jurisdiction.

The second reason is the application of the EC Regulations' jurisdictional rules in cases of conflict of jurisdictions beyond the EC/EFTA Member States' courts. This applies particularly to Northern American assumption of jurisdiction which does not follow the rules of the EC Regulations and inevitably will be in conflict with European assumption of jurisdiction. US courts would equally assume jurisdiction and not apply the *forum non conveniens* or another rule to the same effect in favour to the EC Regulations' standards. The same may certainly be said for many major jurisdictions such as China, Japan, India, Brazil, South Africa or Australia to name but a few. Aside from cases of direct jurisdictional conflict with jurisdictions outside the EC the question will be where to best launch or defend a case from an international perspective. This would require some regard to national procedural bases of jurisdiction which are presented here. This list contains the primary national provisions relating to jurisdiction:

Austria

Paragraph 66 *Jurisdiktionsnorm* reads:

> "(1) Der allgemeine Gerichtsstand einer Person wird durch deren Wohnsitz bestimmt. Der Wohnsitz einer Person ist an dem Orte begründet, an welchem sie sich in der erweislichen oder aus den Umständen hervorgehenden Absicht niedergelassen hat, daselbst ihren bleibenden Aufenthalt zu nehmen."

Austria bases its jurisdiction mainly on habitual residence. Every person is accorded a place of general jurisdiction based on the relationship of his person to a court district. As a rule, cases are initiated in the place of general jurisdiction of the defendant. The place of general jurisdiction of a natural person is based as a rule on the person's legal or habitual residence; one person can also be accorded several places of general jurisdiction.

The place of general jurisdiction of a legal person (company association both national and foreign) mostly depends on the location of its registered office. However, branches of foreign companies may provide a base of jurisdiction too if business is done by these branches in Austria which is related to the claim brought forward.

In some cases, actions can be initiated not only according to the defendant's place of general jurisdiction, but also optionally in another jurisdiction, an elective venue (*Wahlgerichtsbarkeit*). The Austrian Law of Judicature recognises more than twenty different elective venues for civil proceedings alone, for dealing with contractual and statutory relationships under the law of obligations or various claims under the law of property, as well as elective venues of a procedural kind. These might include the forum of the place of performance or the place named on the invoice (contracts). They could be the *forum rei sitae* (jurisdiction at the place where the subject matter in controversy is situated) or the place where damage was inflicted (tort/delict), or else the place of a cross-action. The ways in which these are dealt with can sometimes vary greatly from other comparable European and national rules on jurisdiction.

Austrian law expressly provides for the following places of jurisdiction in the case of the claims listed below:

For claims arising from contracts (not employment contracts): actions to determine the existence or non-existence of a contract, actions to demand the performance of, or the rescinding of a contract, as well as actions brought to demand compensation for non-performance or partial performance of a contract can all be brought at the court where performance of the contract is required of the defendant, according to the agreement of the parties. (The place of jurisdiction is the place of performance.) The agreement must be documented.

For liability in tort: disputes over damages arising from the manslaughter of, or the injury to one or several persons and damages arising from false imprisonment or bodily harm can also be heard in the court in whose district the conduct which caused the damage took place, which is the *lex loci delicti commissii.*

For cases of damages claimed under civil law as a result of criminal acts: damages which are claimed under civil law as a result of criminal acts can be asserted at the court at which the criminal proceedings have been initiated.

No exorbitant bases of jurisdiction are known in Austrian law.

Belgium

Article 624 *Code Judiciaire* reads:

> "Hormis les cas où la loi détermine expressément le juge compétent pour connaître de la demande, celle-ci peut, au choix du demandeur, être portée:
>
> 1° devant le juge du domicile du défendeur ou d'un des défendeurs;
>
> 2° devant le juge du lieu dans lequel les obligations en litige ou l'une d'elles sont nées ou dans lequel elles sont, ont été ou doivent être exécutées;
>
> 3° devant le juge du domicile élu pour l'exécution de l'acte;
>
> 4° devant le juge du lieu où l'huissier de justice a parlé à la personne du défendeur si celui-ci ni, le cas échéant, aucun des défendeurs n'a de domicile en Belgique ou à l'étranger."

Belgium knows four main bases of jurisdiction which are the domicile of the defendant, the place where an obligation is contracted or must be executed, the chosen place of performance of the relevant act and the place where the defendant happens to be when no defendant has a certain domicile. The Belgian legal system is based on the plaintiff's freedom of choice. The general rule is established in Section 624(1) of the Judicial Code. Normally, the plaintiff brings the case before the judge of the place of residence of the defendant, or of one of the defendants. What if the defendant is a legal person? A legal person's place of residence is that of its main place of business, *i.e.* the administrative headquarters from which the undertaking is managed.

An exorbitant base of jurisdiction is contained in Article 638 of the Judicial Code/Code judiciare/Gerectelijk Wetboek.

Denmark

Paragraph 235 *Retsplejeloven* reads:

> "§ 235. Retssager anlægges ved sagsøgtes hjemting, medmindre andet er bestemt ved lov.
>
> Stk. 2. Hjemtinget er i den retskreds, hvor sagsøgte har bopæl. Har sagsøgte bopæl i flere retskredse, er hjemtinget i enhver af dem.

> Stk. 3. Har sagsøgte ingen bopæl, er hjemtinget i den retskreds, hvor han opholder sig.
>
> Stk. 4. Har sagsøgte hverken bopæl eller kendt opholdssted, er hjemtinget i den retskreds, hvor han sidst har haft bopæl eller opholdssted."

Habitual residence of the defendant is the main Danish criteria for assuming jurisdiction. There are some alternative bases of jurisdiction (*lex loci delicti commissii*, where the effect of the tort materialises and place where the obligation is contracted):

> "Sager mod personer, der driver erhvervsmæssig virksomhed, og som vedrører denne virksomhed, kan anlægges ved retten på det sted, hvorfra virksomheden udøves.
>
> Sager om rettigheder over fast ejendom kan anlægges ved retten på det sted, hvor ejendommen ligger.
>
> Sager om kontraktforhold kan anlægges ved retten på det sted, hvor den forpligtelse, der ligger til grund for sagen, er opfyldt eller skal opfyldes.
>
> Sager om erstatningsansvar uden for kontrakt kan anlægges ved retten på det sted, hvor den skadevoldende handling er sket.
>
> I sager om forbrugeraftaler kan forbrugeren anlægge sag mod den erhvervsdrivende ved sit eget hjemting, når forbrugeraftalen ikke er indgået ved forbrugerens egen henvendelse på den erhvervsdrivendes faste forretningssted."

Finally, some provisions on exclusive jurisdiction are found which reflect those in most other states including rules on international jurisdiction which are relevant as Denmark is not subject to the EC Regulation 44/2001, see Article 3 of the Regulation. These are the Danish rules of exclusive jurisdiction:

> "Sager om forældremyndighed skal anlægges ved retten på det sted, hvor barnet har bopæl.
>
> Sager om faderskab indbringes for retten på det sted, hvor moderen har hjemting.
>
> Sager om ægtefælleskifte anlægges ved retten på det sted, hvor ægtefællerne har bopæl. Har de ikke bopæl i samme retskreds, foretages skiftet af retten på det sted, hvor de sidst har haft fælles bopæl, såfremt en af dem fortsat har bopæl i retskredsen."

Finland

Chapter 10 Code of Judicial Procedure reads:

> "When someone intends to bring against another a civil action involving a debt or other personal action, the latter shall be summoned

> to the court of the district in which he/she has his/her home and domicile. A person who has no domicile in Finland shall be summoned to the court of the locality where he/she is found or where he has property in the country. If a Finnish citizen is living abroad, he/she may also be summoned to the court of the locality where he/she last had a domicile in Finland. A citizen of a foreign State who does not have home and domicile in Finland may, in the absence of separate provisions regarding the citizens of said State, be summoned to the court of the locality in Finland where he/she is found or where he/she has property."

The main rule is that the action is brought at the general lower court of the defendant's place of residence. This applies also to a situation where the defendant is a legal person. Only a small minority of actions are processed elsewhere.

Unlike the German Article 23 of the Civil Procedure Order the Finnish property rule is not considered exorbitant because it is assumed that it is subsidiary to all other bases of jurisdiction.

France

Article 42 *Code de Procédure Civile* reads:

> "La juridiction territorialement compétente est, sauf disposition contraire, celle du lieu où demeure le défendeur. S'il y a plusieurs défendeurs, le demandeur saisit, à son choix, la juridiction du lieu où demeure l'un d'eux.
>
> Si le défendeur n'a ni domicile ni résidence connus, le demandeur peut saisir la juridiction du lieu où il demeure ou celle de son choix s'il demeure à l'étranger."

