The Brussels Convention – Successful Model and Old-timer

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I.

If those of the legal profession were somewhat less exacting and did not display such genteel behaviour, it might be possible to get very enthusiastic about the Brussels Convention. The present small contribution begins with a simple statement: the Brussels Convention has proved to be a model of success. Such a statement is not likely to meet with much opposition. It is widely known by now that the Brussels Convention and the Lugano Convention that has followed in its wake are the most successful of the last century in the realm of international procedural law. It will not be necessary to go into detail explaining why this is so.

There are, no doubt, certain aspects where the Conventions do not exactly provide for the best possible solutions one could wish for and days could be spent discussing details. Gaps and shortcomings have been examined before and have now once again been projected, as it were, on to the screen of the world's stage on the occasion of the Hague deliberations on a worldwide Convention on Jurisdiction and Enforcement. Nonetheless, it may safely be asserted – without applying a flattering gloss – that the positive aspects prevail. This certainly applies with respect to the initial stage almost forty years ago when the Brussels Convention meant a big leap forward, an enormous improvement.

My favourable assessment does apply, with a pinch of salt, also to the reform of the whole system of the Brussels Convention consisting in the transformation of the Convention into the enactment of EC Regulation No 44/2001 of 22 December 2000,[1] although one would have wished for more courage on that occasion, leading up to real reform work. It will require substantial reforms and not a mere touching up. One must strike while the iron is hot. The Brussels bureaucrats, however, are refined people, not inclined to handling hammer and anvil. They have chosen to wrap problems in cotton wool or, as it were, steer clear of them more or less skilfully.

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[1] Official Journal L 12 of January 16, 2001, page 1.

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I point out, as an example, the dichotomy prevailing in the realm of jurisdiction in Europe on account of the limited scope of application of relating European provisions and the resulting partial applicability of national – sometimes excessive – provisions dealing with jurisdiction. This situation is at the root of yet another problem arising from the application of the law where Non-Community countries are involved and which, due to the globalization process will become even more acute in the years to come.

Under the auspices of Professor *Schnyder*, the complexity of this problem has been dealt with in a pioneering thesis by Dr. *Grolimund*,[2] who by now has acquired a distinguished reputation even internationally.

The authors of the Brussels Convention had felt – and this is still understandable today – that for a variety of reasons the time for uniform rules governing all aspects of international jurisdiction, replacing related national provisions altogether, had not yet come in the 1960s.[3] European rules of mandatory jurisdiction were enacted only with regard to persons domiciled[4] in a country of the European Community, or, today, within the European economic area.[5] Beyond the gates of the 'fortress Europe', parties are subject to defects and constraints prevailing in the realm of the national jurisdiction concerned.[6] Above all, it is the so-called excessive jurisdiction, characterized in Article 3(2), that remains unaffected, the importance being increased by the fact that decisions rendered under these undesirable rules on jurisdiction must now – subject to Article 59 – be recognized and enforced in all other countries of the European Community pursuant to Articles 25 et seq. of the Convention, or to Articles 33 et seq. of the new EC Regulation.[7]

This double-tracked law, governing jurisdiction prevailing in Europe, has unfortunately been perpetuated even into the 21st century. It is a very serious mistake. There has not been even the slightest attempt to create a uniform body of European rules on jurisdiction.

The fact that national rules on jurisdiction continue – in part – to apply with all their inherent defects and often unfair restrictions to procedural justice in international matters, creates difficulties also for citizens who are domiciled outside the territorial scope of application of the Convention or the EC Regulation as they

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2 *Grolimund*, 'Drittstaatenproblematik des europäischen Zivilverfahrensrechts', (2000).

3 *See also Geimer*, The European Legal Forum 2000, page 54 with further references.

4 The seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile for purposes of Art. 2 par. 1 of the Brussels and the Lugano Convention.

5 Art. 2 par. 1 and Art. 3 par. 1 of the Brussels and the Lugano Convention, respectively, and EC Regulation No 44/2001.

6 Art. 4 of the Brussels and the Lugano Convention, respectively, and EC Regulation No 44/2001.

7 This example is now being followed by Art. 8 par. 2 of EC Regulation 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses; Official Journal L 160 of 30 June 2000, page 19.

are subject to a jurisdiction that is not governed by European rules on jurisdiction but by related national provisions perpetuated by Article 4(1), whose impact, by virtue of Article 4(2), has also been increased. Thus, a Swiss, Italian, German, British, Russian or American national domiciled in France may avail himself of Article 14 of the 'Code civil' in relation to Article 4(2) and sue, in France, any person in the world, on the sole condition that the person named in the action has his or her domicile outside the territorial scope of application of the Convention or the EC Regulation Number 44/2001.

Among the points on the agenda to be dealt with are the problems arising in the event of international attachment and provisional measures. However, these have not, so far, been made the subject of reform work even though, in practice, they are of the greatest importance. For tactical reasons it was correct to bypass these problems in the original version of the Brussels Convention as at that time the Convention would otherwise not have reached the stage where it could be signed at all. But on the threshold of the new millennium, it would have been appropriate to clarify that work is not being pursued only by post-modern epigones content with the preservation of what had already been achieved in Brussels, perpetuating the '*status quo*', barely touching on some of the minor problems arising. The influence of highly motivated lawyers of the younger generation should have been brought to bear, making it clear that it is possible to substantially improve and refine what had been begun by others a generation before.

