

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**

CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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CROSS-BORDER ACTIVITIES IN THE EU - MAKING LIFE EASIER FOR CITIZENS Sessions II-III

Workshop for the JURI Committee



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Cross-border activities in the EU
Making life easier for citizens

Workshop for the JURI Committee

Sessions II - III

This workshop was requested by the European Parliament's Committee on Legal Affairs.

AUTHORS

Ms Giesela Rühl, Jena University
Mr Jan von Hein, Freiburg University
Mr Pierre Callé, Paris Sud University (Paris XI)
Mr Michael P. Clancy, Solicitor, The Society of Scotland, UK
Ms Christiane Wendehorst, Vienna University
Mr Kurt Lechner, Notary Chamber of Palatinate, Germany
Ms Eva Pötter LL.M, Legal Advisor of the Estonian Chamber of Notaries
Ms Ilaria Pretelli, Swiss Institute of Comparative Law, Lausanne
Mr Spiros Livadopoulos, Lawyer and Mediator, European Cross-border Family Mediators' Network
Mr Hans van Loon, Member of Institute de Droit International, The Hague
Mr Paul Lagarde, Université Paris I (Panthéon-Sorbonne)
Mr Harm Schepel, Professor of Economic Law, Brussels School of International studies
Mr Pablo Cortés, University of Leicester
Mr Giuseppe De Palo, ADR Center Srl
Mr Gottfried Musger, Judge at the Austrian Supreme Court (OGH)

RESPONSIBLE ADMINISTRATORS

Udo BUX
Policy Department C - Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: udo.bux@europarl.europa.eu

Céline Chateau
Policy Department C - Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: celine.chateau@europarl.europa.eu

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ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its newsletter please write to:
poldep-citizens@europarl.europa.eu

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CIVIL LAW AND JUSTICE FORUM ***with the participation of National Parliaments¹***

"Cross-border activities in the EU - Making life easier for citizens"

DRAFT PROGRAMME
Thursday, 26 February 2015
09:30 - 12:30 and 14:30 - 18:30

Brussels
Room ASP 5 G 3 -European Parliament, Brussels

09:30 - 10:00
OPENING

09:30 - 09:40

Welcome and opening remarks: What is it all about?

Pavel Svoboda, Chair of the Committee on Legal Affairs

09:40 - 09:50

Using EU private international law to facilitate the free movement of citizens

R.L. Valcarcel Siso, Vice-President in charge of relations with national parliaments

09:50 - 10:00

The Latvian Council Presidency -agenda for the area of civil law

Inese Libina-Egnere, Vice speaker of the Saeima and Vice chair of the Legal affairs committee

10:00 - 12:30
SESSION I
LESS PAPER WORK FOR MOBILE CITIZENS

10:00 - 10:10

Opening remarks: Towards a European Code on Private International Law?

¹ With the support of the Directorate for relations with National Parliaments - Legislative Dialogue Unit

Prof. Giesela Rühl, Jena University, and Prof. Jan von Hein, Freiburg University

10:10 - 10:30 **Promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the EU and beyond (Proposal for Regulation, COM(2013) 228)**

Prof. Pierre Callé, Paris Sud University (Paris XI)
Michael P. Clancy, Solicitor, United Kingdom (The Law Society of Scotland)

10:30 - 11:00 **Debate**, opened by Mady Delvaux, MEP, rapporteur for the public documents proposal

11:00 - 11:15 **Coffee break**

11:15 - 11:25 **Towards European Model Contracts for Succession and Family Law?**

Prof. Christiane Wendehorst, Vienna University

11:25 - 11:45 **EU Regulation 650/2012 on successions and on the creation of a European Certificate of Succession**

Kurt Lechner, Notary Chamber of Palatinate, Germany
Eve Pötter LL.M, Legal advisor of the Estonian Chamber of Notaries

11:45 - 12:30 **Debate**

14:30 - 16:30 SESSION II CROSS BORDER FAMILIES AND FAMILIES CROSSING-BORDERS

14:30 - 14:40 **Opening remarks**

Mairead McGuinness, Vice-President, European Parliament Mediator for parental child abduction,

14:40 - 14:50 **Presentation of study: "Cross-border parental child abduction in the EU"**

Dr Ilaria Pretelli, Swiss Institute of Comparative Law, Lausanne

14:50 - 15:00 **Mediating International Child Abduction Cases**

Spiros Livadopoulos, Lawyer and Mediator, European Cross-border Family Mediators' Network

15:00 - 15:30 **The Brussels IIa Regulation: towards a review?**

Hans van Loon, The Hague, Member of *Institut de Droit International*,

Former Secretary General of the Hague Conference on Private International Law

Michael Shotter, Head of Unit on Civil Justice Policy, DG Justice
European Commission

15:30 - 16:00

Debate

16:00 - 16:10

Name Law - is there a need to legislate?

Prof. Paul Lagarde, Université Paris I (Panthéon-Sorbonne)

16:10 - 16:30

Debate

<p>16:30 - 18:30 SESSION III BUSINESS AND CONSUMERS' CONCERNS</p>
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16:30 - 16:40

Opening remarks on private international law as a regulatory tool for global governance

Dr Harm Schepel, Professor of Economic Law, Brussels School of International Studies, University of Kent at Brussels

16:40 - 16:50

The European Small Claims Procedure and the new Commission proposal

Dr Pablo Cortés, University of Leicester

16:50 - 17:20

Debate, opened by Lidia Geringer de Oedenberg, MEP, rapporteur for the review of the Small Claims regulation

17:20 - 17:30

Mediation as Alternative Dispute Resolution (the functioning of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters)

Prof. Giuseppe De Palo ADR Center Srl

17:30 - 17:40

The 2005 Hague Convention on Choice of Court Agreements and the recast of the Brussels I Regulation

Dr Gottfried Musger, judge at the Austrian Supreme Court (OGH)

17:40 - 18:20

Debate

18:20 - 18:30

Conclusions

Pavel Svoboda, Chair of the Committee on Legal Affairs

18:30

End of the Workshop

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Session II - Cross border families and families crossing-border

Hans van Loon

The Brussels IIa Regulation: towards a review?

Paul Lagarde

Name Law - is there a need to legislate

Session II - Cross border families and families crossing-border

The Brussels IIa Regulation: towards a review?

Hans van Loon

The provisions on parental responsibility of the Brussels IIa Regulation build on the 1996 Hague Child Protection and 1980 Abduction Conventions, but with some significant departures. These provisions are examined in light of the changed profile of many abductors and left-behind parents. Suggestions are made to re-align the Regulation more to the 1996 Convention, to include a chapter on applicable law, and to add provisions dealing with relocation and mediation, promoting speed of (return) proceedings and judicial cooperation.

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LIST OF ABBREVIATIONS

1980 Convention	Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
1996 Convention	Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
Brussels IIa Regulation (or Regulation)	Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000
CJEU	Court of Justice of the European Union
CRC	UN Convention of 20 November 1989 on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU Charter	Charter of Fundamental Rights of the European Union
Hague Conference	Hague Conference on Private International Law
MS	Member State(s)

EXECUTIVE SUMMARY

Background

In 2015, all 28 EU Member States will be bound by the 1996 Hague Convention on Protection of Children, thus completing the EU's reception of the global legal framework for the international protection of children under civil law, consisting of the broad norms of the UN Convention on the Rights of the Child (CRC) and the practical private international law arrangements of the 1980 Hague Child Abduction Convention and the 1996 Convention.

This provides an opportunity to revisit the provisions on parental responsibility of the Brussels IIa Regulation. These Articles have been primarily inspired by the 1996 Convention, and they build on the 1980 Convention. But they also depart from those instruments in significant respects. In an effort to reinforce the 1980 Convention's return mechanism, the Regulation re-defines the balance established by the 1996 and 1980 Conventions between the competences of the courts of the Member State (MS) of the child's habitual residence, and the MS to which the child is taken. The Regulation not only underpins the powers of the former, but also reduces those of the latter.

Significant developments have occurred in recent years, however, which, instead of diminishing the importance of that balance and of the cross-border cooperation between courts and central authorities which it supports, have accentuated its crucial role in promoting such cooperation. These developments concern, first, the recognition of the child as a subject of rights, and of his/her role in (return) proceedings. They relate, secondly, to the changed profile of the other protagonists: the taking parent, who, in contrast to the past, in two-thirds of the cases is now the primary carer of the child, most often the mother of the child; and the left-behind parent, regularly the father, who is now often using the return mechanism of the Regulation to obtain access to, rather than return of, the child.

Aim

In order to adapt the Regulation better to the current legal-sociological reality both within the EU and in its relations to third States, suggestions are made –

- To realign the Regulation more to the 1996 Convention and to re-establish the aforementioned balance, thus also further harmonising the protection of children within the EU and in relations with third States Parties to the 1996 Convention;
- To include in the Regulation an express – instead of an oblique – reference to the Chapter on applicable law of the 1996 Convention; and,
- To add an article on relocation, and provisions aimed at promoting speed of (return) proceedings, including agreed solutions through mediation, and promoting judicial and administrative cooperation.

Following a short Introduction and a Background study, Chapter 3 offers a number of concrete proposals for amendment of the Regulation, a summary of which is presented in the Annex – Summary of Recommendations.

1. INTRODUCTION: THE BRUSSELS IIA REGULATION – ITS PROVISIONS ON PARENTAL RESPONSIBILITY

1.1. The two facets of the Brussels Iia Regulation

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, “Brussels Ila” or “Brussels IIbis”, deals with “matrimonial matters”, and “the matters of parental responsibility”. The term “matrimonial matters” refers to “civil matters relating to divorce, legal separation or marriage annulment” (Art. 1(1)(a)). “Parental responsibility” means “civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility” (Art. 1(1)(b)).

As follows from Article 1(2), for the purpose of the Regulation, “parental responsibility” includes a wide range of matters: rights of custody and rights of access; guardianship, curatorship and similar institutions; designation and functions of any person or body having care of the child’s person or property, representing or assisting the child; placement of the child in a foster family or in institutional care; and measures for the protection of the child relating to the administration, conservation or disposal of the child’s property.

This non-exhaustive list (“in particular”) corresponds in essence with Article 3 of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*¹. This instrument served as a source of inspiration for the negotiations on the Regulation, although it was not in force for any of the then EU Member States (MS).

In contrast to the Regulation, however, the 1996 Convention does not establish a system of rules of jurisdiction and recognition and enforcement of judgments in matrimonial matters, but deals with these matters only in a lateral fashion². This is because issues of parental responsibility *may* arise in the context of matrimonial proceedings, but only in a (declining) number of States requiring the resulting judgments to include decisions on such issues. Besides, decisions on the appointment of a guardian, or the placement of a child in an institution, will as a rule be taken outside of divorce proceedings, often by specialised courts and in a different context. Why, then, does the Regulation combine matrimonial and (all these) child protection matters? This is explained by its genesis.

Regulation (EC) No 1347/2000, the Regulation’s predecessor, was essentially based on the Brussels II Convention of 28 May 1998. Both remained within the boundaries of an instrument on matrimonial matters with ancillary rules on children – limited to a single article on jurisdiction on “parental responsibility” (Art. 3) and a reference, for jurisdiction in matters of child abduction, to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Art. 4)³. As we shall see (*infra* 2.2.), Regulation No 1347/2000’s revision led to a considerable extension of the instrument’s substantive scope concerning the protection of children. The new Regulation Brussels Ila ended up incorporating the essence of many provisions of the 1996 Convention in combination with rules supplementing the 1980 Convention. These new rules on protection of children largely operate independently from those on matrimonial matters.

Consequently, the present Regulation combines two generally distinct subject matters. The difference is further illustrated by the dissimilar applicable law regimes. In matrimonial matters the Rome III Regulation⁴ harmonises

¹ Art. 1(1) a) 1996 Convention refers to these items as “measures directed to the protection of the person or property of the child”.

² It does so, in its Art. 8 (enabling prorogation of jurisdiction to the authorities of a State seized with an application for divorce, legal separation or annulment of the marriage), and in Art. 10 (enabling the authorities, when exercising jurisdiction in matters of divorce, legal separation or annulment of the marriage, also to take measures of protection of the child). In such cases, Chapter III determines the law to be applied, Chapter IV provides for the recognition and enforcement of the measures taken, and Chapter V organises administrative cooperation through Central Authorities.

³ As the *Borrás Report* on the Brussels II Convention notes: “... in some States the legal system requires that the decision on matrimonial matters includes parental responsibility, while in others matrimonial and child-protection issues follow totally separate routes ... For that reason, separate problems had to be faced and it was difficult to bring all States to accept the text in paragraph 1(b) which includes the issue in this Convention rather than leaving it for a separate text... *It is a question, however, only of the matters relating to parental responsibility that appear to be linked to the matrimonial proceedings when those take place (see Article 3(3)).*” Explanatory Report by A. Borrás, OJ C 221, 16 July 1998, para. 23 (emphasis added).

⁴ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

the law applicable to divorce and legal separation for the 16 EU Member States bound by it¹, and offers the parties a limited choice of law. By contrast, in matters of parental responsibility, the Regulation refers, indirectly, to the rules of Chapter III – Applicable Law (Arts 15-22) – of the 1996 Convention, which will shortly be applicable in all MS. Those rules are based on proximity between the child and the authorities, and in principle leave no room for party autonomy.

Following the Regulation's extension to child protection measures generally, the rationale for combining them with matrimonial matters in the same instrument is no longer obvious². At this stage, however, the conclusion suffices that the Regulation covers two largely different matters, to be studied on their own merits and in their proper context. After a short comment on matrimonial matters, this paper will focus on parental responsibility. Only a limited number of issues can be examined. In particular, issues relating to the final stage of the enforcement of judgments will not be discussed, although it is often at that stage that serious complications arise. However, this is a matter for national law beyond the Regulation's reach.