French jurisdiction is mainly assumed by choice ("sauf disposition contraire"), at the place of residence of the defendant, in the case of several defendants the choice among those is with the applicant and in the case that there is no known residence of the defendant the applicant may sue at his place of residence or at a place of his choice if he lives abroad.

If the defendant is a natural person, it is the court of the place where he is domiciled or resident. For a legal person (company, association, etc.), it is the place where it is based, generally the place where it has its head office. It may be that the main premises known are distinct from the head office; in this case, it is possible to refer the matter to the court in the place where the main premises are located. For major companies with several branches, the matter may be referred to the court in the place where one of these branches is located. Some specific provisions should be noted. With regard to contracts: the plaintiff may bring the matter before the court in either the place where the defendant is domiciled, or, according to the nature of the contract, the place where the goods were delivered or the ser-

vice provided. With regard to tort actions or proceedings involving a civil claim as part of criminal proceedings: the claim must be brought before the court in the place where the defendant is resident, or that of the place where the damage was suffered or the harmful event took place. In a matter involving property, the plaintiff may bring the matter before the court in the place where the property is situated. In a matter involving alimony, the plaintiff has the choice between the court in the place where the defendant is resident and that where the creditor lives; in other words, the plaintiff's own court.

Article 14 of the French Civil Procedure Code provides jurisdiction in lawsuits where the applicant is a French national (exorbitant jurisdiction according to Article 3.2./Annex 1 EC Regulation 44/2001, but see ECJ in *Krombach v Bamberski*).

Germany

Paragraph 13 *Zivilprozessordnung* reads:

> "Der allgemeine Gerichtsstand einer Person wird durch den Wohnsitz bestimmt."

Residence is the main criteria according to German law. In the case of a person who has no place of residence, the place where he is staying in Germany is taken as a basis and, if no such place is known, his last place of residence. In the case of a legal entity, its registered office is conclusive. For certain types of claims, the plaintiff has the option of choosing a different jurisdiction than that of where the defendant lives (special, not exclusive jurisdictions). Examples of this are as follows:

In the case of the disputes arising from a contractual relationship and the existence of such a relationship, proceedings can also be initiated in the court of the place where the disputed obligation is to be performed (Section 29(1) of the German Rules of Civil Procedure (Zivilprozessordnung – ZPO). An agreement regarding the place of performance is only material for procedural purposes if the contracting parties belong to the group of persons who are authorized under Section 38(b)(1) ZPO to conclude jurisdiction agreements (see (c)). The term "contractual relationship" includes all contracts governed by the law of obligations, regardless of the type of obligation. Where the employment courts have jurisdiction, the provision applies accordingly.

In respect of claims arising from prohibited acts, the court in whose area the act has been committed also has jurisdiction. The victim of a criminal act may in the course of criminal proceedings make applications intended to assert financial claims accruing to him from the criminal act at the court where the charge has been preferred. In respect of divorce proceedings, substantive jurisdiction lies solely with the Family Court (*Familiengericht*) (a division established at the District Courts) in whose district the spouses have their usual joint residence (meaning the actual focus of their lives). If no such residence exists in Germany at the time when the proceedings become pending (meaning service of the application

document or statement of claim), sole jurisdiction lies with the Family Court in whose district one of the spouses is usually resident together with the couple's underage children. If this does not establish a jurisdiction, sole jurisdiction lies with the Family Court in whose district the spouses have had their joint habitual residence, provided that one of the spouses is still usually resident there at the time when the proceedings become pending (see above). If this also does not apply, the defendant's habitual place of residence is conclusive, unless there is no such place of residence in Germany. In this event, the plaintiff's habitual place of residence is decisive. If this also does not establish a jurisdiction, the Family Court at the Berlin – Schöneberg District Court has sole jurisdiction for those without a clear place of residence where they may be sued.

Where an Act specifically designates a jurisdiction as being exclusive, it takes precedence over all other jurisdictions, *i.e.* the proceedings can (admissibly) only be initiated within the exclusive jurisdiction. Exclusive jurisdictions arise in particular from special Acts: If the proceedings relate to land or to a right equivalent to land (*e.g.* hereditary building right), sole jurisdiction in particular cases lies with the court in whose district the subject matter is located; this relates to proceedings arising from ownership or from a charge on real property, disputes relating to freedom from a charge on real property, possessory actions, boundary dispute actions and actions for a partition (Section 24 ZPO).

In debt collection proceedings, sole jurisdiction lies with the District Court where the applicant has his general jurisdiction, in other words usually his residence or registered office (Section 689(2) ZPO). In compulsory enforcement proceedings, sole jurisdiction lies with the District Court, as the enforcement court, in whose district the enforcement action is to take place or has taken place (Section 764(2), Section 802 ZPO). In the case of compulsory sale by auction or compulsory administration of land, sole territorial jurisdiction lies with the District Court, as enforcement court, in whose district the land is located (Section 1(1), Section 146 of the German Compulsory Auction Act (Zwangsversteigerungsgesetz), Sections 802, 869 ZPO).

However, if the defendant has assets in Germany even unrelated to the claim he may be sued in Germany according to Paragraph 23 *Zivilprozessordnung* (*Allgemeiner Vermögensgerichtsstand*) which is exorbitant jurisdiction according to Article 3.2./Annex 1 EC Regulation 44/2001.

Greece

Articles 22 and 23 of the Civil Procedure Code stipulate that the court, within the district of which the defendant is domiciled, has jurisdiction.[122] If the plaintiff is not domiciled in either Greece or abroad, the competent court is the one in the area where he has his habitual residence. If the place where he is habitually resident is not known, the competent court is the one in the area where his last place of domi-

[122] Anagnostopoulos, "Greece" in Van Lynden (ed.), *Forum Shopping* (LLP, 1998).

cile in Greece was and if there was no place of domicile, his last place of habitual residence. Legal entities (companies both national and foreign) capable of being involved in legal proceedings are subject to the competence of the court in whose region their seat is located.

Some special bases of jurisdiction are known to Greek Law. Contractual disputes; disputes relating to the existence or validity of an *inter vivos* legal transaction and all rights deriving from it can also be brought before the court within whose territorial jurisdiction the legal transaction was entered into or where fulfilment was made. Disputes for liquidated damages and for compensation due to delict during negotiations can also be brought before the same court.

Tort-related disputes can be brought before the court within whose territorrial-jurisdiction the tort was committed even if the claim relates to a person who has no criminal liability. Claims for damages and restitution resulting from crimes and for financial satisfaction due to moral harm or mental anguish can be brought before the criminal court handling the case.

A procedural provision should be noted which became prominent in the Distomo/Kalegoroupoulos/Levadia litigation. Article 323 demands that any execution of judgments against foreign states and their property in Greece requires prior authorisation of the Minister of Justice (and will normally not be granted).

Ireland

The appropriate District or Circuit in which to bring a civil claim is determined by the location where the defendant or one of the defendants ordinarily resides or carries on any profession, business or occupation, or at the election of the plaintiff between those bases of jurisdiction. In most contract cases the appropriate District or Circuit is the one where the contract is alleged to have been made, in tort cases, where the tort is alleged to have been committed and, in cases relating to tenancy or title to real property, where the premises or lands the subject of such proceedings are situated.

These Irish rules are common law rules developed by the courts reflecting the rules as they stood until very recently in England too and are understood as such widely in the English speaking world as a kind of traditional standard. However, the basic rule of jurisdiction which is based on the presence of the defendant in the territory when having been served with proceedings even if accidental is exorbitant jurisdiction according to Article 3.2./Annex 1 EC Regulation 44/2001.

Italy

Article 3 Civil Procedure Code (Law No. 218 of 14 May 1995) reads:

> "La giurisdizione italiana non e' esclusa dalla pendenza davanti a un giudice straniero della medesima causa o di altra con questa connessa."

The competent court is that of the place where the defendant is resident or domiciled or, if that place is unknown, the court of the place where the defendant is living.

If the defendant has no residence, domicile or place of abode in the country, or if the abode is unknown, the competent court is that of the place of residence of the plaintiff.

For legal persons the place of jurisdiction is where they have their head office or (choice of the party) an establishment and a representative authorised to bring legal proceedings. Companies without legal personality, associations and committees have their headquarters in the place where they habitually carry out their activity. Exceptions are contained in rules of exclusive jurisdiction and some mandatory jurisdiction in the public interest when *e.g.* the Italian State sues.

Exclusive jurisdiction overrides other jurisdictions provided for in law; however, competence determined by exclusive jurisdiction is not mandatory and may be changed where cases are related.