To that end, the subject of the international attachment (of claims) and the *enforcement of injunctions* (by which is meant enforcement of judicial orders in non-pecuniary matters concerning actions and omissions) would have been an ideal playground. This is even more applicable to the standardization of the rules governing provisional measures in Europe. The European Court of Justice in Luxembourg seeks to establish even here some binding rules. However, the case-law it produces[8] reveals more holes than Swiss cheese and has failed to provide a real alternative to a standardized European body of rules. Furthermore, there are no rules providing for emergency jurisdiction ('*Notzuständigkeit*'), rules that are indispensable in particular when recognition and enforcement of a ruling is refused and where recognition and enforcement cannot be achieved in a third country.[9]

I also believe that the section dealing with exclusive international jurisdiction (Art. 16 of the Convention) now adopted by the new EC Regulation Number 44/

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[8] Last attempt see ECJ, 27 April 1999, C-99/96 – Mietz/Intership Yachting Rep. 1999, I-1597 = 'Europäische Zeitschrift für Wirtschaftsrecht' (EuZW) 1999, page 727 (*Christian Wolf* EuZW 2000, page 11) = 'Juristenzeitung' (JZ) 1999, page 1105 (*Stadler*) = 'Zeitschrift für Zivilprozess International' (ZZPint) 4 (1999), page 205 (*Spellenberg/Leible*); see also *Jayme/Kohler* 'Praxis des Internationalen Privat- und Verfahrensrechts' (IPRax) 1999, pages 401, 408.

[9] *See Geimer/Schütze*, Europäisches Zivilverfahrensrecht, 1997, Einleitung (Introduction) No. 39, Art. 3 No. 7, Art. 6 No. 73, Art. 16 No. 35 Art. 17 No. 231, Art. 31 No. 64.

2001 (Art. 22) was not well drafted. It may suffice to point out the incredible contortions made by both courts and doctrine with regard to the renting of holiday homes.[10]

The regulation, or non-regulation, of the whole complex of problems arising in joint procedures (*Adhäsionsverfahren*), that is, procedures where criminal and civil action are combined,[11] is almost frightening. The facts of the case at the origin of the decision of 28 March 2000, rendered by the European Court of Justice in the matter of *Krombach v. Bamberski*[12] reveal just how dangerous such joint procedures[13] may be for the parties involved – in particular in countries following the French, Italian and Spanish legal tradition where they are most popular and therefore very common – and to what extent Article 5(4) referring to national provisions governing jurisdiction in penal matters has missed the very point the Convention was meant to settle, that is, the limitation of the defendant's liability to appear before a court outside the country of his or her domicile and, consequently, the admissibility of only a limited number of moderate and pertinent exceptions to the rule: *actor sequitur forum rei*. By way of Article 5(4) the most excessive connecting factors establishing jurisdiction (characterized in Art. 3(2)) are admitted, so that even defendants domiciled within the European Economic Area are subject to the constraints applied by national rules governing jurisdiction.[14]

This defect, which is irreconcilable with the spirit and fundamental concern of the Brussels and Lugano Conventions, has unfortunately not been remedied by the new

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[10] For references see *Geimer/Schütze*, 'Europäisches Zivilverfahrensrecht', 1997, Art. 16 No. 123 et seq.

[11] The criminal court has jurisdiction to make an order for damages or restitution in criminal proceedings. *See* ECJ, 21 April 1993 C-172/91 – Sonntag/Waidmann, Rep. 1993, I – 1963.

[12] ECJ, 28 March 2000 C-7/98, – Krombach/Bamberski Rep. 2000, I–1935; 'Neue Juristische Wochenschrift' (NJW) 2000, page 1853 = 'Zeitschrift für Wirtschaftsrecht' (ZIP) 2000, page 859 (*Geimer*) = 'Entscheidungen zum Wirtschaftsrecht' (EWiR) 2000, page 441 (*Hau*) = 'Europäisches Wirtschafts- und Steuerrecht' (EWS) 2000, page 456 (*Gundel* page 442) = 'Juristenzeitung' (JZ) 2000, page 723 (*von Bar*) = 'Praxis des Internationalen Privat- und Verfahrensrechts' (IPRax) 2000, page 406 (*Piekenbrock* page 364) = 'Zeitschrift für Zivilprozess International' (ZZPInt) 5 (2000), page 219 (*Prinz Sachsen Gesaphe*). Final decision by the German Supreme Court (Bundesgerichtshof): BGHZ 144, page 390 = NJW 2000, page 3289 = 'Lindenmayer-Möhring' (LM) EuÜbk. No. 5 (*Geimer*) = JZ 2000, page 1067 (*Gross*) = ZIP 2001, page 159.

See also European Court of Human Rights, 13 February 2001 – No. 29731/96 – Krombach v. France NJW 2001, page 2387 (*Gundel* page 2381) = IPRax 2001, page 464 (*Matscher* page 428).

[13] Reference is made to *Prinz von Sachsen-Gesaphe*, 'Zeitschrift für Zivilprozess International (ZZPlnt) 5 (2000) page 219.

[14] Pursuant to Art. 5 point 4 civil claims may be asserted in penal proceedings, the jurisdiction being left to national law by the Brussels Convention. In the case decided by the European Court of Justice the offence had been committed in Bavaria. The only connecting factor establishing French penal jurisdiction and by way of Art. 5 point 4 – French civil jurisdiction also, was the victim's citizenship. The victim was a Frenchman.