1.1. Short comment on “matrimonial matters”

Regarding matrimonial matters, the general ideas put forward by the Commission in its Report of 15 April 2014³ – reducing the “rush to court” and introducing a limited possibility for choice of court by the parties and a *forum necessitatis* – seem to be sensible. If a further exploration of these ideas were to lead to a reduction of the wide range of grounds of jurisdiction currently available under the Regulation, it might pave the way for a later adaptation of Rome III. And this, in turn, might ultimately facilitate the incorporation of the (possibly by then revised) rules of Rome III into a new, self-standing instrument that would offer a complete and coherent set of private international law rules for divorce and separation⁴.

¹ Greece's request to participate was approved in 2014; the Regulation will apply to Greece as of 29 July 2015.

² Cf. B. Ancel et H. Muir Watt, « L'intérêt supérieur de l'enfant dans le concert des juridictions : le Règlement Bruxelles II bis », *Rev. crit. DIP*, 94 (4) (2005) 569-605, 571.

³ Report from the Commission to the European Parliament, the Council, and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, COM (2014) 225 final, pp. 4-6, and 7-9 http://ec.europa.eu/justice/civil/files/matrimonial_act_part1_v3_en.pdf.

⁴ The fact that, at this point, only 16 EU MS are bound by Rome III makes it less obvious to suggest including a reference to Rome III in Regulation Brussels IIa for the law applicable to divorce and separation, contrary to what will be proposed *infra* 3.2 regarding parental responsibility.

2. BACKGROUND

2.1. Parental responsibility – The global legal framework

Cross-border issues relating to child protection including parental responsibility are not limited to EU Member States. Disputes over custody, contact and parental child abduction; issues of protection of minors (refugee, asylum seeking, displaced or runaway children); cross-frontier placements of children; or representation and protection of the child's property may, and do, occur around the world.

The 1989 UN Convention on the Rights of the Child (CRC) provides the general normative background to States' responsibility in matters of child protection. The CRC has been ratified by 194 States, including all EU MS. The CRC pays specific attention to child protection issues arising in cross-border situations, such as personal relations and contact between children and parents living in different States (Art. 10(2)), or parental child abduction (Art. 11). The drafters realised that these situations presented additional risks and legal issues for children and families, and also that the CRC could not deal with them in detail. Therefore, the CRC, in several of its Articles, calls on States to conclude or accede to particular international instruments to deal with these issues in a more concrete manner¹.

The 1980 Hague Child Abduction Convention, although adopted nine years before the CRC, may be seen as the world's leading instrument providing nuts and bolts to Article 11 CRC. The 1980 Convention now has 93 States Parties, including all EU MS. It provides a specific remedy to prevent and combat abduction abroad of children. It also facilitates contact between children and their parents. While the Convention is expressly based on the idea that decisions on custody, access and relocation belong to the authorities of the child's habitual residence, it does not spell out rules of jurisdiction, applicable law, or recognition and enforcement of decisions. This is where the 1996 Convention comes in.

The 1996 Convention may be seen as implementing various provisions of the CRC, including Articles 3, 9 and 10, on personal relations and contact between parents and children, 12, on the child's opinion, 18, on parental responsibilities, 19, on protection from abuse, 20, on alternative care, 22, on refugees, and 35, on child trafficking. Currently the 1996 Convention has 41 States Parties, including all of the EU MS (Denmark included) with the exception of Italy; but Italy's ratification is imminent².

The 1996 Convention offers an integrated inclusive system of child protection. As part of its wide range of functions, the Convention provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in different countries. In respect of child abduction, the 1996 Convention reinforces the 1980 Convention in several ways (see *infra* 2.4.3. (b))

The combination of CRC, 1996 and 1980 Conventions provides a comprehensive global system for the protection of children under civil law. Since as of 2015 all three instruments will be in force for all 28 EU MS, it is timely to look again at the Regulation's provisions on parental responsibility in light of this global framework. Where does the Regulation reinforce this framework? And where might it need adaptations to better serve its purpose?

2.2. Assumptions underlying the drafting of the Regulation's provisions on child abduction

Following the conversion of the Brussels II Convention into the Brussels II Regulation, France, in 2000, took the initiative for a scheme aimed at abolishing *exequatur* for judgments falling under the Regulation granting cross-

¹ E.g., Art. 11 CRC: "1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad. 2. To this end, States Parties shall promote the conclusion of ... or accession to existing agreements."

² Third States include, among others, Australia, the Russian Federation, Ukraine, Georgia, Albania, Switzerland, Morocco, Ecuador, Uruguay; the United States of America has signed the Convention and is preparing ratification.

border rights of access to one of the parents. This proposal remained within the framework of the Brussels II Regulation.

The direction changed, however, with the Commission proposal of 2001 for a separate Regulation¹, which alongside wrongful retentions also addressed wrongful removals. The proposal aimed at strengthening the protection of the left-behind “custodial parent”, not only by *reinforcing* the role of the *court of the habitual residence*, but also by *reducing* that of the *court of refuge*². Subsequently, this proposal was merged with the French initiative, which resulted in a new Commission proposal for a revision of the Brussels II Regulation³.

The purpose of the new proposal remained to tighten the mechanism for the return of children to the “custodial parent”. The underlying assumption was that the 1980 Convention, and in particular the application of the exception provided by its Article 13(1) *b*), was not operating satisfactorily. The Commission proposals excluded all possible exceptions to return provided by the 1980 Convention⁴. On the other hand, they introduced the important principle of mandatory hearing of the child, and emphasised the need for cooperation among central authorities.

The proposals to replace the 1980 Convention by a specific intra-EU automatic return mechanism led to intense negotiations. Finally, in November 2002 a compromise was reached, embodied in the current Regulation. The 1980 Convention remained applicable, but was supplemented by provisions for intra-EU cases to reinforce the return mechanism.

In retrospect, the perception that the 1980 Convention’s exceptions to return, in particular Article 13(1) *b*), were not applied with restraint in the EU would seem not to be fully supported by the facts. The statistical survey of applications for return made in 1999 showed that only a relatively small number of return applications were refused⁵. Conclusions of the Fourth Special Commission of the Hague Conference on Private International Law on the operation of the Convention (22-28 March 2001) confirmed this⁶, and so did judicial conferences and academic conferences and writings⁷. There is, therefore, some doubt regarding the perceived need to tighten the 1980 Convention’s return mechanism in intra-EU cases⁸. In any event, recent developments suggest that the Regulation’s approach may call for a fresh look.

2.3. Significant developments since the adoption of the provisions on parental responsibility, in particular in respect of child abduction

Reinforcement of children’s rights

A lasting contribution of the UN Convention on the Rights of the Child is the awareness and respect for the child’s best interests and rights it has incited, and its recognition that children are independent persons, who hold rights. The CRC’s impact on the European Charter of Fundamental Rights is manifest in Article 24 thereof:

¹ *Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility* (COM(2001) 505 final — 2001/0204(CNS)).

² The court of refuge was obliged to order the immediate return of the child to the State of the habitual residence; the taking parent could not invoke any of the exceptions to return of the child provided for by the 1980 Convention. At most, in “urgent cases” the court of refuge could order “provisional measures as may be available under [its] law” and suspend the return until the court of origin decided on the substance of the matter.

³ *Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No 1347/2000 and amending Regulation (EC) No 44/2001 in matters relating to maintenance* (2002/C 203 E/27) COM(2002) 222 final — 2002/0110(CNS) (submitted by the Commission on 3 May 2002).

⁴ According to the May 2002 Commission Proposal, the obligation to return the child was imposed not on the court of the MS of refuge, but on its Central Authority. The only way to prevent the immediate return was to request the court to take a protective measure, which could only be ordered on the basis of the grave risk of harm exception or the objections of the child.

⁵ N. Lowe, S. Armstrong and A. Mathias, “A Statistical Analysis of Applications made in 1999 under the Hague Convention on the Civil Aspects of International Child Abduction”, *Preliminary Document No 3* (2001), available at <http://orca.cf.ac.uk/60081/1/abd2001pd3e.pdf>.

⁶ Permanent Bureau of the Hague Conference, “*Conclusions and Recommendations of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 22-28 March 2001*”, Part IV, para. 4.3., available at http://www.hcch.net/upload/concl28sc4_e.pdf.

⁷ See K. Trimmings, *Child Abduction within the European Union*, Oxford/Portland (2013), Chapter 4.

⁸ Critical of the genesis of the Regulation in this respect, Trimmings (*supra* fn. 17).

- "1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

The Regulation repeatedly emphasises the need for the child to be given an opportunity to be heard¹. This has significantly reinforced the child's procedural role in matters of parental responsibility, going beyond both the 1980 and 1996 Conventions. However, practice continues to vary amongst EU MS in respect of the conditions, criteria and methods for the child's hearing, and the child's role in relocation proceedings and in the context of mediation is still evolving and far from uniform (See *infra* recommendations 3.1.2. and 3.1.4.).

Another major aim of the Regulation is to reinforce the child's fundamental right to contact with both parents. The return mechanisms of the 1980 Convention and the Regulation, in principle, serve this purpose. However, the social and legal reality prevailing when the 1980 Convention was negotiated has significantly changed in recent years.

The changed profile of the taking parent and the left-behind parent

The typical case of wrongful removal or retention of children envisaged by the drafters of the 1980 Convention was that by a non-custodial parent or a parent who feared that he would lose custody². At that time, joint custody or legal restrictions on the removal of children from the jurisdiction of their habitual residence were not yet common. The obvious answer to the taking of the child by the non-custodial parent was to ensure the immediate return of the child, in order to reunite him or her with the primary care-taker. There is broad agreement that this answer has worked, and that the Convention in this respect has largely met its objective.

Since the adoption of the 1980 Convention, however, this paradigm has shifted. Granting of joint custody has become common, as have restrictions on the removal of children. Certain removals of children that used to be lawful have now become unlawful, leading to a wider applicability of the Convention than foreseen. Combined with the Convention's success in preventing and combatting abductions by non-custodial parents, the result is that nowadays in two-thirds of the cases the abductor is the primary care-taking parent, often the mother, often returning to her home country³. In many cases the (alleged) reason for the abduction is domestic violence, and there is more awareness today of the harm which domestic violence may do to children.

Moreover, the Convention is now being used more often by fathers (married or unmarried) to enforce their (joint) rights to determine the child's place of residence, which makes the original sharp distinction between rights of custody – to be protected by the prompt return mechanism – and rights of access – which were to be ensured by other arrangements – less obvious than the 1980 Convention drafters had in mind⁴.

During the past decade, courts, including at the European level the European Court of Human Rights, and legislative bodies, including at the global level the Hague Conference, have had to deal with criticisms of the 1980 Hague Convention in the light of this paradigm shift. These criticisms went in a direction *opposite* to what motivated the Regulation's drafters, in so far as it was argued that in the light of the changed paradigm the return mechanism of the 1980 Convention was too strict and too mechanistic⁵.

¹ See Arts 11(2); 23(b); 41(2)(c); 42(2)(a).

² See P. Beaumont, P. McEleavy, *The Hague Convention on Child Abduction*, Oxford (1999), 8-9.

³ See N. Lowe, A Statistical Analysis of Applications Made in 2008 under The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part 1, Global Report, Preliminary Document No 8 (November 2011), VI.2., 14, www.hcch.net/upload/wop/abduct2011pd08ae.pdf.

⁴ See Hague Conference on Private International Law, *Transfrontier Contact Concerning Children, General Principles and Guide to Good Practice* (2008), p. xxvi.

⁵ For an up-to-date, comprehensive, scholarly analysis of the 1980 Convention in the light of its evolving context, see R. Schuz, *The Hague Child Abduction Convention – A Critical Analysis*, Oxford/Portland (2013), lv + 474 pp.

2.4. The response to these significant developments

The response of the European Court of Human Rights

Since the turn of the century, the European Court of Human Rights (ECtHR), in a series of judgments, has ruled that Article 8 on the protection of private and family life of the European Convention on Human Rights (ECHR) establishes positive obligations for States in respect of abduction of children as well as rights of access. The ECtHR repeatedly concluded that Article 8 had been violated when States had not taken effective measures to ensure the return of children. Likewise, the ECtHR frequently rejected claims that return orders violated parents' rights under Article 8 ECHR.

A new phase started with the ECtHR's 2010 judgment in *Neulinger and Shuruk v. Switzerland*¹. The case concerned the abduction of a child by the mother from Israel to Switzerland. The Swiss lower courts had dismissed the Israeli father's application for the child's return because they found that this would involve a "grave risk" for the child under Article 13(1) b) 1980 Convention, but the Federal Court disagreed and ordered the child's return. The ECtHR ruled that "in the event of the enforcement of the Federal Court's judgment of 16 August 2007, there would be a violation of Article 8 of the Convention in respect of both applicants". The Grand Chamber interpreted the child's right to family life in light of the best interest principle, embodied inter alia in Article 3 CRC and Article 24(2) EU Charter, and considered:

"136. The child's interest comprises two limbs. On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development"

In its 2013 judgment in *X. v. Latvia*², again concerning an abduction by the mother of a child, in this case from Australia to Latvia, the Grand Chamber clarified the nature and extent of the examination of the family situation to be carried out by the court of refuge when deciding on the child's return:

"107. ... Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child's return, the courts must not only consider arguable allegations of a "grave risk" for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted strictly... , is necessary. This will also enable the Court, whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it.