Exclusive jurisdictions are: the jurisdiction established by law for cases involving rights *in rem* and possessory actions (law of the place where immovable property is situated, section 21 Italian Code of Civil Procedure, CCP); that of inheritance cases (place where the succession is opened, section 22 CCP); that of cases involving business associates or co-owners of property (place where the company has its registered office or place where the jointly-owned property is located, section 23 CCP); that of cases involving the management of assets (place where the assets are managed, section 24 CCP).

Appeals against enforcement jurisdiction on the basis of the nature and value of cases are governed by general rules while territorial competence is invariably attributed to the court of the place of execution, namely the place where execution is pending.

Relevant for the "Italian Torpedoes" is the admissibility of a claim for negative declarations sometimes connected with the use of exorbitant bases of jurisdiction which are contained in Articles 3 and 4 of Act/Law No. 218 of 31 May 1995.

Luxembourg

Article 25 Civil Procedure Code reads:

> "En matière personnelle ou mobilière, ainsi qu'en toutes matières pour lesquelles une compétence territoriale particulière n'est pas indiquée par la loi, la juridiction compétente est celle du domicile du défendeur; si le défendeur n'a pas de domicile, celle de sa résidence. En matière contractuelle, la demande pourra également être portée devant le tribunal du lieu où l'obligation a été ou doit être exécutée."

The defendant's domicile and if there is no domicile his residence is the main criteria for assuming jurisdiction. As a rule, the court for the defendant's place of residence is assumed to be his domicile. If the defendant is a natural person, this means the court for his domicile/residence. For a legal person such as a company or an association, it will be the court for the place where it has its registered office. Sometimes a company's main establishment will be separate from its head office.

In such cases it is possible to sue in the court for the place where the main establishment is. For major firms with several branches, the action can be brought in the court for one of the branches. Some exceptions to the basic rule may be noted:

- Contracts: the claimant can bring an action either at the place where the defendant is resident or, depending on the nature of the contract, the place where the goods are to be delivered or the services are to be performed.
- In cases in tort/delict and in civil proceedings joined to a criminal prosecution: the claim may be presented in the court for the place where the defendant lives or the court for the place where the loss was suffered or the harmful act occurred.
- Real property: the claimant can sue in the court for the place where the property is situated.

Netherlands

Article 126, 1 Civil Procedure Code reads:

> "De gedaagde kan de roldatum, vermeld in het exploot van dagvaarding, vervroegen door aan de eiser bij exploot een vroegere roldatum te doen aanzeggen, met vermelding van het uur indien alsdan een terechtzitting plaatsvindt. In zaken waarin partijen niet in persoon kunnen procederen, wordt hierbij tevens procureur gesteld."

The basic rule for proceedings commenced by writ of summons in the first instance (see Article 99 of the Code of Civil Procedure) is that, except where the law determines otherwise, the civil court with competence in the place where the defendant lives shall have jurisdiction for proceedings of this nature. Where the defendant does not have any known place of residence in the Netherlands, the court in the place where the defendant actually resides (in the Netherlands) shall have jurisdiction.

Exceptions to the general rule of residence are referred to in the Netherlands as "alternative jurisdiction". The claimant has the opportunity to choose between the basic rule and the alternative rule. These are:

- In labour cases/agency cases (Article 100 of the Code of Civil Procedure), the court in the place where labour is normally performed shall also have jurisdiction.
- In consumer cases (Article 101 of the Code of Civil Procedure), the court in the place of residence, or, in the absence thereof, the court in the place where the consumer actually lives shall also have jurisdiction.
- In cases concerning obligations arising from a wrongful act (Article 102 of the Code of Civil Procedure), the court in the place where the harmful event occurred shall also have jurisdiction.

- In cases concerning immovable property (Article 103 of the Code of Civil Procedure), the court in the place in which the property, or the greatest part of said property, is situated shall also have jurisdiction. In cases concerning the leasing of residential accommodation or business accommodation, exclusive jurisdiction shall be enjoyed by the subdistrict court with jurisdiction in the area in which the leased property or the greater part thereof is situated.
- In cases concerning estates (Article 104 of the Code of Civil Procedure), the court in the deceased's last place of residence shall also have jurisdiction (this jurisdiction is also referred to as the court with jurisdiction in relation to the "house where the deceased last resided" *i.e.* the municipality in which the deceased died).
- In cases concerning legal entities (Article 105 of the Code of Civil Procedure, for example, cases concerning the dissolution of legal entities, the nullity or validity of decisions taken by legal entities, the rights and obligations arising for members or partners), the court in the place where the legal entity or company is domiciled or has its place of business shall also have jurisdiction.
- In cases concerning application of legal provisions in respect of bankruptcy, moratoriums on payments and debt rescheduling (Article 106 of the Code of Civil Procedure), the court of which the delegated judge forms part shall also have jurisdiction, or, where no delegated judge has been appointed, the court that pronounced the moratorium on payments. The Bankruptcy Act [*Faillissementwet*] also contains a number of jurisdiction rules, which rules shall prevail over the rule indicated above.

Portugal

Article 65 Civil Procedure Code reads:

> "1 – Sem prejuízo do que se ache estabelecido em tratados, convenções, regulamentos comunitários e leis especiais, a competência internacional dos tribunais portugueses depende da verificação de alguma das seguintes circunstâncias:
>
> a) Ter o réu ou algum dos réus domicílio em território português, salvo tratando-se de acções relativas a direitos reais ou pessoais de gozo sobre imóveis sitos em país estrangeiro …"

The basic rule regarding territorial jurisdiction is that the court with jurisdiction over the case is that of the place where the defendant lives. If, however, the defendant does not have a habitual residence, his residence is unknown or he is absent, the case will be brought to the court of the place where the plaintiff lives. If the defendant's domicile and residence is in a foreign country, the case will be brought in the court of the area where the defendant is present. If the defendant is not in Portugal, the case will be brought to the court of the place where the plain-

tiff lives. When this latter domicile is in a foreign country the Lisbon court will have jurisdiction for the case.

In relation to legal persons and companies, the general rule is as follows. If the defendant is the State, the court of the defendant's domicile is replaced by the court of the plaintiff's domicile. If the defendant is another legal person or a company, the case will be brought in the court of the area of the defendant's main registered address or that of the branch office, agency, subsidiary, delegation or representative, depending on whether the case is brought against the main part of the company or the latter entities. However, cases brought against foreign legal persons or companies which have a branch, agency, subsidiary, delegation or representative in Portugal can be lodged in courts in the areas where these have their registered addresses even though the case is being brought against the main company.

Special provisions exist in following cases:

- Cases involving property rights such as the division of jointly owned property, eviction, separation of inherited property from the existing estate of the heir, and foreclosure, as well as those cases involving reinforcement, substitution, reduction or releasing of mortgages should be put to the court for the area where the property in question is located.
- Cases for demanding the fulfilment of obligations, compensation for non-fulfilment or incomplete fulfilment of obligations and the termination of a contract due to non-fulfilment will be brought, at the choice of the creditor, in either the court of the place where the obligation should have been fulfilled or in the court of the place where the defendant lives.

For civil liability cases based on torts/delicts or illegal acts or hazards, the court with jurisdiction is that of the area in which the act occurred.

The court of the port where a ship's cargo, which has been declared under general average rules, was or should have been delivered has jurisdiction to decide on this damage. A case involving losses and damages resulting from a collision of ships can be brought in the court of the area where the accident occurred, the court of the domicile of the owner of the ship which struck the other, the court for the place where this ship is registered or in which it is located, or the court for the first port of call of the ship which was struck.

For company special recovery or bankruptcy proceedings the court with jurisdiction is that of the area in which the company has its registered offices or in which the company carries out its main activity.

The court of the district in which any branch, agency, subsidiary, delegation or representative set up in Portugal of a foreign company is located has jurisdiction to hear special recovery or bankruptcy proceedings resulting from obligations contracted in Portugal or which should be fulfilled here. The liquidation will, however, only involve assets located in Portugal.

There are exorbitant bases of jurisdiction provided for in Articles 65 and 65 A of the Civil Procedural Code (Codigo de Processo Civil) and Article 11 of the Labour Procedural Code.

Spain

Article 22 LOPJ of 1 July 1985 (Law regulating Spanish judicial system) reads:[123]

> "En el orden civil, los juzgados y tribunales españoles serán competentes:
>
> 1. Con carácter exclusivo, en materia de derechos reales y arrendamientos de inmuebles que se hallen en España; en materia de constitución, validez, nulidad o disolución de sociedades o personas jurídicas que tengan su domicilio en territorio español, así como respecto de los acuerdos y decisiones de sus órganos; en materia de validez o nulidad de las inscripciones practicadas en un registro español; en materia de inscripciones o de validez de patente y otros derechos sometidos a deposito o registro cuando se hubiere solicitado o efectuado en España el deposito o registro; en materia de reconocimiento y ejecución en territorio español de resoluciones judiciales y decisiones arbitrales dictadas en el extranjero."