EC Regulation, nor has the working group, on whom it was incumbent to undertake the reform of the Lugano Convention, dealt with this problem.

As for the judicial policy concerning both Switzerland and Germany, the author believes that no account was taken of the interests of either of the two countries and that a serious mistake was made when the forum for an action on warranty or guarantee, and the forum for third party proceedings, were not included in Article 6(2) and Article 10, respectively, as this is at the root of an imbalance in justice being allowed in an international context.[15]

If defendants who are domiciled in Switzerland and in Germany can – on account of the fundamental principles of the European rules on jurisdiction being practically repealed with regard to third parties (that have become involved) in proceedings – be brought to justice in the whole territory of the European economic area in third-party procedures or by way of the '*assignation en garantie*', and if Switzerland and Germany are under the obligation to recognize and enforce relating judgments, this should apply to defendants from other Member States or other Contracting States as well.

The possibility of summoning a third party to appear in a law suit *(Streitverkündung)*, as is provided in both Switzerland and Germany,[16] does not constitute an equivalent procedure as it does not lead to an enforceable title. A second lawsuit must be brought with a view to obtaining a second decision based on the more or less binding nature of the legal and factual findings of the first procedure *(Streitverkündungswirkung)*, which is due to the effects produced by a third-party intervention, whereas under Article 6(2) an enforceable decision would also be given against the third party.[17]

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[15] In Art. V of the protocol to the Brussels and the Lugano Conventions it was laid down that jurisdiction for claims based on a warranty or guarantee or in any other third-party proceedings (third-party claim by the defendant against a person domiciled in another Contracting State, 'Part 20' claim [CPR 20.2]) including the application to intervene (third-party notice, *litisdenuntiatio*), pursuant to Art. 6 point 2 and Art. 10, may not be asserted in Switzerland or Germany, nor in Austria and Spain for that matter. This reservation has now been confirmed for Germany and Austria in Art. 65 of the new EC Regulation No. 44/2001 of 22 December 2000.

[16] § 72 of German Code of Civil Procedure.

[17] Reference is made to a case dealt with by the Oberlandesgericht (Regional Court of Appeal) Hamm described in 'Praxis des Internationalen Privat- und Verfahrensrechtes' (IPRax) 1998, page 202 [*Geimer* page 175]:

A French cement producing plant ordered from a French manufacturer producing gear wheels a gear unit reducing rotational speed, destined for a cement mill. The supplier had the hear unit case-hardened by an engineering office in Bochum against payment of Deutsche Mark 10.000. A few months after having been put into operation, three teeth of one of the gear wheels broke, which brought about a complete breakdown of the cement mill and enormous consequential damage on account of the plant interruption which lasted several months.

The purchaser sued the supplier for damages before the Commercial Court of Versailles, which found for the plaintiff. The supplier for his part brought action for compensation

II.

In spite of the rigidity of the 'Zeitgeist' (spirit of the times) imposing political correctness, there must be allowance for being relaxed and open-minded. It would therefore be interesting to make some less serious remarks, remarks that are by no means intended to be as spiteful as a devil's advocate might be inclined to make. In this tone, it could therefore be said – and there is a grain of truth in every joke – that too many cooks spoil the broth. With hindsight it can be said that it was most fortunate that only six countries were present at the cradle of the Brussels Convention, the six that had brought into being the European Economic Community.

At that time, the goal was, putting it in simple terms, to find a synthesis of traditions which arose from the Romance legal systems which were mainly influenced by the French 'Code de procédure civile' of 24 April 1806, pretending to be revolutionary law although it was really based on, on the one hand, the 'Ordonnance' of April 1667 enacted under Louis XIV, and on the other hand the further developed dogmatic positions of the German legal system, created almost half a century later.

This synthesis was a complete success. The chauvinistic approach of Articles 14 and 15 of the French civil code was overcome. The German rules on jurisdiction were adopted with only a few exceptions[18] in Article 5 of the Brussels Convention,

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against the engineering office Bochum at the Versailles court seized with the main action. The court again found for the plaintiff. The supplier then demanded that the French judgment be declared enforceable in Germany under the provisions of Art. 31 et seq. of the Brussels Convention, the decisions of all three instances seized with the matter being in his favour.

It would have been otherwise had the supplier been sued in Switzerland. The supplier could not have brought an action in Switzerland against the expert domiciled in France, or in any other country, and responsible for the putting into operation of the cement mill. He could have done no more than having a third-party notice served on the engineering office, summoning it to appear in the lawsuit. It is true that France – just like all the other Member States of the European Union – is under the obligation to recognize the effects of a third-party notice served in accordance with the Lugano Convention. It is not clear, however, how French law courts would, in French civil proceedings, deal with a third-party notice served under Swiss law. There is, to say the least, a possibility that a way might be found to resume proceedings by admitting fresh evidence. But even if I am too pessimistic, it is certain that another lawsuit would be unavoidable; this time, an action would have to be brought against the fictitious engineering office in France.

This example reveals an enormous imbalance in the system of the Convention, or the EC Regulation, existing between Switzerland, Austria and Germany on the one hand and the rest of the countries belonging to the European economic area on the other.

[18] Such as, for instance, the forum of membership as per § 22 of the German Code of Civil Procedure, which is of great importance in particular in the domain of company law. The United Kingdom on the other hand has insisted on an extension of Art. 5 by the introduction of its No. 6, relating to actions based on trust law.

and completed by the jurisdiction under Article 6(1) and (2), based on connection, and rooted in the French tradition.