108. Furthermore, as the Preamble to the Hague Convention provides for children's return "to the State of their habitual residence", the courts must satisfy themselves that adequate safeguards are convincingly provided in that country, and, in the event of a known risk, that tangible protection measures are put in place."³

In *conclusion*: the child's right to family life interpreted in light of the best interest principle requires a careful, reasoned examination of objections to return, in particular under Article 13(1) b) 1980 Convention. Courts, when ordering return in the event of a known risk, must satisfy themselves that "tangible protection measures" are in place to secure the child's safety. Return may not be ordered mechanically or automatically.

The response of the Hague Conference

The paradigm shift has also engaged the Hague Conference. It became a prominent theme in discussions on the need for an additional Protocol to the 1980 Convention (initially started to improve on its Article 21 on access). Switzerland submitted a variety of proposals designed to protect abducted children, inspired by the adoption in Switzerland of special provisions on the abduction of children in response, notably, to the case law of the Swiss Federal Court, considered excessively restrictive in its interpretation of Article 13(1) b). After extensive consultations, however, no consensus could be reached on the need for, or desirability of, such a

¹ ECtHR, Grand Chamber, 6 July 2010 (41615/07).

² ECtHR, Grand Chamber, 26 November 2013 (27853/09).

³ It should be emphasised that on this point the dissenting minority of the Grand Chamber declared to be "in full agreement" with the majority.

Protocol. The prevailing view, including that of the EU MS, was that most of the problems around the application of the Convention had to do with a lack of compliance with the existing provisions, and efforts should be better directed, among others, to training of judicial and administrative authorities.

In the debate, the importance of the complementary role of the 1996 Convention was recurrently highlighted. Whilst it was recognised that the new paradigm presented challenges, the Sixth Special Commission reviewing the operation of the 1980 (and 1996) Convention (2011-2012) noted:

"41. ... that the 1996 Convention provides a jurisdictional basis, in cases of urgency, for taking measures of protection in respect of a child, also in the context of return proceedings under the 1980 Convention. Such measures are recognised and may be declared enforceable or registered for enforcement in the State to which the child is returned provided that both States concerned are Parties to the 1996 Convention.

42. In considering the protection of the child under the 1980 and 1996 Conventions regard should be given to the impact on a child of violence committed by one parent against the other."¹

In *conclusion*: whilst acknowledging the significant changes since the adoption of the 1980 Convention, the Hague Conference has taken the view that these changes should not, at this point, lead to the Convention's amendment. Rather, accompanying measures are needed, including ratification of the 1996 Convention, which supports the 1980 Convention including by offering effective protection of the child's safety (*cf. infra* 2.4.3.(b)).

The response of the EU

Whilst the EU and its Member States have supported the Hague Conference's approach to the 1980 and 1996 Conventions in response to the new reality of child abductions, discussion *within* the EU on the possible impact of the changed profiles of the abducting parent and the parent claiming return of the child on the Regulation's return mechanism has been remarkably limited. The Court of Justice of the European Union ("the Court") has stressed the mechanism's role as a deterrent, and as a means to obtain the child's return without delay², but has not yet been in a position to discuss specific issues relating to the short-term interests of the child (and the taking parent) which may arise in the context of the decision on the return of the child.

(a) Impact of the case law of the European Court of Human Rights

What, then, about the impact on the Regulation of the ECtHR's case law on the 1980 Convention related above? Here it must be noted that, concerning the Regulation's return mechanism, the ECtHR has adopted a particular position³. The ECtHR has accepted that, when the provisions of Articles 11(8) and 42 Regulation apply, an EU MS notwithstanding a refusal of its courts to order return of a child is under strict obligations, following from its EU membership, to enforce a certified return order issued by the courts of the MS of origin. So, the only way in such a case to lodge a complaint under the ECHR is to do so before the authorities of the MS of origin. Should such action fail, then an application may be lodged with the ECtHR *against the MS of origin*⁴.

Although the *complaint procedure* under the ECHR has thus been placed "at distance" by the ECtHR, the *fundamental rights* protected by the ECHR, in particular its Article 8, remain applicable. Therefore, when a defence is raised based on Article 13(1) *b*) 1980 Convention in the context of the Regulation, Article 8 ECHR as interpreted by the ECtHR must be respected, since the court of refuge in this case continues to have a certain discretion.

The continued relevance of the ECHR in the Regulation's context is illustrated by the case of *Šneersone and Kampanella v. Italy*⁵. In this case, the Italian courts, following a refusal by the courts in Latvia to return a child to Italy, issued a certified order for the child's return under Articles 11(8) and 42 Regulation. The mother and her son applied to the ECtHR. The ECtHR found that the Italian courts "had failed to address any risks that had

¹ *Conclusions and Recommendations of Part I and Part II of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention and a Report of Part II of the Meeting, April 2012*, http://www.hcch.net/upload/wop/concl28-34sc6_en.pdf. The Conference also decided to set up a Working Group to develop a Guide to Good Practice on the interpretation and application of Art. 13(1) *b*) of the 1980 Convention as well as an Expert's Group on the recognition and enforcement of voluntary cross-border agreements in international child disputes, and to start work on recognition of foreign civil protection orders made, inter alia, in cases of domestic violence, which could be used in the context of the 1980 Convention.

² See CJEU 11 July 2008 (C 195/08), *Rinau*, paras 47-54.

³ As developed since ECtHR, 30 June 2005 (45036/98), *Bosphorus Hava Yollan Turizm ve Ticaret Anonim Şirketi v. Ireland*; see, recently, ECtHR 25 February 2014, *Avotiņš v Latvia* (17502/07).

⁴ See ECtHR, 18 June 2013 (3890/11), *Povse v. Austria*.

⁵ ECtHR, 12 October 2011 (14737/09).

been identified by the Latvian authorities”, and that it was “therefore necessary to verify whether the arrangements for [the child’s] protection listed in the Italian courts’ decisions” were appropriate. The ECtHR established that these arrangements were not adequate¹, and concluded that Article 8 ECHR had been violated².

The courteous – although not absolute – respect given by the ECtHR to the Regulation’s return procedure is understandable from an institutional standpoint. However, bearing in mind the CRC, the ECHR and the EU Charter of Fundamental Rights, the EU may wish to examine whether the relevant Regulation provisions are, in light of the aforementioned paradigm shift and the responses to it, still adequate, or should, in some respects, be adapted.

(b) Significance of the EU-wide ratification of the 1996 Hague Child Protection Convention

Whilst the 1996 Convention was a primary source of inspiration for the Regulation, it was not yet in force for *any* of the then MS at the time of its adoption, in contrast to the 1980 Convention, which already applied in *all* current 28 MS³. For several years, ratification of the Convention was blocked by a controversy over its application to Gibraltar, until, in 2008, the Council was finally in a position to authorise joint ratification by all the MS which were not yet bound by it⁴. Today, with one exception (Italy, which is expected soon to ratify⁵), all MS are bound by the Convention.

This means that, as of 2015, the 1996 Convention will apply in the relations between all MS and third States also bound by it, such as Russia. In addition, it will apply, jointly with the 1980 Convention, in the relations between all MS and third States bound by both Conventions, such as Switzerland, Australia or Ecuador, and between such third States and MS that are also bound by the 1980 Convention⁶. The 1996 Convention will also, jointly with the 1980 Convention, apply in the relations between Denmark and the 27 other MS. Finally, its applicable law provisions will apply generally, even in the relations between MS, since the Regulation does cover the law applicable to parental responsibility.

The 1996 Convention reinforces the 1980 Convention in several respects, including by:

- Emphasising the primary role played by the authorities of the child’s habitual residence in deciding upon any measures to protect the child in the long term⁷;
- Defining with precision the moment when, in the case of wrongful removal, jurisdiction shifts from the court of the prior habitual residence to the court of refuge⁸;
- Providing a jurisdictional basis for any temporary protective measures ordered by the court of refuge (a) when returning a child to the country of habitual residence, (b) to enable contact between the child

¹ The Court found that the safeguards proposed by the father – who, the Court found, had not seen his son for more than three years and had made no effort to establish contact with him in the meantime – and accepted by the Italian courts, regarding the length and frequency of the periods during which the mother – who, the Court found, was unable to accompany the child to Italy – could stay with the child in Italy, were “a manifestly inappropriate response to the psychological trauma that would inevitably follow a sudden and irreversible severance of the close ties between mother and child”, paras 94-96.

² It may be noted that before the case was brought before the ECtHR, Latvia had brought an action against Italy before the European Commission under Art. 227 TEC (now Art. 259 TFEU). The Commission, however, opined that the Italian courts had correctly applied the Regulation.

³ At that time, 15 MS had just (on 1 May 2003) signed the 1996 Convention, but none of them was bound by the instrument.

⁴ *Council Decision 2008/431/EC of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interests of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law* (Official Journal L 151 of 11.6.2008). This decision authorised EU MS that had not yet ratified or acceded to the Convention to do so “if possible by 5 June 2008”. This concerned Belgium, Germany, Ireland, Greece, Spain, France, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Finland, Sweden and the United Kingdom.

⁵ See for the ratification process http://www.senato.it/leg/17/BGT/Schede/Ddliter/comm/44621_comm.htm.

⁶ E.g., the accession by Russia to the 1980 Convention has been accepted only by the following MS: Bulgaria, Czech Republic, Croatia, Estonia, Finland, France, Greece, Ireland, Lithuania, Romania, Slovakia, Slovenia and Spain. See also the recent Opinion of the Court, 14 October 2014, 1/13 (and cf. Opinion of 18 December 2014, 2/13).

⁷ Arts 5 *et seq.*

⁸ Art. 7(1).

and the left-behind parent pending return proceedings, and (c) when refusing return in the period foreseen in Article 7(1)¹.

- Providing for the recognition by operation of law and the enforcement of measures of protection, including temporary protection orders until such time as the authorities in the requested State are able themselves to put in place necessary protections².

The imminent EU-wide ratification of the 1996 Convention offers a suitable opportunity to re-visit the Regulation's provisions where they depart from the 1996 Convention, and the reasons for doing so. In particular, child abduction being a global phenomenon and global instruments being in force for the EU to prevent and combat it, the regional system should only deviate from the global system where it can improve on it in the best interests of the child³.

3. REVIEW OF THE REGULATION PROVISIONS ON PARENTAL RESPONSIBILITY – PROPOSALS FOR REFORM

3.1. Jurisdiction – Chapter II of the Regulation

Article 8

Like the 1996 Convention, the Regulation reinforces the primary role of the authorities of the child's habitual residence (the State of origin) in deciding upon the custody of the child. Article 8, like Article 5 1996 Convention, establishes general jurisdiction for the courts of the habitual residence in matters of parental responsibility. However, Article 8 departs from the 1996 Convention by providing (subject to Arts 9, 10 and 12) that if the court of the habitual residence was seized before the child moved to another MS, the courts of the first MS retain their jurisdiction. In contrast, under Article 5 1996 Convention (subject to its Art. 7), the authorities of the *new* habitual residence acquire jurisdiction.

This *perpetuatio fori* principle offers the advantage of ensuring continuity of domestic proceedings, but it has a price. In the relations between EU MS, as a recent case before the CJEU suggests, it may lead to complex parallel proceedings which may even have repercussions on the question of whether the child's habitual residence is in one or the other MS⁴. In the relations between EU MS and third States bound by the 1996 Convention, such as Switzerland, it may lead to frictions, because that third State may take the view that with the change of habitual residence to that State, its authorities acquire jurisdiction. On balance, it would seem preferable to realign Article 8, paragraph 1, to Article 5(1) 1996 Convention. This leads to the following **Recommendation**:

Article 8: Amend paragraph 1 as follows:

The courts of a Member State shall have jurisdiction in matters of personal responsibility over a child who is habitually resident in that Member State (...). **Subject to Article 10, in case of a change of the child's habitual residence to another Member State, the courts of the Member State of the new habitual residence shall have jurisdiction⁵.**

Relocation – Proposal for a new provision

While abduction is the *unlawful* removal of a child from the child's habitual residence, relocation is the *lawful* permanent move of the child, usually with the primary carer, to a new country. Increasingly, courts are called

¹ Arts 7(3) and 11.

² Arts 23 *et seq.*

³ Cf. on the need to keep the *espace judiciaire européen* open to the wider global environment, B. Ancel et H. Muir Watt (*supra* fn. 6), 605

⁴ See CJEU October 2014, C-376/14 PPU, C v M.

⁵ Art. 8 of the Regulation is subject to Art. 9, which provides, for the specific case where a child moves lawfully from one MS to another MS, that the courts of the former MS retain, in the circumstances indicated, jurisdiction for the purpose of modifying their previously issued ruling on contact (access rights) during three months. As this provision only works in the relations between MS and is limited in time, it does not raise the issues to which Art. 8 gives rise. It is a useful provision that makes quick adaptations to a move of a child to a new MS possible.

upon to deal with relocation cases, for which no specific provision is foreseen in the 1996 Convention or any other binding instrument.

Relocation and abduction are obviously linked, and the fourth Special Commission of the Hague Conference on the operation of the 1980 Convention noted in this regard:

“Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Convention was drafted. It is recognised that a highly restrictive approach to relocation applications may have an adverse effect on the operation of the 1980 Convention.”¹

It would seem important, therefore, to include in Chapter II of the Regulation a rule for court decisions on relocation – which are, contrary to abduction orders, decisions on the merits – before the provisions on abduction². The following is a **Recommendation** for such a provision, respecting the fact that courts will decide on the basis of their internal laws³:

Article 9A Relocation

1. A court to which an application for the relocation of a child is made shall, while considering all relevant factors in its examination, give primary consideration to the best interests of the child.
2. It shall ensure that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.
3. The court shall act expeditiously. Before issuing its judgment, the court shall first examine whether the parties are willing to engage in mediation to find, in the interest of the child, an agreed solution.