Like in the preceding Portugese law the Spanish law assumes exclusive jurisdiction for all issues relating to land and immovables in Spain and otherwise accepts the domicile of the defendant as a basis of jurisdiction, however, there is a long catalogue of special jurisdictional bases.

The basic rule stipulates that the Spanish courts assume jurisdiction where the defendant has his legal residence, or in the absence of this, where he lives. If the defendant does not have his legal residence or live in Spain, the Court of First Instance of the district where the defendant is or where he last lived has jurisdiction. If none of these criteria can be applied, the plaintiff may refer the case to the Court of First Instance of the district in which he has his legal residence.

Spanish courts leave the determination of territorial jurisdiction to the plaintiff in the following cases:

- Plaintiffs/claimants can choose to bring cases against employers and professionals regarding matters arising from their business or professional activities in any place where they conduct these activities.
- Cases may also be taken against companies in the place where the legal relationship or situation referred to in the dispute occurred or is taking effect, provided that they have an establishment or representative in that place.

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[123] See generally Giménez, "Civil Justice in Spain: Present and Future. Access, Cost and Duration" in Zuckerman (ed.) *Civil Justice in Crisis Comparative Perspectives of Civil Procedure* (OUP, 1998) on the chaotic nature of procedural legislation and difficulties for international practitioners in particular. The recent law of 2000, although intended to be a single, uniform civil procedure code, does not include all individual institutions of civil justice.

- Proceedings concerning property, when brought with regard to various properties or to only one, which is located in different jurisdictions. In this case, the plaintiff can choose any one of the jurisdictions.
- Proceedings for the presentation and approval of accounts which must be produced by administrators of borrowed capital, when it is not determined where they should be presented. In this case, the plaintiff can choose between the place where the defendant has his legal residence and the place where the administration is carried out.
- Disputes concerning inheritance, in which the plaintiff may choose between the courts of the last place in Spain where the deceased had his legal residence and the places where most of the properties in the inheritance are located.
- Proceedings concerning intellectual property, in which the plaintiff can choose between the place where the infringement took place, the place where there are indications that it took place, and the place where the illegal examples are.
- Disputes concerning unfair competition, when the defendant is not established, does not have his legal residence or does not live in Spain. In these cases, the plaintiff can choose between the place where the act of unfair competition took place and the place where it is taking effect.
- Cases exclusively concerning the custody of minors or concerning maintenance claimed by one parent from the other on behalf of the minors, when both parents live in different judicial districts. In these cases, the plaintiff can choose between the court in the place where the defendant has his legal residence and the one in the place where the minor lives.

Sweden

Chapter 10 *Rättegångsbalken* reads:

> "The competent court for civil cases in general is the court for the place where the defendant resides."

A case must be brought where the defendant is resident. A natural person is considered to be resident in the place where he or she is registered. Legal persons are normally taken to be resident at the place where they have their head office.

It may also be possible to bring a case before a Swedish court even if the person does not live in Sweden. If the defendant has no place of residence the case may be brought at the place where they are staying, or, in some cases, at the place where they last lived or stayed.

In some civil disputes a case may be brought in Sweden even if the defendant is resident abroad. Bases for such jurisdiction are the existence of property owned by the defendant in Sweden or that an agreement has been entered into in Sweden.

This applies in tort/delict; anyone who has suffered damage may bring an action at the place where the harmful act was performed or where the damage occurred. An action for damages as a result of a criminal act can be brought in connection with a prosecution for the crime. Consumers can bring a case against a company in their own court in consumer cases involving small sums. Cases involving liability to pay on the basis of a contract can in some cases be brought at the place where the contract was entered into. On the other hand there is no provision in Swedish law conferring jurisdiction on the court at the place where a contract is to be performed. A case against a company involving a dispute which has arisen in connection with a business activity can in some cases be brought at the place of business.

Actions involving child custody, housing and visiting rights are normally heard at the place where the child is resident.

Swedish law provides for exclusive jurisdiction in a number of cases:

- Land law disputes must be dealt with by the court in the place where the land is situated. Some disputes involving property must be dealt with by a land court or a rent or leasehold tribunal. Again, this depends on where the property is located.
- Cases involving inheritance laws must be heard by the court in the place where the deceased lived.
- Disputes to do with marriage and the division of property between spouses are heard by the court in the place where one of the parties lives.

Where a dispute must be heard by the Labour Court or the Market Court the case cannot be brought before the general court in the defendant's place of residence.

For most disputes involving environmental law, maritime law, industrial and intellectual property law and family law, where there is an international dimension, there are special rules which confer jurisdiction on only one court which is usually the court where the harm accours or the child resides.

The Swedish Court of Appeal has exclusive jurisdiction to hear petitions involving the enforcement of decisions of foreign courts.

United Kingdom

The Courts in the United Kingdom follow different rules of jurisdiction as the United Kingdom is comprised of several jurisdictions notably England and Wales, Scotland, Northern Ireland, the Isle of Man and the Channel Islands (Guernsey and Jersey) and Gibraltar. However, the main base of jurisdiction is presence and service in the jurisdiction (England and Northern Ireland, Gibraltar, Isle of Man and Channel Islands). In those latter mentioned jurisdictions inside the UK courts would assume jurisdiction under the common law rules known to all English speaking countries particularly service in the jurisdiction and *forum conveniens* or the EC Regulations (Brussels and Rome) when applicable. The main basis of jurisdiction is service of a claim form (summons, writ or process in other countries' terminology) on a defendant present in the jurisdiction.

However, this main basis of jurisdiction in most jurisdictions of the UK is considered to be exorbitant under the Brussels II EC Regulation 44/2001 Annex 1 in cases when the service of proceedings/claim form has been effected on the defendant during his temporary presence in the UK. This applies also when the only basis of jurisdiction is property belonging to the defendant unrelated to the proceedings.

Section 16 Civil Jurisdiction and Judgments Act 1982 reads:

> "1) The provisions set out in Schedule 4 (which contains a modified version of Title II of the 1968 Convention) shall have effect for determining, for each part of the United Kingdom, whether the courts of law of that part, or any particular court of law in that part, have or has jurisdiction in proceedings where—
>
> (a) the subject-matter of the proceedings is within the scope of the 1968 Convention as determined by Article 1 (whether or not the Convention has effect in relation to the proceedings); and
>
> (b) the defendant or defender is domiciled in the United Kingdom or the proceedings are of a kind mentioned in Article 16 (exclusive jurisdiction regardless of domicile)."

In relation to Scotland which is a jurisdiction in the civil/Roman law tradition, some specific provisions should be noted. The central principle of the Scottish rules of jurisdiction is that persons, whether legal or natural, are to be sued in the courts for the place where they are domiciled. Some special rules and practices exist:

- Contract – a person may also be sued in the courts for the place of performance of the obligation in question.
- Delict/tort – a person may also be sued in the courts for the place where the harmful event occurred.
- Disputes arising out of the operation of a branch, agency or other establishment – here there is jurisdiction in the courts where the branch/agency is situated.

In certain classes of proceedings a court shall have exclusive jurisdiction regardless of domicile or any other jurisdictional rule. These are:

- in proceedings which have as their object rights *in rem* in, or tenancies of, immoveable property, there is exclusive jurisdiction in the courts for the place where the property is situated. Although where the tenancy is for temporary private use for a maximum period of six months the courts of the defender's domicile shall also have jurisdiction, if the landlord and tenant are natural persons domiciled in the same country.
- in proceedings regarding the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, there is exclusive jurisdiction in the courts for the place where

the company, legal person or association has its seat. In proceedings which have as their object the validity of entries in public registers, there is exclusive jurisdiction in the courts for the place where the register is kept. In proceedings concerned with the enforcement of judgments, there is exclusive jurisdiction in the courts for the place where the judgment has been or is to be enforced.

United States

The Courts in the United States both Federal and State would assume jurisdiction under the common law rules known to all English speaking countries. The main basis of jurisdiction is service of process (summons, writ or claim form in other countries' terminology) at a defendant present in the jurisdiction. This is *e.g.* embodied in the New York Statutes on Jurisdiction of Courts.[124]

"Para 301. Jurisdictions over persons, property or status.

A courts may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

Para 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortuous act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortuous act without the state, causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, it he
   (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
   (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce, or
4. owns, uses or possesses any real property situated within the state

[124] Quoted from Andreas Lowenfeld, *International Litigation and Arbitration* (3rd ed. Thomson West, 2005) p. 1.