It is unnecessary to go into detail in this context (for instance, the fact that to the old 'Code de procédure civile' the court of general jurisdiction modelled after §§ 12 et seq. of the German Code of Civil Procedure was unknown). The essential difference, even in the realm of jurisdiction, was made between '*actions personnelles*' and '*actions réelles*', the '*actions mixtes*' being, as it were, placed in the midst of them. Even the general forum for delict (or the Common law tort), stipulated by § 32 of the German Code of Civil Procedure of 1877 and adopted by the Brussels Convention (Art. 5(3)) was not known in France in this general form.

With regard to the recognition of foreign judgments, the principle of the automatic extension of effects without any special procedure being required, that is, the recognition by operation of law as per § 328 of the German Code of Civil Procedure was adopted and the requirement of *enforcement* ('*delibazione*', highly praised in Italy at the time) abolished.[19] Furthermore, scrutiny under conflict of laws rules at the stage of recognition and declaration of enforceability (*exequatur*) is abolished to a great extent. In this respect, too, the starting point of French doctrine was and is quite different.[20] Even today, experts focussing exclusively on conflict of laws rules may argue very excitedly that the private international law of the State in which recognition is sought is being pushed aside when recognition is granted without any scrutiny under conflict of laws rules. The image of the cart being put before the horse, used by George Droz to describe the situation, is somewhat crude. However, the caravan moves on and the remnants of the classical private international law approach are left behind on both sides of the track.

Great progress has been made through standardizing at a European level and tightening-up the procedure of declaration of enforceability (*exequatur*),[21] which in the first section has been given the form of an *ex parte* procedure.[22]

Finally, the concept of *lis pendens* abroad was introduced as a criterion in accordance with the *principle of priority*. From the Italian and French standpoint, this meant a very significant new orientation although it should be pointed out that the wording of Article 21 of the Brussels Convention is not sufficient, at least with regard to the decisive moment of the beginning of *lis pendens*. Here reform work has achieved some progress.

It was not necessary at that stage to take account of the Common Law concept of

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[19] Art. 26 of the Brussels Convention; now Art. 33 of the EC Resolution No. 44/2001 of 22 December 2000.

[20] According to the autonomous national French law on recognition and enforcement of foreign judgments 'conformité de la décision étrangère au système français de conflit de lois' is necessary. For references see *Geimer*, Anerkennung ausländischer Entscheidungen in Deutschland, 1995, page 37.

[21] In the United Kingdom by registration for enforcement in the appropriate court, Art. 31 par. 2 Brussels Convention, 1982 Civil Jurisdiction and Judgments Act section 4 par. 3.

[22] Art. 34 par. 1 of the Brussels Convention.

jurisdiction (including the doctrine of *forum [non] conveniens*). It was no doubt a great gain to the legal systems of England, Scotland and Ireland, when the United Kingdom and the Republic of Ireland were, *nolens volens*, compelled to adopt the Brussels Convention, subject to some amendments and modifications, when joining the European Economic Community. One cannot help admiring British flexibility and pragmatism. Even without being under an obligation to this effect arising from international law, the United Kingdom adopted the European rules on jurisdiction and the enforcement of judgments also with regard to relations between its three national jurisdictions.[23]

Even Switzerland has gained, via the Lugano Convention, by the ensuing pressure exercised worldwide by the Brussels Convention, giving reform work a push. It is appropriate to mention, by way of example, the abolition of the *forum domicilii* guaranteed by Article 59 of the old Constitution to the solvent debtor[24] and the reform of the Swiss Federal Law Governing Debtor's Prosecution and Bankruptcy. It is possible that Switzerland will go so far as to decide in favour of the introduction or – as far as some of the French-speaking cantons are concerned – the re-introduction of the enforceable deed (authentic instrument).[25]

The real test still lies ahead of us. For the time being it is still not known whether the efforts of the Hague Conference will prove successful. It is uncertain now whether a worldwide convention on jurisdiction and the enforcement of judgments will be achieved. Even if the work of the Hague Conference should achieve its aim, it remains to be seen just how much of the Brussels spirit will be left in the bottle and to what extent it has been banished by the American 'genie in the bottle' by means of the grey list.

III.

The author shall cease his hymn in praise of the Brussels and the Lugano Conventions for a while as he has also – by way of contrast – introduced the term 'old-timer' into the subject of this brief paper. It is true that the Brussels system contrasts favourably with the internationally still generally uncoordinated legal situation and the modest achievements of the doctrine in the middle of the last

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[23] The Civil Jurisdiction and Judgment Act of 1982 declares the Brussels jurisdiction rules to be applicable also between England and Wales on the one hand and between Scotland and Northern Ireland on the other.

[24] *See* Art. Ia of Protocol No. 1 to the Lugano Convention. Reference is made to *Walther* 'Zeitschrift für Zivilprozess International' (ZZPInt) 5 (2000), page 295.

[25] For references see *Geimer*, 'Freizügigkeit vollstreckbarer Urkunden im Europäischen Wirtschaftsraum', 'Praxis des Internationalen Privat- und Verfahrensrechtes' (IPRax) 2000, page 366; *Dicey/Morris*, Conflicts of Laws, 13th edition by *Collins*, 2000, 14–223 (page 558).

century; it may even appear to be progress at breakneck speed. However, it seems to be bland and old-fashioned when measured against plans and projects the Brussels Commission has suggested to the governments of the Member States of the European Union and on which the author shall comment in the following.