Article 10 – Proposal for a new Article on protective measures

Article 8 Regulation is subject to Article 10 on jurisdiction in cases of child abduction. Article 10, like Article 7(1) 1996 Convention, determines when, in case of abduction, jurisdiction switches from the courts of the MS of origin to those of the MS of refuge.

However, in a major departure from the 1996 Convention, Article 10 Regulation does not include the equivalent of Article 7(3) 1996 Convention, nor does the Regulation provide for the equivalent of Article 11 of that Convention referred to in Article 7(3). Under the 1996 Convention, where the court of refuge orders return subject to certain undertakings by the parties or to protective measures “as are necessary for the protection of the person or property of the child”, these orders will be urgent measures under its Article 11. They must be recognised and enforced under Chapter IV of the Convention, and remain effective until the court of origin has taken “the measures required by the situation”.

As practice under the 1980 Convention has shown, without this enforcement obligation, undertakings and protective measures will often not be respected and remain ineffective. This has given rise to the need to obtain mirror or safe harbour orders in the State of origin, but these may not always be available, or, again, not be effective. Articles 7(3) and 11 1996 Convention, therefore, strongly reinforce the return mechanism of the 1980 Convention⁴. The court of refuge’s urgency jurisdiction empowers that court to take effective urgent measures of protection where this seems necessary.

In contrast, under Article 20 Regulation, the court of refuge may take protective measures under its own laws, if those laws so provide⁵. However, (1) the Regulation does not provide itself a jurisdictional basis for such

¹ *Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22-28 March 2001)*, para. 7.3, http://www.hcch.net/upload/concl28sc4_e.pdf.

² Because Art. 9A precedes Art. 10, and since no reference to Art. 9A is included in Art. 8(2), jurisdiction lies with the court of the habitual residence of the child, subject to Art. 12.

³ The draft is inspired by the draft Recommendation prepared by the European Committee on Legal Co-operation of the Council of Europe and submitted to its Committee of Ministers with a view to its adoption in early 2015. Para. 3, second sentence, is inspired by the proposed addition to Art. 11(3), see *infra* 3.1.6.

⁴ See, e.g., Schuz (*supra*, fn. 23) 30-33.

⁵ And, moreover, provided that not only the child in need of protection but also *all other persons* concerned are present in the MS of the court taking the provisional measures (emphasis added), CJEU 2 April 2009 (C-523/07), *Detiček*.

measures and (2) any measures taken under national law are not covered by its Chapter III. There is, therefore, as the CJEU has concluded¹ no obligation for the State of origin to recognise or enforce such measures.

This is problematic and may be counterproductive. In particular, when the court of refuge, under Article 11(4) Regulation, must determine “that it is established that adequate arrangements have been made to secure the protection of the child after his or her return”, it will, in the absence of a solution agreed among the parents, depend on any measures taken by the court of origin. The effect may well be that, failing such measures, the court of refuge may, out of (abundance of) caution, refuse the child’s return.

That the lack of provisions similar to Articles 7(3) and 11 1996 Convention is a real gap in the Regulation may be illustrated by a recent judgment of the UK High Court². In this case the father had applied under the 1980 Convention and the Regulation for the return to Lithuania of a child wrongfully removed to the UK by the mother. The mother raised several defences, including the exception of a grave risk of harm to the child. The High Court, while ordering the return, imposed, *pursuant to Article 11 of the 1996 Convention*, a number of “safeguards...which will ensure that there is no risk as mentioned in Article 13 (b), so that defence will not be available”³.

The application of Article 11 1996 Convention by the High Court seems incompatible with Article 61 Regulation⁴. Yet, this case brings out the advantages of Article 11 1996 Convention:

- It may help avoid lengthy procedural debates regarding burden of proof and evidence,
- It enables the court of refuge to make itself, at least initially, “adequate arrangements... to secure the protection of the child after his or her return” (Art. 11(4)), without awaiting such measures to be taken by the court of origin; indeed, it may encourage the court of origin to take such measures, and thus facilitate coordination and cooperation between the court of refuge and the court of origin, and, thereby,
- It will help reduce the need for an order refusing return.

In relation to protective measures taken under Article 20 Regulation, the CJEU has ruled that “in so far as the protection of the best interests of the child so requires, the courts having taken the protective measures must inform directly or through the central authority designated under Article 53 Regulation, the court of another Member State having jurisdiction”⁵. This will further stimulate cooperation between the courts of refuge and of origin, and it seems therefore useful to add this, both to the proposed new paragraph 2 of Article 10 and the proposed new Article 15A. This leads to the following **Recommendations**:

Article 10: Add a new paragraph:

2. So long as the courts first mentioned in paragraph 1 keep their jurisdiction, the courts of the Member State to which the child has been removed or in which he or she has been retained can only take such urgent measures under Article 15A as are necessary for the protection of the person or property of the child. In so far as the protection of the best interests of the child so requires, the courts having taken the protective measures must inform directly or through the central authority designated under Article 53, the courts first mentioned in paragraph 1.

Following Article 15, insert a new Article:

Article 15A Provisional, including protective, measures

1. In all cases of urgency, the courts of any Member State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection. In so far as the protection of

¹ CJEU 15 July 2010 (C-256/09), Purrucker I.

² B v B [2014] EWHC 1804 (Fam).

³ These safeguards included a restriction of contact (“in light of the admissions of violence made by the father”), an order prohibiting the father from molesting the mother and from approaching her flat in Lithuania where she would live with the child. These safeguards being put in place, the mother was ordered to return the child within three weeks. She was given those three weeks to obtain an urgent interim hearing in the Lithuanian court which might allow her to stay in the UK.

⁴ *Practice Guide for the application of the Brussels IIa Regulation* (revised version 2014), 89.

⁵ CJEU 2 April 2009 (C-523/07), A (ruling No 4).

the best interests of the child so requires, the court having taken the protective measures must inform directly or through the central authority designated under Article 53, the court of another Member State having jurisdiction.

2. The measures taken under the preceding paragraph with regard to a child habitually resident in a Member State shall cease to apply as soon as the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

The introduction of these Articles makes Article 20 redundant, **therefore:**

Article 20: to be deleted.

Article 11(2)

Article 11(2) Regulation provides that, when applying Articles 12 and 13 1980 Convention, it shall be ensured that the child is given the opportunity to be heard, unless the child's age or maturity makes this inappropriate. The principle of a mandatory hearing of a child of an appropriate age and sufficient maturity is an important expansion of the provision in the 1980 Convention that the return may be refused if "the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views". Article 11(2) Regulation was inspired by Article 12 CRC (*supra* 2.3.1.).

Article 11(2) obliges the authorities to enable children to make their views known not only when the child objects to being returned but generally when decisions are made under Articles 12 and 13 1980 Convention. In the context of abduction proceedings, it is particularly important to ensure the child's hearing at the stage of the return proceedings by the court of refuge, even if the court does not accept to follow the child's views. Returning the child without at least considering the child's views is to treat him or her "like a chattel who can be moved around at will by adults"¹.

Where the parents cannot or may not represent the child, but also in other situations, it is important that the child of sufficient understanding is assisted by a special representative, who may provide information to the child, including on the consequences of compliance with his or her views, and may present the views of the child to the court². It would seem important, following the provisions of the *European Convention on the Exercise of Children's Rights*, to add a provision to this effect to Article 11(2). This leads to the following

Recommendation:

Article 11(2): add a second sentence:

In so far as the protection of the best interests of the child so requires, the court shall appoint a special representative for the child, to provide the child with information, and to present the child's views to the court.

Article 11(3)

The need to handle applications for return of a child expeditiously remains a pressing concern regarding return proceedings under the 1980 and 1996 Conventions as well as the Regulation. Article 11(3), setting up a maximum period of six weeks, save in exceptional circumstances, for obtaining a decision after the application is lodged is, therefore, a helpful reinforcement of the more indicative six weeks found in Article 11 1980 Convention. Although research suggests that meeting the six weeks' time limit remains a considerable challenge for many courts³, court practice in a few MS demonstrates that with sufficient efforts and resources, it is generally possible to deal with an application in one instance.

However, the provision should be further elucidated and strengthened in two respects: as regards (a) appeal proceedings, and (b) the central authority's intervention.

(a) Article 11(3) does not specify whether the six-week period includes the situation where the court of first instance renders a judgment that is not enforceable because an appeal decision is required to obtain an

¹ Schuz (*supra* fn. 23) 387. Taking into account the child's views may already be critical when it comes to the decision on the child's habitual residence, which may be decisive for the question whether there is wrongful removal or retention in the sense of Art. 10 Regulation (and Arts 3 and 4 1980 Convention) in the first place.

² Cf. *European Convention on the Exercise of Children's Rights*, Strasbourg, 25 January 1996, Arts 4, 9, 10.

³ See Lowe (*supra* fn. 21) VI.6.

enforceable order. It seems unrealistic to assume that first and second instance proceedings can be concluded together within six weeks. But it would not seem unreasonable to expect appeal proceedings, leading to an enforceable decision, to be completed within six weeks following the decision of the court below¹.

(b) Often in abduction cases, the left-behind parent will request the assistance of central authorities. Their crucial role is highlighted by the 1980 Convention. Whilst the general duty of Contracting States “to use the most expeditious procedures available”² also applies to central authorities, the Convention does not specify any delays for their actions. See *infra*, 3.4., for a proposed addition to Article 55.

Mediation – Proposal for a new provision

There is now increasingly broad recognition that solving family law disputes, including concerning children, by agreement and in particular through mediation, may bring great advantages³. Both the Regulation (in Art. 55(e)) and the 1996 Convention (Art. 31 b)) require central authorities to facilitate agreed solutions through mediation or similar means for the protection of the child. In recent years, the crucial importance of mediation in child abduction cases has come more and more to the forefront. The Guide to Good Practice on Mediation developed by the Hague Conference summarises these advantages as follows:

“a In the context of international child abduction, mediation between the left-behind parent and the taking parent may facilitate the voluntary return of the child or some other agreed outcome. Mediation may also contribute to a return order based on the consent of the parties or to some other settlement before the court.

b Mediation may also be helpful where, in a case of international child abduction, the left-behind parent is, in principle, willing to agree to a relocation of the child, provided that his / her contact rights are sufficiently secured. Here, an agreed solution can avoid the child being returned to the State of habitual residence prior to a possible subsequent relocation.

c In the course of Hague return proceedings, mediation may be used to establish a less conflictual framework and make it easier to facilitate contact between the left-behind parent and the child during the proceedings.

d Following a return order, mediation between the parents may assist in facilitating the speedy and safe return of the child.”⁴

Mediation in the context of return proceedings may, therefore, lead to considerable financial and emotional cost saving. Courts in some MS will now, in an early stage of the return proceedings, and, importantly, *without prejudice to the expeditious handling of return proceedings*, examine whether the parties are willing to engage in mediation. Where possible, this practice should be a part of the proceedings in the application of the Regulation. This leads to the following **Recommendations**:

Article 11(3): Insert a new subparagraph following the first subparagraph:

Before issuing its judgment, the court shall first examine whether the parties are willing to engage in mediation to find, in the interest of the child, an agreed solution.

And amend the final subparagraph:

Without prejudice to the **previous** subparagraphs, the court shall, except where exceptional circumstances make this impossible, issue its **enforceable** judgment no later than six weeks, **or, if a judgment in appeal is required to obtain such an enforceable order, no later than twelve weeks** after the application is lodged.

Article 11(4)

According to Article 11(4), “A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the

¹ This is now the practice in some MS, e.g., the Netherlands. As a result, MS where first instance decisions are not enforceable pending appeal would either have to expedite appeal proceedings or to introduce a possibility for enforcement pending appeal.

² 1980 Convention, Art. 2.

³ See, recently, Service Social International, Cilgia Caratsch, *Resolving Family Conflicts – A Guide to International Family Mediation – To help you To protect your children* (Geneva, 2014). More generally, the EU has encouraged mediation through its Mediation Directive (*Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*) and has taken the lead in setting up specialised mediation structures for parental child abduction, notably the European Parliament Mediator for International Parental Child Abduction (created in 1987).

⁴ *Guide to Good Practice under the 1980 Hague Child Abduction Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Mediation*, http://www.hcch.net/upload/guide28mediation_en.pdf, Nos 49-64. The guide has been translated into all the official languages of the European Union thanks to the support of the European Commission.

child after his or her return". This provision properly emphasises the need to ensure the safety of the child before the return is ordered. It is not enough, of course, that the possibility of making such arrangements exists *in abstracto* in the State of origin: *concrete measures* must be in place for the child's safety¹.

However, there are some difficulties with this provision, in particular: who has the burden of proof and what kind of evidence must be produced, in the context of what is in essence a summary procedure, that any protective measures are indeed adequate? Is it for the left-behind parent to demonstrate that protective measures have been taken, or for the abducting parent to show that such measures have not been taken? Negative proof, specifically that the requesting State will not enforce legal arrangements against domestic violence, is usually difficult. Or is it up to the court of refuge to determine whether the measures are adequate? There is an ambiguity here that is not in the interest of promoting the child's prompt and safe return.

It does not help, further, that the court of refuge does not find in the Regulation the jurisdictional basis to order urgent, including protective, measures that are enforceable in the MS of origin. It depends for its determination on "adequate arrangements" having been made on the parties and any measures taken by the court of origin.