(b) … (matrimonial matters)

(c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section."

It is the clause in para 302 (a) 3. and 4. "doing business" or owing property both unrelated to the cause of action (or the equivalent provisions in the other states of the United States) which can be seen in some circumstances to be exorbitant normally leading to non recognition of judgements by foreign courts.

In relation to the personal capacity to sue and to be sued there are Federal Rules in the US. Rule 17 Federal Rules of Civil Procedure reads:

"Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

(B) 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court."

4.5.2 Service of Proceedings

The aim of this study is to provide an overview of the rules governing cross border civil proceedings in Member States of the European Union and in those states which have contracted to the major international treaties on civil proceedings. These include Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom and the United States. The system of initiating proceedings, selecting jurisdiction and enforcing judgments as envisaged by the treaties and other legal instruments currently in force is examined in some detail. Inconsistencies in the domestic law of a number of states with regard to cross border proceedings are also identified. There is a need for awareness of the systems of procedural law operating in different jurisdictions if businesses and private citizens are to enforce their

rights abroad successfully.[125] This is obviously an issue in the light of rapid growth in international commerce and continued globalisation. It is particularly important in the European Union, however, where Community law instruments since the year 2000 have made bold attempts to harmonise procedural rules in such proceedings.[126] It is hoped to assess the extent to which procedural rules as they pertain to international civil disputes themselves constitute a body of international law, which can be said to operate effectively.

4.5.2.1 Hague Convention

The Treaty of the Hague of 1 March 1954 and the Treaty of the Hague of 15 November 1965 concerning the service and notification of judicial documents are also known as The Hague Service Conventions. Contracting states include the above mentioned list. Generally, Articles 2 to 7 of the Convention refer to the service of documents on persons outside the Contracting State and provide for the designation of a Central Authority in each state to whom such documents should be forwarded. In most cases the role is given to a branch of the national courts or to the public prosecutor. Articles 8 to 11 provide for the service of documents by Contracting States through their diplomatic or consular agents or indeed by post, provided the receiving state does not object. In accordance with Article 11, Contracting States may also, by agreement, devise their own channels of transmission for judicial documents. Such arrangements continue to exist between certain Contracting States, though use of the Central Authority procedure envisaged in Articles 2 to 7 results in greater clarity for practitioners seeking to initiate proceedings in another Contracting State.[127]

4.5.2.2 Council Regulation (EC) No 1348/2000

More recently, however, Article 11 has been given effect in a manner which helps to avoid the instability of various bilateral or multilateral treaties between small collections of neighbouring states. Regulation 1348/2000 possesses the inherent benefits of a Community law instrument, incorporates many aspects of the Hague Service Conventions and adds clarity to others.[128] It also supersedes the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 to which the above states are signatories. Article 2 of Regulation 1348/2000 provides for "transmitting and receiving agencies", which are to

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[125] See generally Grubbs (ed.), *International Civil Procedure* (Kluwer Law International, 2003).

[126] Council Regulation (EC) No. 44/2001 and Council Regulation (EC) No. 1348/2000.

[127] See Stokke and Surlien, "Norway" in Van Lynden (ed.), *Forum Shopping* (LLP, 1998) on the multilateral treaty in force between Sweden, Finland, Norway, Iceland and Germany.

[128] Council Regulation (EC) No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

be nominated by Member States for the purpose of serving documents. Most states already possess such a system in the form of a designated "Central Authority", as required by the Hague Service Conventions. Article 2(3), however, clarifies the position for those Member States which are federal in nature and permits more than one such agency to be designated. This is given effect, for example, in the German Code of Civil Procedure, whereby each of Germany's 16 *Länder* possesses its own "agency".[129] While Denmark exercised its entitlement not to adopt Regulation 1348, it has subsequently adopted its provisions in a limited form.[130]

4.5.2.3 Lugano Convention

The Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988 governs the procedure for service of proceedings amongst EU Member States and members of the European Free Trade Association. The provisions are identical to the Brussels Convention and, following Regulation 44/2001, are now largely relevant only in cases involving non-EU EFTA Member States.

4.5.2.4 Noteworthy Domestic Provisions

A number of states have contained in their own domestic law provisions which relate to service abroad and which supplement the provisions of the above instruments and indeed further their aims. However, it is frequently the case that domestic law is selective about the states in which it renders service of proceedings simpler. Common law countries, Scandinavian countries, Benelux countries and some central European countries, for example, operate reciprocal arrangements of one form or another.

The United Kingdom courts generally do not require parties to obtain leave to serve proceedings outside of the jurisdiction. Where proceedings are being served outside Ireland, Order 11 of the Irish Rules of the Superior Courts sets out the High Court procedure. Order 11, rule 2 makes provision for cases where the defendant resides in Northern Ireland, England or Scotland and entitles the Court to have regard to the jurisdiction and powers of local courts in considering whether to grant leave to an applicant seeking to serve proceedings there. Neither the Hague Service Conventions nor Regulation 1348/2000 explicitly envisages such a

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[129] *Zivilprozessordnung.*

[130] Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil and commercial matters. Article 3(1) of the Agreement provides that amendments to the regulation shall not be binding upon or applicable in Denmark. Article 4(1) provides that Denmark shall not take part in the adoption of opinions and that implementing measures shall not be binding upon or applicable in Denmark. Article 5(1) provides that international agreements entered into by the Community shall not be binding upon or applicable in Denmark.

procedure but it is clearly of particular relevance to applicants in the Republic of Ireland wishing to serve proceedings in Northern Ireland. As practitioners in both parts of Ireland will be aware, this is a common occurrence.

In Denmark the Administration of Justice Act contains no specific rules regarding service of proceedings outside the jurisdiction. It appears to be common practice, however, to effect service by means of the local Danish embassy or consulate.[131]

The following list contains the primary sources of domestic law relating to service of proceedings abroad:[132]

Austria

Paragraph 11 *Zustellgesetz* reads:

> "Services to destinations abroad shall be effected in accordance with existing international agreements or in any case in the way permitted by the laws or other legal provisions of the state where service shall be effected or in accordance with international practice, in case of necessity with the support of Austrian official representation authorities abroad."

Belgium

Article 40 Civil Procedure Code reads:

> "A ceux qui n'ont en Belgique ni domicile, ni résidence, ni domicile élu connus, la copie de l'acte est adressée par l'huissier de justice sous pli recommandé à la poste, à leur domicile ou à leur résidence à l'étranger et en outre par avion si le point de destination n'est pas dans un Etat limitrophe, sans préjudice des autres modes de transmission convenus entre la Belgique et le pays de leur domicile ou de leur résidence. La signification est réputée accomplie par la remise de l'acte aux services de la poste contre le récépissé de l'envoi dans les formes prévues au present article. A ceux qui n'ont en Belgique ni à l'étranger de domicile, de résidence ou de domicile élu connus, la signification est faite au procureur du Roi dans le ressort duquel siège le juge qui doit connaître ou a connu de la demande; si aucune demande n'est ou n'a été portée devant le juge, la signification est faite au procureur du Roi dans le ressort duquel le requérant a son domicile ou, s'il n'a pas de domicile en Belgique, au procureur du Roi à Bruxelles.

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[131] Rosenberg, Overby and Nielsen, "Denmark" in Lynden (ed.), *Forum Shopping*.

[132] See generally http://www.lexadin.nl/wlg/ and http://www.ec.europa.eu/civiljustice/ .

Les significations peuvent toujours être faites à la personne si celle-ci est trouvée en Belgique. La signification à l'étranger ou au procureur du Roi est non avenue si la partie à la requête de laquelle elle a été accomplie connaissait le domicile ou la résidence ou le domicile élu en Belgique ou, le cas échéant, à l'étranger du signifié."

Denmark

There is no specific provision in Danish law on service of foreign process.

Finland

Chapter 11 Code of Judicial Procedure reads:

"Section 1 (690/1997)

(1) The court shall see to the service of notices, unless otherwise provided below.

(2) The court may entrust the service of a notice to court personnel or a process server. At the same time, the court shall set a deadline for service and, where necessary, issue further instructions on service.

Section 2 (1056/1991)

(1) On the request of a party, the court may case entrust the service of a notice to the party, if it deems there to be justified grounds for this. At the same time the court shall set a deadline for service and a deadline for the delivery of the certificate of service to the court. (690/1997)

(2) If the service of a summons is entrusted to the plaintiff, he/she shall be notified that if he/she at the time when the court resumes the hearing of the case has not delivered a certificate of service, carried out before the deadline and according to the provided procedure, the case may be discontinued. At the same time the plaintiff shall be notified that he/she can request an extension to the deadline, a new deadline or that the court see to the service of the summons.