Those suggestions are not just more or less noncommittal declarations of intent *ad Calendas Graecas*, but rather concrete legislative programmes to be realized in the immediate future. This dynamic approach – it might even be said feverishness – was triggered by the shift from one pillar to the other by the Treaty of Amsterdam (*Säulenwechsel von Amsterdam)* by which the Brussels system, deemed to arise from public international law (international convention), was converted into secondary European Community law, Regulations to be more precise. Even in Tampere, Finland, the heads of State and of government present at the special summit meeting held there in October 1999 decided on the gradual construction of an area of freedom, security and justice based on the new Title IV of the EC Treaty. In addition, on 30 November 2000, a decision was taken on a very detailed programme providing for measures to be taken and to become effective within well-defined periods of time.[26]

From the hazy catchword 'European enforceable title' which has continued to recur in working papers, the following concrete goals have now become apparent.

Abolition of the exequatur (procedure of declaration of enforceability[27]), which means that any enforceable title existing in any of the Member States shall be sufficient for execution also in all the other EU Member States without a preceding enforcement order being required.

This means that the whole procedure leading up to the enforcement order being issued will be abolished together with all grounds preventing judgments given in a Member State from being recognized or impeding their enforceability, such as are still set out in Articles 27 and 28 of the Brussels or the Lugano Convention, and in Articles 34 and 35 of EC Regulation Number 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 22 December 2000, and in Article 15 of EC Regulation Number 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses of 29 May 2000.[28] This will, in any event, apply in the long term. It is not clear yet whether, and if so under what conditions, some sort of opposition proceedings in the State in which recognition is sought, based on national or European law, are to be provided for.

However, even today the judge applied to for the granting of the declaration of enforceability (*exequatur*) is – contrary to the prevailing opinion expressed on Article 34(2) of the Brussels or the Lugano Convention, which the author has refuted by

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[26] Official Journal C 12 of 15 January, page 2001.
[27] Art. 31 et seq. of the Brussels Convention.
[28] Official Journal L 160 of 30 June 2000, page 19.

arguments[29] set out in doctrine – no longer under the obligation to verify *ex officio* the existence of reasons why a declaration of enforceability should not be granted. Such review is, according to Article 41 of EC Regulation Number 44/2001, undertaken only if the debtor against whom enforcement is sought has lodged an appeal against the decision authorizing enforcement.

To give up the possibility of declining recognition of a judgment on the grounds that it is contrary to *public policy* had been proposed by the Commission of the European Communities even in relation to the reform of the Brussels Convention and the preparation of EC Regulation Number 44/2001 as public policy was held not to be compatible with the European integration process.[30] The Commission did not succeed at that time. At present it seems that the political surroundings are more favourable to such a stringent modification, the motto now being 'free circulation of judgments'.

If the European legislative process were to take this direction, it would be consistent, from the European standpoint, with the course set for legal integration and harmonization in the European Community. Viewed from the angle of the classical rules of international proceeding geared to the method of thinking prevailing in public international law, an evolution in this direction would be tantamount to a *quasi-revolutionary development* and would be likely to uncouple once and for all the Lugano Convention from the Brussels I system. It is difficult to imagine, for instance, that Switzerland, a country that guards its sovereignty very jealously, could give up the reservation of public policy with regard to the recognition of foreign judgments. Without this emergency brake, or sheet anchor, whatever the public policy reservation may be called, foreign judgments would not only have to be recognized, and their enforcement granted (even if based on foreign rules that are irreconcilable with the fundamental and unrenounceable legal principles of Switzerland, or violating such prohibitions as Switzerland wants to have applied even internationally) but also, if they are the result of proceedings, deemed to be extremely unfair, making a mockery of elementary principles of procedural justice.

Problems may even arise, *de conventione lata*, from tension prevailing in the relationship between the general obligation to recognize and enforce foreign judgments under Article 26 et seq. of the Convention, or Article 33 of EC Regulation Number 44/2001 on the one hand, and the reservation of essential national interests of the State in which recognition is sought on the other hand. The reservation of Article 27(1) of the Brussels and the Lugano Conventions, or Article 34(1) of the new EC Regulation on jurisdiction and enforcement mentioned above, is limited in its scope by provisions of public international law or European Community law respectively. The author considers himself as being a partisan of

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[29] *Geimer*, 'Neue Juristische Wochenschrift' (NJW) 1973, page 2138.

[30] Working Paper 'Towards greater efficiency in obtaining enforcing judgments in the European Union', Official Journal C 33 of 31 January 1998, page 22 (Art. 37a No. 2).

this view[31] and the European Court of Justice has followed suit in its decision given on 28 March 2000 in the matter of *Krombach v. Bamberski*[32] and in its decision of 11 May 2000 in the matter of Usines Renault.[33] A presumption may be made that Switzerland has taken note of these precedents very critically and that they would not have been accepted under Article 27(1) of the Lugano Convention.

The European Court of Justice considers the reasons why a foreign judgment is not recognized under the terms of the Brussels Convention and, in the future, the EC Regulation, to be obstacles on the way to free circulation of judicial decisions within the European Community and points out that in particular the public policy reservation relating to recognition must be applied restrictively, so that public policy may be resorted to only in the event of a blatant violation of an essential legal provision of the State in which recognition is sought, or of a fundamental legal principle prevailing in that State.