Here, the addition of provisions equivalent to Articles 7(3) and 11 1996 Convention (proposed *supra* 3.1.3.) will bring relief. They will reduce procedural debates regarding burden of proof and evidence, because the provisional measures may be taken in response to what appears like a serious defence without necessarily engaging in an – often problematic – in-depth examination of the alleged facts. Moreover, as noted, a court of refuge, empowered to take itself measures of protection, is more likely to order return of the child, even in the face of allegations of grave risk or objections of the child, because it has the possibility to provide additional security when ordering the child's return, and will be more motivated to cooperate with the court of origin. The courts will benefit regarding such cooperation from the European Judicial Network, and it may be useful also to refer here to the EJN, mentioned in the context of the general functions of the central authorities (Art. 54).

Recommendation:

Article 11(4)

A court cannot refuse to return a child on the basis of Article 13(1) b) of the 1980 Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return. **To this end, the court shall, where appropriate, use the European Judicial Network in civil and commercial matters created by Decision No 2001/470/EC.**

Article 11(6)-(8)

Under Article 11(6)-(8), the court of refuge, when refusing return pursuant to Article 13 1980 Convention, must immediately transmit a copy of the order and relevant documents to the court of origin. This information must then be notified to the parties with an invitation to make submissions to the court within three months (if they have not already done so). "Notwithstanding a judgment of non-return" any subsequent judgment issued (in particular) by the court of origin which requires the return of the child is then enforceable "without any possibility of opposing its recognition" when certified by the court of origin under Article 42. This court must take into account in issuing its judgment the reasons for and evidence underlying the refusal order pursuant to Article 13 of the 1980 Convention.

Under the 1996 Convention, a final decision on the child's custody taken by the court of origin may also imply the return of the child, and that decision is, under Chapter IV of the Convention, to be recognised and enforced, in "a simple and rapid procedure" (Art. 26(2)) by the State of refuge, notwithstanding a prior refusal to return the child taken by the court of refuge. However, the Regulation's procedure departs significantly from the 1996 Convention, in so far as it turns the court of origin into a "second instance" regarding the return refusal by the court of refuge. The court of origin is given the power, when it disagrees with the court of refuge on the non-return, to "trump" the latter's refusal. This amounts to judicial review, not by a higher court in the *same* MS, but by a court of *another* MS. There are several problems with this rule:

¹ *Practice Guide* (*supra*, fn. 53), 55. This leaves the question, however, whether such measures will or can be taken before the child is returned and is back in the MS of origin.

(a) The introduction of a judicial review, not by a higher court in the *same* MS, but by a court of *another* MS, is alien to “the principle of mutual trust which underpins the Regulation”¹. As we have seen, return refusals under the 1980 Convention are very limited in number. Moreover, return decisions are difficult decisions, and if a court of a MS decides, perhaps after hearing the child, a guardian ad litem, the parents, and a psychologist, to refuse return, that decision must be presumed not to have been taken lightly. Indeed, according to the ECtHR, the decision on the child’s return under Article 13 1980 Convention should be a careful, well-motivated decision (*supra* 2.4.1.). If it is based on the child’s objections (Art. 13(2)) the court will have duly considered them. Where the refusal is based on Article 13(1) *b*), the court must be convinced that returning the child would expose it to “grave risk”. That decision should in principle be respected by the court of origin as long as that court has not decided, on the basis of a full examination of the child’s best interests, on the custody issue. After all:

(b) The proper role of the court of origin is not to review (the reasons given for) the return refusal, but to decide on the custody issue. That decision may imply the child’s return and, in that case, must be recognised and enforced in the MS of refuge. However, orders on return, made by the court of refuge, and on custody, rendered by the court of origin, are distinct decisions – one dealing with the *short-term* risks attached to the return, the other dealing with the child’s *long-term* best interests. As the CJEU has recently recalled:

“... an action [based on Article 12 of the 1980 Convention and Articles 10 and 11 of the Regulation], whose object is the return, to the Member State of origin, of a child who has been wrongfully removed or retained in another Member State, does not concern the substance of parental responsibility and therefore has neither the same object nor the same cause of action as an action seeking a ruling on parental responsibility (...). Further, according to Article 19 of the 1980 Hague Convention, a decision under that convention concerning return is not to be taken to be a determination on the merits of any custody issue. There can therefore be no *lis pendens* between such actions.”²

(c) As such, the idea of Article 11(6)-(7), that the court of refuge should promptly inform the court (or central authority) of origin of its refusal, and that the parties are then invited to make submissions to the latter court, “so that the court can examine the question of *custody* of the child” (para. 7, emphasis added), makes sense, in particular when that court has already been seized by one of the parties. This will expedite the final decision on custody, and it may be useful for the court to be informed of the reasons for the court of refuge’s refusal. However, in its *Povse* judgment of 1 July 2010, the Court ruled that Article 11(8) must be interpreted as covering “a judgment, even if it is not preceded by a final judgment on custody and parental responsibility”³.

As the Court itself admits, this “interpretation might lead to the child being moved, needlessly, if the court ... were ultimately to award custody to the parent residing in the Member State of removal”. But, in the Court’s view the arguments in favour of this interpretation⁴ outweigh its disadvantages. With full understanding for the specific difficulty of the *Povse* case, it is submitted that any needless risk of a tossing back and forth of the child should be avoided. Such a forced return order is appropriate if it is made after a full examination of the merits, and, therefore, in combination with a custody order. Consequently, Article 11(6) and (8) should be clarified to the effect that it is not the court of origin’s role to review the refusal to return the child, but to examine the merits, and *in the context of that examination*, to come to a decision on the child’s custody which may imply the child’s return.

In theory, it would be conceivable, as in the Commission’s proposal of May 2000 – which was not accepted (*supra* 2.2.) – to lay the powers to decide both on the return and on the custody of the child in the court of origin’s hands, thus eliminating altogether (the role of) the court of refuge. But that would even further upset the delicate balance between the two forums.

This would be particularly ill-advised in the light of the changed profile of the taking parent and the left-behind parent, which may lead to more situations than in the past where the safety of the child needs to be examined. And this should, in the best interests of the child, preferably be done by the court closest to the child and where appropriate in cooperation with the court of origin. The ECtHR, as we have seen, has also accentuated the role

¹ CJEU 1 July 2010 (C-211/10 PPU), *Povse*, para. 59.

² CJEU 9 October 2014, C-376/14 PPU, *C v M*, para. 40.

³ CJEU 1 July 2010 (C-211/10 PPU), *Povse*, second ruling, and see paras 51-67 (emphasis added).

⁴ “the importance of delivering a court judgment on the final custody of the child that is fair and soundly based, the need to deter child abduction, and the child’s right to maintain on a regular basis a personal relationship and direct contact with both parents, take precedence over any disadvantages which such moving might entail” (para. 63).

of the court of refuge considering the right of the child to protection under Article 8 ECHR. This leads to the following **Recommendations**:

Article 11(6): Amend as follows:

If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law, **for that court's information**. The court shall receive all the mentioned documents within one month of the date of the non-return order.

Article 11(8): Amend as follows, and see suggestion below in respect of Article 42:

Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment **on the question of custody** which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with (...) Chapter III below in order to secure the return of the child.

The mechanism of Article 11(6)-(8) combined with Article 42 Regulation results in an *automatic* return of the child. We will address this aspect *infra* 3.3.

3.2. The law applicable to parental responsibility – Proposal to add a new Chapter IIA referring to Chapter III of the 1996 Convention

The Regulation does not deal with the law applicable to parental responsibility. However, it is understood that this gap is filled by the applicable law rules contained in Chapter III (Arts 15-22) 1996 Convention, for the MS parties to this Convention. This follows, but rather indirectly, from Article 62(1) combined with Article 61 Regulation¹. Now that all MS will finally be bound by the Convention, it is timely to include an express reference in the Regulation to the applicable law provisions contained in the Convention. This will remind the courts of MS, more clearly than the present text does, to apply those rules when exercising their jurisdiction according to the Regulation.

In particular, this will help remind courts, accustomed to applying the law of the child's nationality to issues of parental responsibility, to apply instead the law of the child's habitual residence (Art. 15(1)); and to apply the law of the child's new habitual residence and not the law that applied before that change (Art. 15(3)); and not to overlook Article 16, in particular its paragraphs 3 and 4 (and Art. 21), which provide solutions for the attribution of parental responsibility in the event of a change of the child's habitual residence to another State. As "in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration" (Art. 24(2) EU Charter), a clear reference to Chapter III 1996 Convention would be fitting.

It would therefore be appropriate to include in the Regulation, between Chapters II (Jurisdiction) and III (Recognition and Enforcement), a new Chapter IIA (Applicable Law to parental responsibility), consisting of one Article, Article 20A. **Recommendation**: insert:

- CHAPTER IIA – LAW APPLICABLE TO PARENTAL RESPONSIBILITY

Article 20A

The law applicable to parental responsibility shall be determined in accordance with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Convention), in particular its Chapter III (Applicable Law) (Articles 15-22). The reference in Article 15, paragraph 1, of that Convention to "the provisions of Chapter II" shall be read as "the provisions of Chapter II, Section 2, of this Regulation".

¹ The *Practice Guide* (*supra*, fn. 53), 89, is more explicit: "... the Convention applies in relations between Member States in matters of applicable law, since this subject is not covered by the Regulation".

This technique has a precedent in *Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*, Chapter III, Article 15¹. This method has been well received. In the case of our Regulation it is all the more justified as all EU Member States will soon be bound by the 1996 Convention.

3.3. Recognition and enforcement – Chapter III of the Regulation

The provisions of Chapter III, Sections 1-3, on recognition and enforcement of judgments in matters of parental responsibility² are comparable to those of Chapter IV 1996 Convention. Their efficiency is enhanced by the prohibition of review of *jurisdiction* of the court of origin: Article 24 – in contrast to Article 23(2) a) 1996 Convention, which does allow such a review. Moreover, the Regulation provides that the decision on enforceability shall be taken without delay, and without any possibility for the person against whom enforcement is sought, nor the child, to make any submissions on the application (Art. 31).

Furthermore, according to the Court³,

“in order to ensure that the requirement under Article 31 of the Regulation that there be no delay cannot be undermined by the suspensive effect of an appeal brought against a decision on a declaration of enforceability [under Arts 33 and 34], it is appropriate... that the Regulation be interpreted as meaning that a placement order is to become enforceable at the point in time when the court of the requested Member State declares, in accordance with Article 31, that that order is enforceable”.

While this ruling applied to a placement order made under Article 56 of the Regulation, the justification given, namely that “decisions should be made that respect the criterion of the best interests of the child, in the light of Article 24 of the Charter”, would seem to apply to all cases where those interests would be at risk as a result of the suspensive effect of appeal proceedings.

The result is a system that provides for an effective, rapid procedure, combined with a possibility to apply for a decision not to recognise or enforce the decision (Art. 21(3) and Art. 31(2)) for one of the reasons specified in Article 23 (and Art. 24)⁴. The grounds for refusal provided in Article 23 are needed, in exceptional cases, to protect the best interests of the child and fundamental procedural safeguards. They cannot be missed, and the idea of abolishing these checks and balances altogether cannot be supported⁵. On the contrary, Section 4, which abolishes exequatur for a limited category of judgments, is problematic.

Section 4 – Enforceability of certain judgments concerning rights of access and of certain judgments which require the return of the child

Section 4 goes even further beyond the 1996 Convention, as it eliminates the need for a declaration of enforceability and excludes the possibility of opposing recognition of judgments on rights of access, and on return of a child pursuant to Article 11(8) (Art. 40). It gives the left-behind parent an option *in addition* to the procedure of sections 1-3 (Art. 40).

Article 41

The 1980 Convention, which essentially provides for assistance in securing the exercise of access rights through the Central Authority framework (Art. 21), offers only limited protection of these rights. The 1996 Convention, on the other hand, provides for jurisdiction of the courts to order access, also pending return proceedings or after refusal of return, and for recognition and enforcement of access orders, even in advance of the move of the child (Art. 24). The Regulation's procedure under sections 1-3 of Chapter III reinforces recognition and enforcement even further.

¹ The Chapter is entitled “Determination of the applicable law” and Art. 25 reads: “The law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations ... in the Member States bound by that instrument.”

² Arts 21(2) and 22 apply to matrimonial matters only.

³ CJEU 26 April 2012 (C-92/12 PPU), *Health Service Executive/S.C. E.C.*, paras 119-133.

⁴ Thus understood, and with the proviso that the actual enforcement laws of the EU MS remain untouched, the system may be characterised as providing for “near-automatic recognition and enforcement”, Advocate General Sharpston in her Opinion before CJEU 15 July 2010 (C-256/09), *Purrucker I*, point 175.

⁵ See D. van Iterson, *The ECJ and ECHR Judgments on Povse and Human Rights – a Legislative Perspective*, <http://conflictoflaws.net/2013/the-ecj-and-echr-judgments-on-povse-and-human-rights-a-legislative-perspective/>.

The effect of the certificate delivered under Article 41 is that, save subparagraph (e) of Article 23 (see Art. 47 *in fine*), none of the exceptions of Article 23 can be invoked, not even on behalf of the child. This goes far, but given that access usually involves regular short-term visitations, and in light of the importance of securing personal relationships and personal contact between the child and his or her parents, on balance, the rule probably constitutes progress.

Article 42

On the other hand, Article 42 is problematic. Expressly written for the – exceptional – case where the court of refuge has refused return, it enables the holder of the certificate issued by the court of origin to enforce that court's "trumping" return order in the MS of refuge. And this, as the Court has ruled, also in the case of "a judgment, even if it is not preceded by a final judgment on custody and parental responsibility"¹. None of the exceptions of Article 23 can be invoked, not even on behalf of the child. That goes far in the case of access, but there it is in the context of short, regular, periods of contact. In contrast, here the judgment may entail the definitive move of the child to the other MS.