Section 3 (1056/1991)

(1) When the court or the public prosecutor sees to the service of a notice, service shall be carried out by sending the document to the party:

(1) by sign-for-delivery post; or

(2) by regular post, if it may be presumed that the addressee receives notice of the document and returns the certificate of service before the deadline.

(690/1997)

(2) The postal authorities shall be notified of the date when the service by sign-for-delivery post is at the latest to take place.

Section 3a (595/1993)

(1) When the court sees to the service of a notice, a notice other than a summons may be served also by posting it to the address of service indicated to the court by the addressee. (690/1997)

(2) The addressee shall be deemed to have been served with the document on the seventh day after the posting."

France

Article 648 *Code de Procédure Civile* reads:

"Tout acte d'huissier de justice indique, indépendamment des mentions [*obligatoires*] prescrites par ailleurs :

1. Sa date ;
2. a) Si le requérant est une personne physique : ses nom, prénoms, profession, domicile, nationalité, date et lieu de naissance ;
   b) Si le requérant est une personne morale : sa forme, sa dénomination, son siège social et l'organe qui la représente légalement.
3. Les nom, prénoms, demeure et signature de l'huissier de justice ;
4. Si l'acte doit être signifié, les nom et domicile du destinataire, ou, s'il s'agit d'une personne morale, sa dénomination et son siège social.

Ces mentions sont prescrites à peine de nullité."

Germany

Paragraphs 166–190 *Zivilprozessordnung*. Paragraph 176 reads:

"(1) Wird der Post, einem Justizbediensteten oder einem Gerichtsvollzieher ein Zustellungsauftrag erteilt oder wird eine andere Behörde um die Ausführung der Zustellung ersucht, übergibt die Ge-

schäftsstelle das zuzustellende Schriftstück in einem verschlossenen Umschlag und ein vorbereitetes Formular einer Zustellungsurkunde.

(2) Die Ausführung der Zustellung erfolgt nach den §§ 177 bis 181."

Greece

Article 134 Civil Procedure Code provides that, where proceedings are to be served outside of Greece, then service is to be made on the public prosecutor of the court in which the proceedings are pending, who, in turn passes the documents to the Greek Foreign Ministry for transmission abroad. Service is considered to be effected at the time the proceedings are served on the public prosecutor.[133]

Ireland

Order 11 Rules of the Superior Courts reads:

"1. Service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the Court whenever—

(a) the whole subject matter of the action is land situate within the jurisdiction (with or without rents or profits), or the perpetuation of testimony relating to land within the jurisdiction; or

(b) any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action, or

(c) any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or

(d) the action is for the administration of the personal estate of any deceased person, who, at the time of his death, was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Ireland …"

Order 11A Rules of the Superior Courts provides:

"Service out of the Jurisdiction under Council Regulation (EC) No. 44/2001 (Civil and Commercial Matters)

[133] Anagnostopoulos, "Greece" in Van Lynden (ed.).

1. The provisions of this Order only apply to proceedings which are governed by Article 1 of Regulation No. 44/2001 and, so far as practicable and applicable, to any order, motion or notice in any such proceedings.
2. Service of an originating summons or notice of an originating summons out of the jurisdiction is permissible without the leave of the Court if, but only if, it complies with the following conditions:
   (1) the claim made by the summons or other originating document is one which, by virtue of Regulation No. 44/2001, the Court has power to hear and determine, and
   (2) no proceedings between the parties concerning the same cause of action are pending between the parties in another Member State of the European Union (other than Denmark).
3. Where an originating summons or notice of an originating summons is to be served out of the jurisdiction under rule 2, the time to be inserted in the summons within which the defendant served therewith shall an enter an appearance (including an appearance entered solely to contest jurisdiction by virtue of Article 24 of Regulation No. 44/2001) shall be:
   (1) five weeks after the service of the summons or notice of summons exclusive of the day of service where an originating summons or notice of an originating summons is to be served in the European territory of another Member State of the European Union (other than Denmark), or
   (2) six weeks after the service of the summons or notice of summons exclusive of the day of service where an originating summons or notice of an originating summons is to be served under rule 2 in any non-European territory of a Member State of the European Union (other than Denmark).
4. (1) Where two or more defendants are parties to proceedings to which the provisions of this Order apply, but not every such co-defendant is domiciled in a Member State of the European Union or a Contracting State of the 1968 Convention or a Contracting State of the Lugano Convention for the purposes of Regulation No. 44/2001 or the 1998 Act, then the provisions of Order 11 requiring leave to serve out of the jurisdiction shall apply to each and every such co-defendant.
   (2) This rule shall not apply to proceedings to which the provisions of Article 22 of Regulation No. 44/2001 concerning exclusive jurisdiction or Article 23 of Regulation No.

44/2001 concerning prorogation of jurisdiction apply. Service of such proceedings on all co-defendants shall be governed by the provisions of this Order.

5. (1) Subject to the provisions of Regulation No. 44/2001, where the parties to any contract have agreed without conferring jurisdiction for the purpose of Article 23 of Regulation No. 44/2001, that service of any summons in any proceedings relating to such contract may be effected at any place within or without the jurisdiction on any party or on any person on behalf of any party or in any manner specified or indicated in such contract, then, in any such case, notwithstanding anything contained in these Rules, service of any such summons at the place (if any) or on the party or on the person (if any) or in the manner (if any) specified or indicated in the contract shall be deemed to be good and effective service wherever the parties are resident. If no place, or mode, or person be so specified or indicated, service shall be effected in accordance with these Rules.

(2) Where a contract contains an agreement conferring jurisdiction to which the provisions of Article 23 of Regulation No. 44/2001 concerning prorogation of jurisdiction apply and the originating summons is issued for service out of the jurisdiction without leave under rule 2 of this Order and is duly served in accordance with these Rules, the summons or notice of summons shall be deemed to have been duly served on the defendant.

6. Where the defendant is not, or is not known or believed to be, a citizen of Ireland, notice of summons and not the summons itself shall be served upon him.

7. Subject to the provisions of this Order, notice in lieu of summons shall be given in the manner in which summonses are served.

8. Where a defendant wishes to enter an appearance to contest the jurisdiction of the Court for the purposes of Article 24 of Regulation No. 44/2001, he may do so by entering an appearance in Form No. 6 in Appendix A, Part II of these Rules.

8A. While the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters annexed to Council Decision No. 2005/790/EC of 20 September 2005 (OJ L 299/61 of 16 November 2005) signed at Brussels on 19 October 2005 and approved on behalf of the Community by

Council Decision No. 2006/325/EC of 27 April 2006 (OJ L 120/22 of 5 May 2006) is for the time being in force, notwithstanding any other provision of these Rules to the contrary, the provisions of these Rules which relate to Regulation No. 44/2001 shall apply in relation to the Kingdom of Denmark, to the extent permitted, and subject to any modifications made necessary, by that Agreement, and the provisions of these Rules which relate to the 1968 Convention shall not apply.

9. For the purpose of this Order:

"the 1998 Act" means the Jurisdiction of Courts and Enforcement of Judgments Act 1998;

"the 1968 Convention" means the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (including the protocol annexed to that Convention), signed at Brussels on the 27th day of September 1968, including the 1978 Accession Convention, the 1982 Accession Convention, the 1989 Accession Convention and the 1996 Accession Convention;

"Contracting State of the 1968 Convention" means Contracting State as defined by section 4(1) of the 1998 Act, other than a Member State of the European Union in which Regulation No. 44/2001 is in force;

"Contracting State of the Lugano Convention" means a Contracting State as defined by section 17(1) of the 1998 Act;

"domicile" is to be determined in accordance with the provisions of Articles 59 and 60 of Regulation No. 44/2001;

"Regulation No. 44/2001" means Council Regulation (EC) No. 44/2001 of 22 December 2000, (O.J. L. 12 of 16 January 2001 and L. 307/28 of 24 November 2001) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters as amended by Commission Regulation (EC) No. 1496/2002 of 21 August 2002 (O.J. L. 225/13) and by the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded of 16 April 2003 (O.J. L. 236/33);

"summons" includes, where the context so admits or requires, any other originating document."