In other words: the European Court of Justice has, based on the Convention or, in the future, on Community law, put limitations on public policy by granting the Member States the right to decide for themselves on the requirements to be satisfied under their public policy, but denying the State in which recognition is sought the right to decide for itself whether its public policy reservations made carry enough weight to impede the recognition or declaration of enforceability of the judgment given in another Member State, pursuant to Art. 27(1) of the Brussels Convention or, in the future, Art. 34(1) of the new EC Regulation. The European Court of Justice argues that the scope of public policy reservations is to be determined by interpretation of the Convention or the EC Regulation, respectively, which interpretation, again, is incumbent on the European Court of Justice. 'While it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits'.[34]

The logic of the law implies that a parallel interpretation of Article 27(1) of the

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[31] *Geimer* in *Geimer/Schütze*, 'Internationale Urteilsanerkennung', half volume 1, 1983, page 970, and also *Geimer*, 'Anerkennung ausländischer Entscheidungen in Deutschland', 1995, page 13..

[32] EJC 28 March 2000 C-7/98 – Krombach/Bamberski (foot note 12).

[33] EJC 11 May 2000 C-38/98 – Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento Rep. 2000, I–2973 = NJW 2000, page 2185 = EWiR 2000, page 627 (*Geimer*) = 'Praxis des Internationalen Privat- und Verfahrensrechtes' (IPRax) 2001, page 328 (*Heß* page 301) = 'Zeitschrift für Zivilprozess International' (ZZPInt) 5 (2000), page 248 (*Fritzsche*).

[34] In its decision given on 11 May 2000, the European Court of Justice declared without much ado that the reasons put forth by the Italian Court of Appeal with a view to preventing the declaration of enforceability of a French judgment, were not sufficient to fall within the scope of public policy. It follows that the sword of Damocles is suspended above the Member States insofar as the European Court of Justice, generally given to unification, may not hold the fundamentals and essentials of a national legal system to be weighty enough to justify the exclusion – on the grounds that this would be contrary to public policy – of recognition and declaration of enforcement.

Lugano Convention should be considered, if not undertaken as a matter of course. The author believes, however, that the Swiss would not agree with this and not only because their ancestors had made a vow at the *Rütli* never to tolerate foreign judges above them. Although the author is not an expert on Helvetian history, it is understood that the Helvetians' ancestors, even in the '*Bundesbrief*' of 1291 (the Great Charter of Switzerland), solemnly stated: 'We have unanimously decided not to recognize in our valleys any bailiff or governor who is not a countryman'.

Considered from this perspective, 'Lugano' was already quite a bold adventure. Depriving public policy of its forcefulness with regard to recognition of foreign judgments clearly goes too far, even though, as far as 'Lugano' is concerned, things would not be as bad as they look, as, contrary to what is provided for by the Brussels Convention, there is no supranational body in charge of interpretation but only the compliant and limp Protocol Number 2 on the uniform interpretation of the Convention.

IV.

After this discourse in which certain passages may be thought by some to be somewhat provocative, the discourse will now move into comparatively still waters and be confined to some sober comments and assessments. The success of the Brussels Convention is essentially due to four elements:

1) First, the creation of a *European body of rules on jurisdiction*, that is, the regulation of the '*compétence directe*', not just '*compétence indirecte*' as a precondition for the recognition, which previously was the standard in international treaties on recognition and enforcement of foreign judgments.
2) The second, very important step, which is not indispensable but follows logically upon the first, is the *general renunciation of a review of international jurisdiction* at the stage of recognition and authorization of enforcement (*exequatur*).[35] This removes an enormous number of potential conflicts that may arise in relation to the recognition and declaration of enforceability of foreign judgments, increasing at the same time the defendant's burden to appear before a court with regard to jurisdictional discovery, although the defendant is not under an obligation to appear in court just in order to deny its competence. The court shall, of its own motion, verify its jurisdiction, as Article 20(1) excludes any sort of fictitious confession arising from circumstances the plaintiff asserts with a view to establishing the court's jurisdiction.

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[35] Art. 28 par. 3 (half phrase 2 at the end) of the Brussels Convention, now Art. 35 par. 3 (half phrase 2 at the end) of the EC Regulation No. 44/2001 of 22 December 2000 and Art. 17 of the EC Regulation No. 1347/2000 of 29 May 2000.

Jenard rightly states that Article 20 is 'one of the most significant provisions of the Convention'.[36] This provision is intended to safeguard the defendant's interests. However, this principle applies only *cum grano salis*. There is no full protection of the defendant. It is not excluded that the judge could wrongly affirm jurisdiction, either on account of an erroneous assessment of the factual situation, or because he has wrongly interpreted Article 2 et seq., as for instance the term domicile or seat,[37] or the decisive moment of its establishment,[38] or the place of performance for claims arising from a contract, or, in the event of tort, the place where the act occurred or the place where the consequences of the act are felt.

If the judge, for whatever reason, wrongly affirms jurisdiction, it is incumbent on the defendant to fight the decision resorting to such procedural means of redress that are provided for by the law of the court seized. The defendant cannot wait for the decision of the court first seized to become final and put in a plea of international lack of competence on the part of the State of origin only when the court of the State, in which recognition is sought, is concerned with the matter. The review of international jurisdiction of the State of origin is not admissible, apart from such exceptions as are stipulated under Article 28(1) or Article 35(1). Moreover, the reservation of public policy may not be resorted to in the event of a decision on jurisdiction that is obviously wrong. A decision given in violation of Article 20(1) or Article 2 et seq. becomes effective and final not only in the State of origin but must also be recognized and its enforcement admitted in all the other Contracting States.