Moreover, the certified judgment may be declared enforceable notwithstanding appeal, and as there is no time limit to the certificate's validity, appeal in the MS of origin, including on the child's behalf, may be no longer possible when the certificate holder does not immediately present the judgment for enforcement. The result may be that in case of changed circumstances no remedy is available, except perhaps, as a situation of heavy conflict *in extremis*, under the enforcement laws of the MS of enforcement (Art. 47).

That the system of Articles 11(8) and 42 can work out in an overly rigid manner is illustrated by the case CJEU 22 December 2010 (C-491/10 PPU) (Aguirre v Pelz). In this case the German authorities refused the return to Spain requested by the father of a child retained by her mother in Germany following a visit, after the child had expressed strong objections against her return before the German court. The Spanish court then gave the father custody of the child and certified its decision according to Article 42, but made its order without hearing mother and child. This led the German courts to submit to the Court the question whether such a certified decision must be automatically enforced, even if it manifestly violates the fundamental right of the child to be heard. The Court ruled that

"the court with jurisdiction in the Member State of enforcement cannot oppose the enforcement of a certified judgment, ordering the return of a child who has been wrongfully removed, on the ground that the court of the Member State of origin which handed down that judgment may have infringed Article 42 ... interpreted in accordance with Article 24 of the Charter of Fundamental Rights, since the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin."²

The only remedies available, therefore, are those provided by the MS of origin. This even applies when the certificate contains errors³.

All in all, the system of Articles 11(8) and 42, would seem –

- To be based on assumptions which are open to some doubt (*cf. supra* 2.2.);
- To be disproportionate in comparison to the procedure applicable under the Regulation to return orders *not* given pursuant to Article 11(8) (Chapter III sections 1-3);
- To raise questions concerning safeguards for the child's safety;
- Not to be necessary as the procedure under Chapter III sections 1-3 is also available⁴.

Article 42 would best be deleted. In any event – if it were maintained – Article 11(8) should be redrafted so as to eliminate any doubt that any judgment referred to in Article 42(1), second sentence, that orders the return of a

¹ *Cf. supra*, 3.1.8.

² CJEU 22 December 2010 (C-491/10 PPU), Aguirre v Pelz.

³ *Cf. A. Schulz, "The abolition of exequatur and state liability for human rights violations through the enforcement of judgments in European Family Law", in Permanent Bureau of the Hague Conference, A Commitment to Private International Law, 2013, 515-527; F. Marchandier, "La suppression de l'exequatur affaiblit-elle la protection des droits fondamentaux dans l'espace européen?" Journal européen des droits de l'homme, 2013/3, 348-380.*

⁴ Moreover, further research will be needed to prove the system's effectiveness in practice. In the case of Aguirre v Pelz, it appears that, in January 2015, the child is still in Germany.

child notwithstanding a judgment of non-return pursuant to Article 13 1980 Convention, can only be a judgment on the custody of the child (*supra* 3.1.8.). This leads to the following **Recommendation**:

Article 42: to be deleted.

3.4. Cooperation between Central Authorities in matters of parental responsibility

Chapter IV of the Regulation

Article 55

In addition to the time limit proposed for appeals in return proceedings (*supra* 3.1.5.), it would seem desirable to add a time limit for the action of central authorities in the preparatory stage. Of course, the central authority in the State of refuge will often be dependent on further action on the part of the central authorities of other MS or a parent or even third persons, including social workers, psychologists and other experts. Central authorities may, sometimes, have even greater difficulties than courts to respect any time limit. Nevertheless, it would seem inconsistent to impose an express six weeks rule save exceptional circumstances on courts, and not to provide a similar rule for central authorities. This leads to the following **Recommendation**:

Article 55: Add a new paragraph:

(f) ensure that where they initiate or facilitate the institution of court proceedings for the return of children under the 1980 Convention, the file prepared in view of such proceedings, save where exceptional circumstances make this impossible, is complete within six weeks.

CONCLUSION

It is hoped that the proposed amendments – which do not affect the essence of the Regulation's parental responsibility provisions – will have a double-positive effect. They should adapt the Regulation to the significant legal and sociological changes that have occurred in recent years, and they should harmonise the intra-EU child protection system and the regime governing the relations of EU Member States with third States (and Denmark) Parties to the 1980 Child Abduction and 1996 Child Protection Conventions.

In any event, much will continue to depend on the application of the Regulation in practice. The successful location of children, effective attempts to bring about voluntary return and contact, in particular through mediation, enforcement of foreign measures in the final stage – governed by national law – and many other aspects remain essential. In particular, strong, well-resourced, proactive central authorities are an absolute requirement for the proper operation of the Regulation; real progress here will require that the EU agrees on minimum standards in relation to resourcing central authorities and their staff. Both centralisation and specialisation of courts, which should make good use of the European Judicial Network, are also highly desirable.

ANNEX – SUMMARY OF RECOMMENDATIONS

CHAPTER I – JURISDICTION

Article 8: Amend paragraph 1 as follows:

The courts of a Member State shall have jurisdiction in matters of personal responsibility over a child who is habitually resident in that Member State (...). **Subject to Article 10, in case of a change of the child's habitual residence to another Member State, the courts of the Member State of the new habitual residence shall have jurisdiction.**

Following Article 9: Add a new Article:

Article 9A Relocation

- 1. A court to which an application for the relocation of a child is made shall, while considering all relevant factors in its examination, give primary consideration to the best interests of the child.**
- 2. It shall ensure that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.**
- 3. The court shall act expeditiously. Before issuing its judgment, the court shall first examine whether the parties are willing to engage in mediation to find, in the interest of the child, an agreed solution.**

Article 10: Add a new paragraph:

2. So long as the courts first mentioned in paragraph 1 keep their jurisdiction, the courts of the Member State to which the child has been removed or in which he or she has been retained can only take such urgent measures under Article 15A as are necessary for the protection of the person or property of the child. In so far as the protection of the best interests of the child so requires, the courts having taken the protective measures must inform directly or through the central authority designated under Article 53, the courts first mentioned in paragraph 1.

Article 11(2): Add a second sentence:

In so far as the protection of the best interests of the child so requires, the court shall appoint a special representative for the child, to provide the child with information, and to present the child's views to the court.

Article 11(3): Insert a new subparagraph following the first subparagraph:

Before issuing its judgment, the court shall first examine whether the parties are willing to engage in mediation to find, in the interest of the child, an agreed solution.

And amend the final subparagraph:

Without prejudice to the **previous** subparagraphs, the court shall, except where exceptional circumstances make this impossible, issue its **enforceable** judgment no later than six weeks, **or, if a judgment in appeal is required to obtain such an enforceable order, no later than twelve weeks** after the application is lodged.

Article 11(4)

A court cannot refuse to return a child on the basis of Article 13(1) b) of the 1980 Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return. **To this end, the court shall, where appropriate, use the European Judicial Network in civil and commercial matters created by Decision No 2001/470/EC.**

Article 11(6): Amend as follows:

If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law, **for that court's information**. The court shall receive all the mentioned documents within one month of the date of the non-return order.

Article 11(8): Amend as follows, and see suggestion below in respect of Article 42:

Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment **on the question of custody** which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with (...) Chapter III below in order to secure the return of the child.

Following Article 15, add a new Article:

Article 15A Provisional, including protective, measures

1. In all cases of urgency, the courts of any Member State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection. In so far as the protection of the best interests of the child so requires, the court having taken the protective measures must inform directly or through the central authority designated under Article 53, the court of another Member State having jurisdiction.

2. The measures taken under the preceding paragraph with regard to a child habitually resident in a Member State shall cease to apply as soon as the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

Article 20: to be deleted.

Following Chapter I, add a new Chapter:

- **CHAPTER IIA – LAW APPLICABLE TO PARENTAL RESPONSIBILITY**

Article 20A

The law applicable to parental responsibility shall be determined in accordance with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Convention), in particular its Chapter III (Applicable Law) (Articles 15-22). The reference in Article 15, paragraph 1, of that Convention to “the provisions of Chapter II” shall be read as “the provisions of Chapter II, Section 2, of this Regulation”.

- **CHAPTER III – RECOGNITION AND ENFORCEMENT**

Article 42: to be deleted.

- **CHAPTER IV – COOPERATION BETWEEN CENTRAL AUTHORITIES IN MATTERS OF PARENTAL RESPONSIBILITY**

Article 55: Add a new paragraph:

(f) ensure that where they initiate or facilitate the institution of court proceedings for the return of children under the 1980 Convention, the file prepared in view of such proceedings, save where exceptional circumstances make this impossible, is complete within six weeks.

Biography

Hans van Loon has been at the forefront of private international law for well over a quarter of a century. Secretary General of the Hague Conference on Private International Law from 30 June 1996 until 30 June 2013, he steered the Organisation during a time of global expansion and transformation. He has been involved in the development of nine Hague Conventions, two of which are fast approaching 100 Contracting States, as well as the revision of the Statute of the Hague Conference. In his time as Secretary General, he has seen the Organisation's membership grow from 44 to 72 Members (with more than 60 non-Member States now party to at least one Hague Convention), which has turned the Hague Conference into a veritable world organisation. He studied law and sociology at the University of Utrecht, and international law and international relations at the University of Leiden and at the Graduate Institute of International Studies, Geneva (1966-1973). Following a traineeship with the Council of Europe (European Commission of Human Rights), he was admitted to the Bar in The Hague and practiced law with the Supreme Court of the Netherlands, acting also before the European Court of Human Rights (case of *Winterwerp v. The Netherlands*, 1979, 1981). Hans van Loon is a *doctor honoris causa* of the University of Osnabrück (Germany, 2001), an Associate Member of the *Institut de Droit International* (since 2009), a Member of the European Group of Private International Law since its inception (1991), and an honorary Member of the *Asociación Americana de Derecho Internacional Privado* (ASADIP, 2007).

Session II - Cross border families and families crossing-border

Name Law - is there a need to legislate?

Paul Lagarde

The Committee on Legal Affairs of the European Parliament (JURI) has requested an in-depth analysis on surnames, to be presented at the Civil Justice Forum which will be attended by national parliaments. This study focuses on the problems that arise in relation to the law on names as a consequence of the free movement of citizens of the European Union - situations involving transnational couples, the parents of children born in different Member States and their nationality, and so on. By presenting recent decisions of the Court of Justice of the European Union, it underlines its impact on national legislation. In addition, it reflects on whether it might be necessary to legislate at European level.

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EXECUTIVE SUMMARY

The right of all citizens of the European Union to move and reside freely within the territory of the Member States, affirmed by Article 21 of the TFEU, implies that it is possible to have the same name in all of these States. Currently, this is not the case, due to the diversity of laws on this subject, both in the form of civil law and private international law. The name assigned in one Member State in accordance with the law of that State is not always recognised in another Member State applying a different law.

This study starts by looking at the broad picture of diversity of the laws of the Member States, both in terms of their civil law and their private international law. It then examines the reaction of the European Court of Human Rights and the Court of Justice of the European Union to this situation, and then looks at the present state of international law emanating from the United Nations organisation, the Council of Europe and the International Commission on Civil Status. Finally, it evaluates the different methods that could be employed within the framework of European legislation. In this respect, it rules out the possibility of a substantive unification of the law on names and does not consider the unification of the rules on conflicts of law to be a priority, favouring recognition as the method of choice. The study concludes by proposing legislation aimed at the mutual recognition of names recorded in the civil registers in the Member States.

GENERAL INFORMATION

News stories over the last twenty years have drawn our attention to the difficulties encountered by individuals as a result of the diversity of rules on surnames in the Member States of the European Union. A person whose choice of surname in one Member State is not recognised in another which assigns a different surname to them must when passing from one State to the other, dispel any doubts regarding their identity and sometimes allay suspicions of misrepresentation arising from the discrepancy between the surnames used. This seriously impairs the exercise of their right to free movement.

Legislative reforms in the Member States, surprisingly high volumes of case-law activity on this subject on the part of the Court of Justice of the European Union and the European Court of Human Rights, and lastly the activity in this area of other international organisations such as the International Commission on Civil Status lead us to wonder whether the time has not now come for the Union to legislate on names.

To attempt to answer this question, it is necessary to first prepare an overview of both the national and private international laws of the Member States and of the two supreme European jurisdictions. Then, we should examine international laws regarding names. Once this has been completed, we will look at a few options in terms of the area and methods that could be employed for any future legislative action by the Union.

1. OVERVIEW OF THE LAW IN THE MEMBER STATES

It is useful to distinguish according to whether it is a question of substantive law in the Member States or of their private international law.

1.1 Rules of substantive law

Due to the number of Member States, it has not been possible to conduct an exhaustive presentation, but the research that has been undertaken in respect of a certain number of States has revealed the points around which the greatest disparities exist¹. Whereas numerous reforms introduced in the Member States over the last two decades, almost all characterised by a move towards freedom of choice in this area, have helped to lessen these disparities, some do still continue to exist today. A distinction is made between the transfer of surnames from parent to child and the effects of marriage or a registered partnership on the names of the spouses or partners.

Transfer of names from parent to child

Prior to recent developments in most of the Member States, their laws were divided between various models for the choice of surname. In the States which provide for spouses to choose a married name (Germany, Finland and Sweden), this name is naturally the one that is assigned to the children of the couple. In the absence of a shared name and in States which do not have a shared name system, most legislatures follow the patriarchal model of assigning the father's name to a child (Germany, Austria, France and Italy amongst others) or, for children born outside of wedlock, that of the mother or, usually with the same outcome, that of the parent whose relationship to the child was established first. Some, like Spain, accommodated both the paternal and the maternal lines with a child taking the first name of the father and the first name of the mother. Others, following the English model, leave parents the freedom to choose the name of their child.