Italy

Article 142 Civil Procedure Code (Law No. 218/1995) reads:

> "Salvo quanto disposto nel secondo comma, se il destinatario non ha residenza, dimora o domicilio nello Stato e non vi ha eletto domicilio o costituito un procuratore a norma dell'art. 77, l'atto e' notificato mediante spedizione al destinatario per mezzo della posta con raccomandata e mediante consegna di altra copia al Ministero degli affari esteri per la consegna alla persona alla quale e' diretta.
>
> Le disposizioni di cui al primo comma si applicano soltanto nei casi in cui risulta impossibile eseguire la notificazione in uno dei modi consentiti dalle Convenzioni internazionali e dagli artt. 30 e 75 del D.P.R. 5 gennaio 1967, n. 200.
>
> (1) Articolo così modificato dal Dlgs. 30 giugno 2003, n. 196.
>
> (2) La Corte costituzionale con sentenza 3 marzo 1994, n. 69 ha dichiarato l'illegittimità costituzionale degli artt. 142, terzo comma, 143, terzo comma, e 680, primo comma, del codice di procedura civile nella parte in cui non prevedono che la notificazione all'estero del sequestro si perfezioni, ai fini dell' osservanza del prescritto termine, con il tempestivo compimento delle formalità imposte al notificante dalle Convenzioni internazionali e dagli articoli 30 e 75 del D.P.R. 5 gennaio 1967, n. 200."

Luxembourg

Article 14 Civil Code reads:

> "L'étranger, même non résidant dans le Luxembourg, pourra être cité devant les tribunaux luxembourgeois, pour l'exécution des obligations par lui contractées dans le Luxembourg avec un Luxembourgeois; il pourra être traduit devant les tribunaux luxembourgeois, pour les obligations par lui contractées en pays étranger envers des Luxembourgeois."

Netherlands

Article 45 Code of Civil Procedure reads:

> "1. Exploten worden door een daartoe bevoegde deurwaarder gedaan op de wijze in deze afdeling bepaald.
>
> 2. Het exploot vermeldt ten minste:
>
> a. de datum van de betekening;

b. de naam, en in het geval van een natuurlijke persoon tevens de voornamen, en de woonplaats van degene op wiens verzoek de betekening geschiedt;

c. de voornamen, de naam en het kantooradres van de deurwaarder;

d. de naam en de woonplaats van degene voor wie het exploot is bestemd;

e. degene aan wie afschrift van het exploot is gelaten, onder vermelding van diens hoedanigheid.

3. Indien het exploot een vordering tot ontruiming betreft van een gebouwde onroerende zaak of een gedeelte daarvan door anderen dan gebruikers of gewezen gebruikers krachtens een persoonlijk of zakelijk recht, van wie naam en woonplaats in redelijkheid niet kunnen worden achterhaald, behoeft het deze naam en deze woonplaats niet te vermelden, noch de persoon aan wie afschrift van het exploot is gelaten.

4. Het exploot en de afschriften daarvan worden door de deurwaarder ondertekend."

Portugal

Article 1094 Civil Procedure Code reads:

> "1 – Sem prejuízo do que se ache estabelecido em tratados, convenções, regulamentos comunitários e leis especiais, nenhuma decisão sobre direitos privados, proferida por tribunal estrangeiro ou por árbitros no estrangeiro, tem eficácia em Portugal, seja qual for a nacionalidade das partes, sem estar revista e confirmada.
>
> 2. Não é necessária a revisão quando a decisão seja invocada em processo pendente nos tribunais portugueses, como simples meio de prova sujeito à apreciação de quem haja de julgar a causa."

Spain

LEC of 7 January 2000 provides that service of proceedings on foreign defendants domiciled abroad should be carried out pursuant to applicable international treaties or conventions in force.

Sweden

Chapter 33 *Rättegångsbalken* reads:

> "Applications, notices, and other pleadings in litigation shall state the name of the court and the name and residence of the parties.

The party's first written pleadings shall specify the party's:

1. occupation and the national registration number of the person or organization,
2. postal address, the address of the place of work and, where appropriate, any other address where the party can be found for service by a bailiff,
3. telephone number to the residence and workplace; however, the number of a secret telephone subscription needs to be stated only if the court so orders, and
4. other circumstances of importance for service upon him.

   When a legal representative conducts the party's action, corresponding information shall be stated about him. When the party has retained an attorney, his name, postal address and telephone number shall be stated.
5. a summons application shall state information about a private defendant in the respects stated in the second and third paragraphs. However, information about the occupation, workplace, telephone number of the defendant or his legal representative or about the defendant's attorney need be furnished only if the information is available without special inquiry for the applicant. If the defendant lacks a known address, information shall be supplied about the inquiry made to establish that.

If a party requests that a witness or another person shall be heard, the party is obliged to furnish information about him to the extent stated in the fourth paragraph.

The information stated in paragraphs 1 through 5 shall refer to the state of affairs existing when the information was filed with the court. If a change occurs in any circumstance or the information is incomplete or incorrect, the court shall be notified thereon without delay. (SFS 1985:267)"

United Kingdom

Rules 6.19 and 6.20 Civil Procedure Rules 1998 (S.I. 3132 of 1998) read:

"Service out of the jurisdiction where the permission of the court is not required

6.19 (1) A claim form may be served on a defendant out of the jurisdiction where each claim included in the claim form made against the defendant to be served is a claim which the court has power to determine under the 1982 Act and –

(a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other Convention territory; and

(b) (i) the defendant is domiciled in the United Kingdom or in any Convention territory;

(ii) Article 16 of Schedule 1 or 3C to the 1982 Act, or paragraph 11 of Schedule 4 to that Act, refers to the proceedings; or

(iii) the defendant is a party to an agreement conferring jurisdiction to which Article 17 of Schedule 1 or 3C to the 1982 Act, or paragraph 12 of Schedule 4 to that Act, refers.

(1A) A claim form may be served on a defendant out of the jurisdiction where each claim included in the claim form made against the defendant to be served is a claim which the court has power to determine under the Judgments Regulation and –

(a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other Regulation State; and

(b) (i) the defendant is domiciled in the United Kingdom or in any Regulation State;

(ii) Article 22 of the Judgments Regulation refers to the proceedings; or

(iii) the defendant is a party to an agreement conferring jurisdiction to which Article 23 of the Judgments Regulation refers.

(2) A claim form may be served on a defendant out of the jurisdiction where each claim included in the claim form made against the defendant to be served is a claim which, under any other enactment, the court has power to determine, although –

(a) the person against whom the claim is made is not within the jurisdiction; or

(b) the facts giving rise to the claim did not occur within the jurisdiction.

(3) Where a claim form is to be served out of the jurisdiction under this rule, it must contain a statement of the grounds on which the claimant is entitled to serve it out of the jurisdiction.

Service out of the jurisdiction where the permission of the court is required

6.20 In any proceedings to which rule 6.19 does not apply, a claim form may be served out of the jurisdiction with the permission of the court if –

General Grounds

(1) a claim is made for a remedy against a person domiciled within the jurisdiction.

(2) a claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction.

(3) a claim is made against someone on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –

(a) there is between the claimant and that person a real issue which it is reasonable for the court to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

(3A) a claim is a Part 20 claim and the person to be served is a necessary or proper party to the claim against the Part 20 claimant."

United States

Rule 4 Federal Rules of Civil Procedure reads:

"(f) Serving an Individual in a Foreign Country.

Unless federal law provides otherwise, an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as directed by the the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders."

4.5.2.5 Security for Costs

A regular feature of cross border civil proceedings is security for costs. This is often sought by the defendant solely on the basis that the plaintiff resides outside the jurisdiction and that difficulties may be encountered in pursuing him for costs, should the plaintiff be successful. The trend in Contracting States to the main conventions is to provide for security for costs where a party is resident abroad but to explicitly exempt those residents of other Contracting States from having to provide security. Order 29, rule 2 of the Irish Rules of the Superior Courts goes a step further however, and specifically provides that the plaintiff's Northern Ireland address shall of itself not be a sufficient basis on which to grant the defendant's security for costs. It may of course be argued that such a provision is obsolete as the Brussels Convention and now Regulation 1348/2000 require the applicant to pay or reimburse the costs of service in another Member State. Indeed Order 29, rule 8 provides that no defendant shall be entitled to an order for security for costs where the plaintiff is resident in a Contracting State. Nonetheless, it is perhaps significant that certain domestic codes were furthering the conventions' aims prior to the Community regulation requiring that they do so where such arrangements were of obvious practical benefit to parties in the states concerned.

4.5.3 Recognition and Enforcement

As in the case of jurisdiction or choice of law issues, the primary instrument within the European Union for recognition and enforcement of foreign judgments is Regulation 44/2001. The Brussels and Lugano Conventions remain the primary international law instruments in this area.

Article 33 of the Regulation provides for recognition of judgments by a Member State without any "special procedure" being required. Most states examined here have adopted a reasonably straightforward and efficient application procedure, whereby a foreign judgment will be recognised and/or enforced.