The exclusion of the review of (international) jurisdiction of the State of origin results in an extension of the defendant's obligation to appear before a court. This obligation increases and the burden on the defendant gets heavier as the territorial scope of the Brussels or Lugano Convention extends. The European economic area is already immense and another expansion thrust into Central and Eastern Europe lies immediately ahead. Poland joining the Lugano Convention is but a foretaste of what is to be expected in the course of the 21st century with respect to globalization of the burden to appear in court, which even today stretches from Tschenstochau to Fatima and from Messina to Hammerfest at the North Cape. Human rights activists will likely find it very difficult to overcome due process scruples.[39]

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[36] *Jenard*'s Report relating to Art. 20 of the Brussels Convention.

[37] *See* foot note 4.

[38] *See* for instance Canada Trust Co. v. Stolzenberg [2000] 3 WLR 1376, [2000] 4 All. E.R. 481 [H.L.]. Reference is made to *Vogenauer* 'Praxis des Internationalen Privat- und Verfahrensrechts' (IPRax) 2002, page 253.

[39] For the human rights aspects of international jurisdiction see *Geimer* in Festschrift (Liber amicorum) Schwind, 1993, page 17 and in 'Berichte der Deutschen Gesellschaft für Völkerrecht' (BerDGVR) 33 (1994) pages 231, 238.

3) The third equally important point is the Convention's *renunciation of any kind of jurisdiction based on citizenship*. For the younger generation, it may be self-evident that a system of rules on jurisdiction that is more or less aimed at procedural justice is also geared to the old principle of the Romans: *actor sequitur forum rei*. However, in the 1960s, when the Brussels Convention was negotiated, the ill-conceived Articles 14 and 15 of the 'Code civil' had by no means ceased to linger in the heads of leading academics in the countries of the Romance law traditions. The credit for this epoch-making innovation, that is, the final abolition of this chauvinistic principle, goes entirely to Arthur Bülow, then presiding over the working group preparing the new Convention. And yet his efforts would not have met with success if he had not been supported by two congenial and vigorous fellow-combatants: Martha Weser and Paul Jenard, who persuasively argued for the abolition, thus winning over the representatives of the other States.

It should not be forgotten that, strictly speaking, there has never been an explicit mandate to regulate the '*compétence directe*' also, as Article 220 of the EEC Treaty (now Article 293 of the EC Treaty) only provides for the Member States' obligation to enter into negotiations 'with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards'.

The wording of the EC Treaty has remained unsatisfactory to this day. In its Article 65, the EC Treaty refers *expressis verbis* merely to improvements and simplifications of the procedure of recognition and enforcement of judicial and extra-judicial decisions in civil and commercial matters and not to the standardization of the '*compétence directe*'. Nevertheless it is this rudimentary Article on which EC Regulation Number 44/2001 of December 2000 is based, the Regulation that perpetuates the system of rules on jurisdiction of the Brussels Convention as secondary Community law. The author is persuaded that the European Court of Justice in Luxembourg will, in spite of its feeble authority in the matter, not declare the Regulation to be null, although the recent decision relating to the Tobacco Directive has clearly shown that the European Community does not possess an unlimited general competence to pass laws and that the European Community Treaty only provides for special legislative power in certain limited areas.

Again the progress, or even dialectic leap forward, which is possible where a clear-thinking, issue-related mandatary is prepared to venture a courageous, extensive interpretation, has been demonstrated. An example demonstrating the opposite is Brussels II, which was tackled hesitantly and with little consequence only. In its Article 13(1), decisions by which an action is dismissed were excluded from the obligation to recognize foreign judgments. It was argued that the mandate to elaborate a new legal instrument served only the purpose of facilitating the recognition of divorces

and that the obligation to recognize foreign judgments did not include judgments by which an action or a petition is dismissed.[40]

This is circular reasoning because, if the precluding effects of an action or petition that has been dismissed in Member State A do not have to be recognized in the other Member States, the plaintiff is free to apply for a divorce again in Member State B whose courts are not bound to take account of the previous dismissal of the action. If a divorce is granted in Member State B, it is again Member State A, which is under the obligation to recognize that judgment. If the negotiating teams acting on behalf of post-modern jurisprudence had shown the same concise expertise as was shown by those responsible for the creation, from nothing, of the Brussels Convention, this error could have been avoided.

4) The fourth point involves the important *competence of interpretation conferred upon the European Court of Justice* which was and is at the root of the Brussels Convention's success.[41] By the creation of only one instance charged with interpretation, thus assuring a uniform interpretation, the Brussels Convention certainly has a very great advantage over the Lugano Convention, where, regrettably, to this day no such instance exists.

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[40] Reference is made to *Borrás* Report No. 60 (Official Journal C 221 of 16 July 1998, page 27).

[41] Thirty-five years have passed since the Convention was negotiated. At that time it was something entirely new and therefore it met with a great deal of opposition. It was therefore not possible, to implement – by means of the Convention – at the first attempt the generally binding interpretation by the European Court of Justice, modelled after Art. 177, now Art. 234, of the European Community Treaty. When the Brussels Convention was signed, only a common declaration of intent had been agreed on. It was only three years later, on 3 June 1971, that the protocol on the interpretation of the Brussels Convention could be signed. This protocol became effective on 1 September 1975, only.