Recently, the laws of the Member States have been divided on the following points: the possibility for parents to choose the names of their children, the extent of the choice, and the name of a child in the absence of a name being chosen.

Possibility of choice

The right of parents to choose the surname of their children is gradually becoming common in the law of the Member States and those who formerly opposed this possibility are gradually accepting it. Thus, as recently as several years ago, Austria, Belgium, France and Italy did not allow parents any choice. In these countries, the children had to bear their fathers' surnames. This extremely rigid rule was contrary to sexual equality. There was also the risk of the gradual extinction of surnames in the absence of male heirs in a particular branch of a family.

The imperative nature of the law was discontinued in France by an Act of 4 March 2002, frequently amended since that time, which granted parents the right to choose the surname of their child by means of a declaration to the Registrar. In Italy, in a case where the parents of a child wished to confer her mother's family name on her and were unsuccessful before the courts, a judgment of the Italian Constitutional Court of 6 February 2006 condemned this discrimination between the mother and father. In 2014, the European Court of Human Rights pronounced the same verdict and, referring to Article 46 of the European Convention, it considered that 'reforms of Italian legislation and/or practice should be adopted in order to make such legislation and such practice compatible with the conclusions it had reached in this case, and to ensure that the provisions of Articles 8 and 14 of the Convention were respected'. In Austria, it was necessary to wait for the *Kindschafts- und Namensrechts-Änderungsgesetz 2013* (Parent and Child and Legal Name Amendment Act) and in Belgium, an Act

¹ To this end, we have used, inter alia, publications by the International Commission on Civil Status (ICCS), particularly its *International Practical Guide to Civil Status* and the annual general reports of the Secretary-General of this organisation, the national reports published annually (in German) in the *Zeitschrift für das gesamte Familienrecht, FamRZ* (German Family Law Journal), and ad hoc research.

was passed on 8 May 2014, for parents to be allowed the right to choose. It had been permitted in Poland since the passing of the law of 24 July 1998.

The extent of the choice

Those States that envisage this right to choose generally allow the parents to give the child the surname of one and/or the other parent. In cases where the parents do not bear a married name, German law, which is stricter, only allows the parents to choose the surname of one parent or the other for their child, disallowing the option of a name composed of the surnames of both parents. As shall be seen, this rigour was the reason for the Grunkin and Paul Judgment of the Court of Justice.

Most of the other Member States have provided for both options and even allow parents, if they choose a double name, to determine the order in which these two names are to appear themselves. This is the case for example in Belgium (Act of 8 May 2014), France (Article 311-21 of the French Civil Code) and in Luxembourg (Act of 23 December 2005). A similar idea but with more limited scope exists in Spain, where the Act of 5 November 1999 (Article 109 of the Spanish Civil Code) gave parents the right to reverse the normal order of their traditional double-barrelled surnames and to declare, at the time they declared the birth, that the first part of the child's surname would be the first part of the mother's surname and the second part of the child's surname would be the first part of the father's surname. There is even greater liberalism still in Austria since the law of 2013. The family name chosen by the spouses is assigned to the children, but they can be given a double surname composed of the surnames borne by the parents before marriage. In the absence of a shared surname, it is possible to choose the surname of one or other of the parents or a double-barrelled surname composed both surnames separately for each child.

Going a step further, Ireland allows a different surname from that of the two parents, but such cases are subject to authorisation by the Civil Registration Authority.

Surname of a child where a surname has not been chosen

There remain numerous disparities between our laws. The conferring of the father's surname exists in some of them. This is the case in Belgium (Article 335 of the Belgian Civil Code) and France (Article 311-21 of the French Civil Code) if the parent and child relationship is established in relation to the two parents at the same time. If it exists in relation to one of the parents, it is logically the surname of that parent which is conferred on the child. In Austria, since the law of 2013, it is conversely the mother's surname which is conferred upon the child as a last resort (Article 155 paragraph 3 of the Austrian Civil Code).

This alternative solution in favour of the surname of one of the parents may be interpreted as expressing the agreement of the latter, even if implicit. However, if it is used in the event of a disagreement between the parents, as foreseen by the Belgian Civil Code, it ignores the principle of parental equality. Other solutions are sometimes also adopted. In France and in Luxembourg, if the disagreement of the parents is indicated to the registrar prior to or at the time the birth is declared, the child takes the surname of both parents. The order of the two surnames is determined by the drawing of lots in Luxembourg, whereas in France, it is determined by alphabetical order since the Act of 17 May 2013. This solution was rejected in Spain. If the parents fail to agree, it is the registrar who decides the order in which the surnames are given in the greater interest of the child (Spanish Civil Registration Act 20/2011 of 21 July, which will enter into force on 15 July 2015).

In Germany, in the event of a disagreement between the parents, an original solution has been retained. A family law judge (Familiengericht) grants the spouse of their choice the right to determine the surname of the child. If the spouse does not exercise this choice within a given time frame, the child will bear the surname of that parent (paragraph 1617 subparagraph 2 of the German Civil Code).

The surnames of spouses and registered partners

This variety of solutions that exists amongst the laws of the Union in relation to children's surnames also applies to spouses' surnames. There has been a significant decline in the old patriarchal tradition of conferring the husband's surname upon the woman in favour of either each spouse keeping their own surname, often with the right of using the spouse's name, or the choice of a shared married name.

The practice of women being assigned the name of their husband has remained intact for a long time, in the absence of any alternatives, in certain Member States such as Austria, Greece and Italy.

Separate surnames in marriage is the most common rule, particularly in the following States: Austria since 2013, Belgium, Spain, France, Greece since 2008¹, Ireland, Luxembourg, United Kingdom and since an act passed on 24 July 1998, Poland.

Some laws provide for parents to choose a married surname which then replaces the surnames held by each spouse previously. Thus, in Germany, paragraph 1355 of the German Civil Code envisages that spouses must determine a shared family name (*Ehename*) by making a declaration before a registrar, and this name will be passed on to the couple's children. The name is then kept by each of the spouses after the dissolution of the marriage due to the death of the other spouse or due to divorce, unless a declaration is made to the contrary in order to take back the surname that was used previously. The married name must be the birth surname of one of the spouses or the surname one of the spouses has at the time of the declaration. However, the law does authorise the spouse whose name has not been chosen to add, also by declaration before the registrar, their own surname to the married name. In the event that the spouses cannot decide on a married name, the law envisages that each one continues to use the name that they used previously after they are married. In Austria, the options are similar to those under German Law since the law of 2013, save that spouses may choose to combine their names and that each spouse can choose to give their name the masculine or feminine form in keeping with the language of origin of that name. In Hungary, women were given a vast array of options by the law of 1952, where they can also add a suffix to the chosen surname to indicate whether they are married or widowed. A married name chosen by the spouses is also envisaged in other Member States, such as Finland and Sweden.

This wide variety of options under the civil law of the Member States is the source of numerous conflicts of law which themselves result in an equally wide variety of solutions.

1.2 Private international law of the Member States

Numerous Member States have recently consolidated or reconsolidated their private international law and possess written rules on conflicts over surnames. Some legislations have different rules regarding the recognition of surnames conferred in other States.

The surnames of spouses and registered partners

Main connection

The majority of Member States still refer choice of surname to the national law of the person concerned considering it to be the law governing their personal status. This solution is expressly declared in the private international laws of the following Member States (non-exhaustive list): Germany (Article 10 of the Introductory Act to the German Civil Code (the EGBGB)), Austria (paragraph 13 of the Act of 15 June 1978), Belgium (Article 37 of the Act of 16 July 2004), Bulgaria (Article 53 of the Private International Law Code of 17 May 2005), the Netherlands (Article 19 of the Act of 19 May 2011), Poland (Article 15 of the Act of 4 February 2011), Romania (Article 2576 of the Act of 24 July 2009), Slovenia (Article 14 of Act 56/1999) and the Czech Republic (Article 29 of the Act of 25 January 2012). It is implied and comes from a long tradition in Member States such as France, Greece and Italy. Solutions for conflicts of nationalities are varied, ranging from the preponderance of the nationality of the authority concerned to the alternative application of the national law of the person concerned.

¹ Act 3719 of 26 November 2008. V. A. G. Koutsouradis, *FamRZ* 2009.1544.

In the Baltic States, or in Lithuania and Estonia at least, recent laws do not make any express provisions in relation to surnames, but consider personal status as being governed by the country of residence (Estonia) or the country of habitual residence (Lithuania, Article 1.16 of the Act of 17 August 2000), which would indeed seem to cover surnames. The same solution prevails in Denmark, as demonstrated by the Grunkin and Paul case.

Right of choice

Some laws, whilst leaning towards a connection between personal status and national law, accept that this connection is not imperative and allow those concerned to choose the law of another country.

Thus, in Germany, Article 10 of the Introductory Act of the German Civil Code allows spouses either during the wedding or after the celebration of marriage to choose the surname they will use after they are married in conformity with the national law of one of the spouses or in conformity with German law if Germany is the place of habitual residence for one of them. And, similarly, the legal representative of a child may declare that that child will use the surname determined by the national law of one of the parents, by German law if Germany is the habitual residence of one of the parents or, where applicable, by the national law of the person conferring their surname upon the child (cf. paragraph 1618 of the German Civil Code).

Though more restricted, Romanian and Czech laws also stipulate the flexibility of a national law connection. On the subject of the choice of surname for a child, the first prescribes 'the law of the State of which ordinary citizenship has been attained both by the parents and the child [and] the law of the State in which the child was born or has resided since birth' (Article 2576 paragraph 2). Czech law only has one provision relating to change of surname (paragraph 29). In principle, this is governed by national law, but the party may also refer to the law of the country of their habitual residence (paragraph 29, clause 3). For change of surname, Bulgarian law also allows a foreigner whose habitual residence is in Bulgaria to request for Bulgarian law to be applied (Article 53, paragraph 4).

Recognition of names

Judgments pronounced by the Court of Justice of the European Union in the cases *Garcia Avello* (2 October 2003, Case C-148/02) and *Grunkin and Paul* (Case C-353/06), according to which 'Article 18 EC precludes the authorities of a Member State, in applying national law, from refusing to recognise a child's surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth', led many Member States to reconsider their position on the recognition of surnames acquired in another Member State, or where applicable, in a third Member State, in accordance with a law other than that determined by their own rule on conflicts of law. Some only accept recognition in a limited way, whilst others establish recognition as a principle outright.

Limited acceptance of the recognition of surnames

In Belgium, the Member State directly concerned by the *Garcia Avello Judgment*, the Code of Private International Law published by the Act of 16 July 2004, contains quite a restrictive Article 39 on the recognition of changes of first names or surnames performed in foreign countries. The change is recognised if it is recognised in the Nation State of the person concerned. It is not permitted for Belgian nationals, unless the change is in conformity with the rules on conflicts of law of a State of which the person concerned is also a national. Dual nationality applied in the *Garcia Avello case*, save that in this case, the issue was not the recognition of a change of name that had occurred abroad but a change of surname requested directly in Belgium. For people with dual nationality, a change would be permitted, but the European Commission had to institute proceedings against Belgium in September 2012 before the Court of Justice due to the difficulty encountered by the parents to ensure the registration of their child directly in the Belgian civil registers under the name envisaged by the other national law of the child, without having to first change the surname.

In Spain, the General Department of Registers and Notaries published the Directive of 24 February 2010 on the recognition of family names recorded in the civil registers of other Member States of the European Union. It prescribes that the registration of birth in the Spanish Civil Register using family names determined and

registered in a foreign civil register, in other words the recognition of such names, is not permitted as a general rule. The birth must have taken place in a Member State of the European Union, which has been the country of habitual residence of the parent(s) and the private international law of the State in which the child was born rules that family names are governed by the law of habitual residence.

In Germany, following the *Grunkin and Paul Judgment*, an Act of 23 January 2013 stipulated, with a new Article 48 of the Introductory Act to the German Civil Code, that when the law that applies to the surname of a person is German law, this person may, by means of a declaration before a German registrar, choose the surname acquired during habitual residence in another Member State of the European Union and entered in the civil register of that other Member State, provided that this did not expressly contravene the main principles of German Law. In summary, it can be said that the law of 2013 accomplished the minimum required to bring German law into conformity with the *Grunkin and Paul Judgment*¹.

General acceptance of the recognition of names

The Netherlands have a very liberal rule on this matter. According to Article 24 paragraph 1 of the Act of 9 May 2011:

'If the first names or the surname of a person have been registered outside the Netherlands at the child's birth or they have been modified following a change in their personal status which has occurred outside the Netherlands and these first names or the surnames have been recorded in a document prepared by a competent authority in accordance with the local regulations in force, the first names or the surname thus registered or modified shall be recognised in the Netherlands. Recognition may not be refused on grounds of incompatibility with the public order for the sole reason that a law other than that applicable by virtue of this Title [of the Law] has been applied'.

This liberal solution is the logical consequence of Article 9 of the same Law, which provides for the recognition of statuses created in a foreign State even by way of derogation to applicable law by virtue of Dutch private international law, *'insofar as refusal [of recognition] would constitute an unacceptable violation of the justified confidence of the parties or of legal certainty'*.

In Romania, although the Act of 24 July 2009 does not contain any specific provisions on the recognition of names, it does contain a general provision on the recognition of acquired rights, which would indeed seem to accommodate this:

Article 2567: *'Rights that are acquired in a foreign country shall be respected in Romania, with the exception of cases where this would be contrary to public order under Romanian private international law'*.

¹ On the subject of this law, see C. Kohler and W. Pintens, 'Entwicklungen in europäischen Personen- und Familienrecht 2012-2013', *FamRZ* 20131440; C. Kohler, 'La reconnaissance des situations juridiques dans l'Union européenne: le cas du nom patronymique', in P. Lagarde (Publication Editor), *La reconnaissance des situations en droit international privé*, Paris, Pedone, 2013, p. 67 et seq.