Articles 34 and 35 specify situations in which a foreign judgment should not be recognised or enforced. These include where such recognition is contrary to public

policy, where a defendant was not properly served with proceedings or other procedural irregularities occurred, where the judgment conflicts with a domestic judgment already given in a dispute between the same parties or where the judgment is irreconcilable with an earlier judgment given in the same cause of action in another Member State.

The following list contains the primary domestic provisions relating to recognition and enforcement:

Austria

The *Exekutionsordnung* (Enforcement Act) provides for the enforcement and recognition of foreign judgments. This is not possible if no treaty or convention exists with the state in which the judgment was given. Further, recognition is not possible if the defendant was unable to participate in proceedings, the type of judgment or order is not enforceable in Austria or the general principles of the Austrian legal system would be violated by enforcement.

Belgium

The Judicial Code contains the general domestic provisions on enforcement and recognition. Should the rights of the defendant have been breached or if *ordre publique* would be violated, foreign judgments will not be recognised. One noteworthy aspect of the Belgian system is the provision in the Judicial Code permitting domestic courts to examine whether foreign law was correctly applied.[134] The main conventions and treaties on enforcement and recognition prohibit this and their provisions would take precedence over domestic law should the situation arise.

Denmark

There is no provision in domestic law for the enforcement and recognition of foreign judgments. Judgments falling outside the scope of the Brussels and Lugano conventions, therefore, cannot be recognised by the Danish courts.

Finland

There is no provision in domestic law for the enforcement and recognition of foreign judgments. A similar situation prevails to that in Denmark.

France

The *Code Civile* lays down a procedure involving application to the *Tribunal de Grande Instance* (Civil Court) in the case of judgments from both Contracting States and those outside the conventions.

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[134] Lefebvre, "Belgium" in Grubbs (ed.).

Germany

Where the judgment of a Contracting State is at issue, the procedure is relatively straightforward. Paragraph 328 of the *Zivilprozessordnung* contains the general domestic provisions on enforcement and recognition. Where no conventions or treaties apply a judgment may be recognised and declared enforceable provided reciprocity is guaranteed, there are no procedural irregularities and the judgment would not contravene *ordre publique.*

Greece

A procedure involving application to the one-member Court of First Instance is envisaged in the Civil Procedure Code in the case of judgments from both Contracting and non-Contracting States.

Ireland

Application is made to the Master of the High Court for enforcement. Following the expiry of the defendant's time limit within which to appeal a decision to enforce, the enforcement order takes effect. Where non-Contracting States are concerned, judgments will be recognised and enforced where they are in accordance with conflict of laws principles.

Italy

Where the judgment of a Contracting State is at issue, an application for enforcement may be filed with the relevant Court of Appeal. Where no conventions or treaties apply, Law 218/1995 provides that enforcement and recognition proceedings may be instituted before the Court of Appeal. An application may be refused if the rights of the defendant have been violated or if *ordre publique* would be contravened.

Luxembourg

Where the judgment of a Contracting State is at issue, the procedure of enforcement and recognition is relatively simple. Where no conventions or treaties apply, the general domestic provisions contained in Articles 545–556 and 2123–2128 of the Civil Procedure Code provide for an application process. Provided that certain rights of the defendant have not been violated, that there are no procedural irregularities and that *ordre publique* would not be breached, the application will be considered.

Netherlands

Where the judgment of a Contracting State is at issue, the procedure is relatively simple. If not, however, there is no provision in domestic law for recognising or enforcing foreign judgments *per se*. Nonetheless, should new proceedings in the Dutch courts be instituted, the relatively efficient procedure envisaged in Article 431 of the Civil Procedure Code can lead to enforcement and recognition.

Portugal

Where the judgment is given in a non-Contracting State, a procedure for enforcement and recognition is laid down in Article 1094 of the Civil Procedure Code. Factors excluding recognition include failure to uphold the rights of a defendant, procedural irregularities or contravention of *ordre publique*.

Spain

Where the judgment is given in a non-Contracting State, Articles 951–958 of the Civil Procedure Act provide for a similar procedure to that of Portugal.

Sweden

In contrast to many of the above states, the Swedish system is somewhat restrictive with regard to the recognition and enforcement of foreign judgments.[135] Where treaties or conventions apply, the enforcement of a judgment will generally require the initiation of enforcement proceedings in the Court of Appeal.[136] Where no treaties or conventions apply, however, there is no uniform regulation of recognition and enforcement of foreign judgments. A judgment that is not formally recognised or enforced, however, may still be used as proof of certain facts by the parties in Swedish proceedings.

United Kingdom

Where the judgment of a Contracting State is at issue, recognition will be in accordance with the Regulation and will only be denied on very limited grounds. Where other states are concerned, the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933 set out a procedure for the recognition and enforcement (called "registration") of foreign judgments which are final and conclusive, do not injure the rights of a defendant and are in accordance with public policy and normally does not go to the merits of the case in a much more liberal way than experienced in continental jurisdictions.

United States

No federal act, treaty or constitutional provision governs the recognition of foreign judgments in the United States.[137] However, the Uniform Foreign Money-Judgments Act has been adopted by twenty-two states. It provides for recognition where a foreign judgment is final and conclusive and enforceable where rendered. Under the act, contraventions of public policy or injustice to a defendant are grounds for refusal of the application.

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[135] Broman and Granström, "Sweden" in Grubbs (ed.).

[136] Lynden, *Forum Shopping,* p. 273.

[137] Grubbs and DeCambra, "United States" in Grubbs (ed.).

4.5.3.1 Noteworthy Domestic Provisions

In addition to the domestic provisions identified above, various provisions often exist outside the area of civil procedure, which nonetheless affect recognition and enforcement in international civil proceedings.

In Ireland, for example, the Maintenance Orders Act 1974 provides for the enforcement on a basis of reciprocity of maintenance orders made in either part of Ireland, and in England, Wales and Scotland.[138]

In the Netherlands the preliminary injunction procedure known as *kort geding* has been referred to as "a prominent example of informality".[139] Traditionally intended for use in cases in which the interests of one party would be damaged by lengthy delays in litigation, it has gradually developed into a relatively speedy summary procedure used in a wide variety of district court proceedings. Statistics indicate that most cases last no longer than six weeks and it is rare for new proceedings to be initiated subsequently.[140] The procedure has been identified as particularly useful in patent law cases, which are often complex and expensive.[141]As such cases frequently involve an international element, it is not difficult to see the benefits which would flow from a harmonised international *kort geding* procedure in areas of international civil law. This may go some way to avoiding the procedural flaws which inevitably arise in such litigation.

From an examination of the enforcement and recognition procedures in force internationally it would seem that the main international conventions lead to a presumption that a judgment in a civil or commercial matter given by a court of another Contracting State is to be enforced.[142] The regime in EU Member States is clarified to a large degree by Regulation 44/2001. A foreign judgment from another Contracting State, therefore, is likely to be recognised and enforced in the absence of a number of clearly established circumstances. Even where judgments of non-Contracting States are at issue, most states have developed a clear framework for deciding on enforcement and recognition, which ought to provide practitioners with a good deal of guidance as to the likely decision in any given case.

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[138] Nowlan, "Ireland" in van Lynden (ed.).

[139] Blankenburg, "Civil Justice: Access, Cost and Expedition. The Netherlands" in Zuckerman (ed.), *Civil Justice in Crisis Comparative Perspectives of Civil Procedure* (OUP, 1998).

[140] Blankenburg, "Civil Justice: Access, Cost and Expedition. The Netherlands" in Zuckerman (ed.), *Civil Justice in Crisis Comparative Perspectives of Civil Procedure* (OUP, 1998).

[141] Brinkhof, "Between Speed and Thoroughness: The Dutch 'Kort Geding' Procedure in Patent Cases" (1996) 18(9) EIPR 499-501.

[142] Grubbs (ed.), *International Civil Procedure* (Kluwer Law International, 2003), xlvii.

4.5.4 Conclusion

The vital tools for a practitioner in the area of international civil proceedings must consist of the above treaties and conventions and, where EU Member States are concerned, both recently introduced regulations. The great majority of domestic provisions relating to service of proceedings, jurisdiction and recognition and enforcement of foreign judgments possess common characteristics. Where inconsistencies do occur, does this pose an obstacle to those engaged in cross border litigation? It must be noted that many previous domestic bars on initiating such proceedings are now rendered obsolete by the Hague, Brussels and Lugano Conventions. Where non-Contracting States are involved, many domestic regimes now have clearly defined rules, such as in the area of recognition and enforcement of foreign judgments. It is also the case that many of the above states' bilateral treaties or domestic civil procedure codes in fact further the aims of the main conventions, alongside which they co-exist.