Ever since, the judges of the European Court of Justice have been trying, with variable success, to find an interpretation as appropriate as can be. Up to 1 March 2002 they did not act in a capacity of an organ of the European Community but rather as a law court instituted under public international law by way of a special agreement. After that date, the Brussels Convention will be substituted by EC Regulation No. 44/2001 of 22 December 2000, with respect to all the EU Member States with the one exception of Denmark. From that date onward, the problem will no longer be the interpretation of a public international law treaty but rather the binding interpretation of secondary Community law, which does not require any particular provision establishing competence of interpretation, jurisdiction being derived from Art. 234 of the European Community Treaty.

The obligation of submission, laid down for Regulations that are based on Art. 65 of the European Community Treaty, which consequently applies also for EC Regulation No. 44/2001 taking the place of the Brussels Convention is, as far as Art. 234 of the European Community Treaty is concerned, restricted by Art. 68 of the EC-Treaty.

V.

I will conclude by expanding upon one of my hobbyhorses, that is the notorious Article 27(2) of the Brussels or Lugano Convention. It is maintained[42] that this provision is a complete failure as, in order to protect the defendant, double safety has been provided for: on the one hand compliance with the *rules governing service in the State of origin* and on the other hand receipt in due course by the defendant of the document served on him or her, thus leaving him or her a true chance to organize his or her defence. Bearing in mind Article 6(1) of the European Convention on Human Rights and (the future) Article 47(2) of the European Charter of Fundamental Rights, the latter is the essential point. Any meaningless requirements as to form should be avoided. It is generally known within the legal profession how formalistic the rules on the service of documents are and how easily a formal mistake can be made, which is of no consequence materially. The important aspect is the protection of the defendant's right to be heard also in the State in which recognition is sought.[43]

Applying Article 27(2) literally, as advocated by the European Court of Justice,[44] would also prejudice to an unreasonable extent the plaintiff's right to justice being granted in accordance with Article 6(1) of the European Convention on Human Rights. This is something the European Court of Justice has overlooked. It could not bring itself to adopt the teleological method of interpretation suggested by the author. Consequently, its jurisdiction remained incoherent and became stalled so that it lacked the strength and the momentum required to manage a reversal and a new interpretation of Article 27(2) in the light of the *ratio conventionis*. It was the European legislator, who finally had to take the matter in hand. In Article 34(2) of EC Regulation Number 44/2001 it was stipulated: 'A judgment shall not be recognized where it was given in default of appearance, if the defendant was not served with the document that instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him or her to arrange for his or her defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him or her to do so'.[45]

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[42] *See* for instance *Geimer*, 'Juristenzeitung' (JZ) 1969, page 13 and 'Praxis des Internationalen Privat- und Verfahrensrechts' (IPRax) 1985, page 6.

[43] *Geimer*, 'Menschenrechte und internationales Zivilverfahrensrecht' in 'Berichte der Deutschen Gesellschaft für Völkerrecht' (BerDGVR) 33 (1994), pages 231, 238, 260.

[44] ECJ 3 July 1990 C-305/88 – Lancray/Peters Rep. I – 1990, 2725 = 'Recht der Internationalen Wirtschaft' (RIW) 1990, page 927 = 'Europäische Zeitschrift für Wirtschaftsrecht' (EuZW) 1990, page 352 (*Geimer*) = 'Praxis des Internationalen Privat- und Verfahrensrechts' (IPRax) 1991, page 177 (*Rauscher* page 155).

[45] This provision overrules ECJ of 27 November 1992 C–123/91 – Minalmet/Brandeis Rep. 1992, I – 5661 = 'Juristenzeitung' (JZ) 1993), page 357 (*Stürner*) = 'Recht der Internationalen Wirtschaft' (RIW) 1993, page 65 = 'Europäische Zeitschrift für Wirtschaftsrecht' (EuZW) 1993, page 39; reference is made to *Jayme/Kohler*, 'Praxis des Internationalen Privat= und Verfahrensrechts' (IPRax) 1993, page 362.

Compliance with the rules of the State of origin governing the service of documents is not reviewed any more, or, in other words: the violation of rules governing service in the State of origin does not as such, automatically entail the denial of recognition and authorization of enforcement. The only decisive criterion now is whether or not the defendant was given sufficient opportunity to arrange for his or her defence or, as the case may be, secure such opportunity by means of a legal remedy. This means that the former jurisdiction of the European Court of Justice has been surpassed. In this respect, the new Regulation may be said to constitute substantial progress.

Unfortunately, this wording has, deliberately, not been used in the text of Article 15 of EC Regulation Number 1347/2000 of 29 May 2000 relating to matrimonial matters. According to Article 15(1)(b), a judgment relating to a divorce, legal separation or marriage annulment shall not be recognized where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has *accepted* the judgment unequivocally.

Identical phrasing is to be found in Article 15(2)(c) relating to judgments and orders on parental responsibility. This merely approximate adaptation may be said to constitute a serious defect in the Marriage Regulation. The different rules governing divorce as such on the one hand and legal consequences of divorce on the other, may give rise to detrimental results. It is argued that an absolute consistency of provisions in the two Regulations is indispensable as, otherwise, different rules would apply for decisions to be given in inter-linked proceedings. It can by no means be reasonable that in one and the same procedure different rules, diverging in substance, should apply, as in most of the Member States it is customary to decide in the course of the same procedure not only on the divorce itself, that is on the dissolution of the matrimonial bond, but also on the legal consequences of the divorce.