2. CASE-LAW OF THE EUROPEAN COURTS

2.1. The European Court of Human Rights

The European Court of Human Rights has on a number of occasions had to decide on applications relating to first names or surnames on the grounds of an alleged violation of Articles 8 (Right to respect of private and family life) and 14 (Prohibition of discrimination) of the European Convention on Human Rights. These decisions mainly affect the substantive law on names in the contracting States and, to a much lesser extent, private international law.

The intervention of the Court of Strasbourg presupposed that it could extend its jurisdiction to matters regarding names. Although the European Convention does not contain a provision on the law on names, in contrast to the International Covenant on Civil and Political Rights (Article 24, paragraph 2) and the International Convention of 1989 on the Rights of the Child (Articles 7 and 8), the Court admitted that *'a person's name, as a means of personal identification and a link to a family, none the less concerns his or her private and family life'* because, according to the Court *'private life [is] conceived of as including, to a certain degree, the right to establish and develop relationships with other human beings, in professional or business contexts as in others'* (*Burghartz Judgement v Switzerland*, No 24, Application No 16213/90, 22 February 1994, wording repeated in later judgments). However, at the same time, it pronounced inadmissible an application by married parents to ensure that their daughter would not be entered in the Register of Births under their family name, but rather under her mother's surname, considering that it was not entitled to substitute national authorities to decide which policy might be the most suitable in relation to family names (27 September 2001, pronouncing inadmissible Application No 36797/97, *G.M.B. and K.M. v Switzerland*).

Once this point had been admitted, the Court sanctioned numerous instances of discrimination existing in the law of the States that were parties to the Convention, but revealed itself to be more reserved with regards to the refusal by these States to allow changes of first name or surname.

Sentencing on discrimination

Sentencing on discrimination usually concerns the surname of spouses, but occasionally the transfer of their name to their common child as well.

Discrimination between the sexes is mainly related to the right of spouses and not just that of women. The previously mentioned Judgment, *Burkhartz v Switzerland* of 22 February 1994 (Application No 16213/90), in a case where a German husband and his German-Swiss wife had chosen her name as their married name, ruled against the Swiss authorities for refusing to allow the husband the right to put his own family name before the family name, when Swiss law allows married women to do that when they have chosen their husband's name as the family name.

The Judgment *Ünal Tekeli v Turkey* of 16 November 2004 (Application No 29865/96) noted the consensus that exists between the contracting States of the Council of Europe in relation to equality between the spouses regarding the choice of family name. It found discriminatory the Turkish law rule whereby a married woman may not use only her maiden name after marriage (she may only put it before her family name, which is her husband's surname), whereas a married man keeps his family name as it was before he married. The judgment underlines the imperative nature of the rule of equality adding *'that it is for the Turkish State to implement in due course such measures as it considers appropriate to fulfil its obligations to secure to each married partner, including the applicant, the right to keep their own surname or to have an equal say in the choice of their family name in compliance with this judgment'* (point 73).

On 9 November 2010 (*Losonci Rose and Rose v Switzerland*, Application No 664/06), the Court applied the principle of equality once more, ruling that the provisions of Swiss law that resulted in a wife of foreign origin marrying a Swiss husband being able to choose for her surname to be governed by her national law pursuant to Article 37, paragraph 2 of the federal law on private international law, whereas this choice was not possible for a Swiss woman marrying a man of foreign origin if they opted to take the woman's name as their family name (Point 43).

The prohibition of discrimination includes the transfer of surnames to the children of a couple. In the Judgment *Cusan and Fazzo v Italy* (7 January 2014, Application No 77/07), it ruled against the Italian rule of law which intended that the choice of surname should, without exception, be that of the child's father, despite a common desire of the spouses to the contrary, which in this case had led to a refusal by the authorities to allow the parents to confer only the mother's surname upon their child.

Changing of forenames and/or surnames

In the case *Daroczy v Hungary* (1 July 2008, No 44378/05), the Court heard the appeal of a woman who had been widowed against Hungary which had forced her to change her surname which she had used for more than fifty years and which featured in the civil registers on the grounds that this name had been written incorrectly in contradiction with the law. It held that this interference into the private life of the applicant was disproportionate and constituted a violation of Article 8.

It is however more circumspect vis-à-vis appeals against refusals to allow changes of first names or surnames demanded by the persons concerned. It is primarily asserted that the change requested was intended to adjust the official first name or surname to that by which the applicant is known or to get rid of a name that is difficult to bear and which affects the person in their private life. The Court considers that whilst obliging a person to change their surname always constitutes an interference into the right of a person to the respect of their private life, a refusal to allow such a change cannot necessarily be deemed an interference. Therefore, it usually rejects appeals of this nature.

Consequently, in one Judgment, *Stjerna v Finland* (25 Nov. 1994, Application No 18131/91) there is a refusal to see such an interference in the refusal by the Finnish authorities to accept the applicant's request to change his name from Stjerna to Tawaststjerna, based on the nickname that his current surname apparently resulted in and the fact that the surname requested was maintained to have been used by his ancestors in the XVIII century. Similarly, and on two occasions, the Court has refused to rule against refusals to allow or to change first names, on the grounds that the interested parties were not prevented from continuing to use the desired first name in everyday life (see ECHR, 24 Oct. 1996, *Guillot v France*, Application No 15773/89, first name Fleur de Marie refused, but Fleur, Marie accepted; 17 Feb 2011, *Golemanova v Bulgaria*, Application No 11369/04: refusal to change first name Donka, registered at birth, to Maya, by which the applicant was known in family and social circles). In contrast, in the Judgment *Johansson v Finland*, the Court held that considerations of public interest argued by Finland did not justify its refusal to register the first name Akl (6 Sept. 2007, No 10163/02).

More recently, the Judgment *Henry Kismoun v France* (5 Dec. 2013, Application No 32265/10) upheld an appeal against a refusal to allow a change of surname. The applicant, who held Franco-Algerian dual nationality and had been born in France, had been registered under his mother's surname, Henry. She had abandoned him very early on and he was acknowledged and taken in by his father, who took him to Algeria where he was schooled and where he completed his military service under his father's surname, Kismoun, under which he was registered in Algeria. When he discovered at the age of 21 that his civil status in France was Christian Henry and not Cherif Kismoun, as it was in Algeria, he asked the French authorities to change his name. The Court ruled against the refusal that he received. It recalled '*that in the area in question, the contracting States enjoyed a significant margin of appreciation [and that] it was not the duty of the Court to replace competent national authorities to decide the most appropriate policy for changes to surnames*' (Point 28), but considered that the national authorities had not '*achieved the right balance in weighing up the different interests involved which are on the one hand, the private interest of the applicant to bear his Algerian name and on the other, the public interest of regulating the choice of surnames*' (Point 30). In fact, the applicant asked the national authorities to recognise the identity he had developed in Algeria, the name 'Kismoun' representing one of the main components of this identity. He wanted to have just one name, the one he had used since his childhood, in order to put an end to the disparities arising from the fact that the French civil register and the Algerian civil register recognised him under two different identities. The Court recalled on this point that being a main component of a person's individuality in society, surnames form part of the core considerations affected by the right to respect of one's private and family life (*Losonci Rose and Rose v Switzerland*, No 664/06, paragraph 51, 9 November 2010). It also underlined, as had the Court of Justice of the European Union in the above-cited case-law [Judgments *Garcia Avello* and *Grunkin and Paul*], 'the importance for a person to have a unique name.' (Point 36).

2.2 Court of Justice of the European Union

Whilst the European Court of Human Rights is mainly concerned, in the afore-mentioned judgments, on the protection of private and family life which includes the right of a person to establish and develop relationships with other human beings, the Court of Justice of the European Union, without denying the importance of surnames in private life, concentrates more on the area of free movement of European citizens. In the cases that it hears, it examines whether decisions taken by a Member State in relation to the surname of a European citizen constitute a legitimate obstacle to their right to free movement.

The Court has intervened in disputes concerning the written form of surnames resulting from the diversity of languages with the European Union on the one hand and in cases directly related to the choice of surname on the other.

The written form of surnames

The first judgment of the Court concerning the written form of a name was pronounced on 30 March 1993 in the *Konstantidinis* case (Case C-168/91). The applicant was a Greek man who worked on a freelance basis in Germany and whose name had been carried over into the German civil registers after transliteration following ISO standards. He challenged this transliteration which made his name unrecognisable and could only be a hindrance to him in his professional life. The Court upheld his appeal and found that it would be contrary to the principle of non-discrimination and to the right of establishment if a Greek was obliged to use in his professional life a transliteration of his name used in the civil registers which changes its pronunciation if this adjustment carried a risk of confusing potential clients.

Many years later, a similar question arose in the case of *Runevic-Vardyn* (12 May 2011, Case C-391/09). The applicant was a woman of Lithuanian nationality but Polish origin. Firstly, she alleged the Lithuanian civil registration authorities had registered her Polish first name and surname in their Lithuanian form and had rejected her request to change her records to respect the Polish spelling. Furthermore, as she was married to a Polish man and lived in Belgium, she also asked that the family name of her husband, which had been added to the maiden name of the applicant and recorded in her marriage certificate, be recorded in such a way so as to respect Polish spelling rules. The Court rejected the first question of the application. The fact that the family name of a European citizen, used before her marriage, as well as her first name cannot be changed and registered in certificates of civil status of the Member State from which she originates in anything other than the characters of the language of that Member State *'is not liable to deter a citizen of the Union from exercising the rights of movement recognised in Article 21 TFEU and, to that extent, does not constitute a restriction.'* (Point 70). On the second question, the Court did not rule out that the different spelling of the same family name applied to two people from the same couple could lead to inconvenience for the parties concerned. If this was the case, which had to be ascertained by the court of reference, it would represent a restriction to the freedoms established for all citizens of the European Union by Article 21 of the TFEU.

Choice of surname

The notion of European citizenship, together with its corollary freedom of movement, also serves as a foundation for this second category of decisions by the Court of Justice.

The *Garcia Avello* Judgment of 2 October 2003 (Case C-148/02) gave a ruling on the surname of two children with dual nationality, born in Belgium with a Belgian mother and a Spanish father. When the Belgian authorities, applying Belgian law, gave the children the father's surname (Garcia Avello) the parents requested in vain that they amend the surname in accordance with Spanish law, which gives the child the first surname of the father followed by the first surname of the mother, i.e. Garcia Weber.

The Court's judgment is important in several respects. Firstly, it included the issue of surnames as being within the competence of the European Union, at least partially. *'Although, as Community law stands at present, the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law, (see, by analogy, the Judgment of 2 December 1997, Dafeki, C-336/94, Applications p. I-6761, Points 16 to 20) in particular with the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States'* (Point 25).

Secondly, the Court decided that by treating these Belgian-Spanish children as if they exclusively Belgian, the Belgian authorities ignored the difference of these statuses and consequently violated the principle of non-discrimination (Article 12 EC) on grounds of nationality in regard to the rules governing their surname. In fact, *'In contrast to persons having only Belgian nationality, Belgian nationals who also hold Spanish nationality have different surnames under the two legal systems concerned. More specifically, in a situation such as that in issue in the main proceedings, the children concerned are refused the right to bear the surname which results from application of the legislation of the Member State which determined the surname of their father'* (Point 35). Finally, for the Court, as regards European citizenship and free movement: *'It is common ground that such a discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels resulting from, inter alia, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in another Member State of which they are also nationals'* (Point 36).

The *Grunkin and Paul* Judgment of 14 October 2008 (Case C-353/06) settles the conflict between the civil law and the private international law of two Member States regarding the attribution of surnames to children. In this case, which was more simple than the previous one because there was no conflict of nationalities, a child of German parents whose habitual residence was in Denmark was born in Denmark. As permitted by Danish law applicable as the law of habitual residence according to the rule of conflict of Danish law, the child was given a double-barrelled surname composed of the surnames of the two parents. Later on, when the two parents wanted to register this double-barrelled name in the German civil registers, they were confronted with the refusal of the German authorities based on the fact that German law, applicable as the national law of the child according to the German rule of conflict, only allowed parents to choose the name of one or other of the parents for the child, but did not allow the choice of a double-barrelled name made up of the surnames of the two parents.

The Court did not rule against the German rule of conflict which links the surname to the national law nor the German substantive law which refuses the principle of the choice of a double-barrelled surname for a child, but the refusal by the German justice system to recognise in Germany the surname which had been attributed to the child in accordance with the law in Denmark. On this point too, the Court based its decision on the freedom of movement linked to European citizenship. It underlined that *'If those authorities refuse to recognise the surname as determined and registered in Denmark, the child will be issued with a passport by those authorities in a name that is different from the name he was given in Denmark. Consequently, every time the child concerned has to prove his identity in Denmark, the Member State in which he was born and has been resident since birth, he risks having to dispel doubts concerning his identity and suspicions of misrepresentation caused by the difference between the surname he has always used on a day-to-day basis, which appears in the registers of the Danish authorities and on all official documents issued in his regard in Denmark, such as, inter alia, his birth certificate, and the name in his German passport'* (Points 25 et 26).

Consequently, the Court ruled against the refusal by a Member State, on applying national law, to refuse to recognise a child's surname, as determined and registered in a second Member State in which the child – who, like his parents, had only the nationality of the first Member State – was born and had been resident since birth. The Court therefore obliges Member States to recognise the surname of a child who is a national of that country, which has been conferred in another Member State of habitual residence, even if it has not been conferred in accordance with applicable law under conflict rules of the State where the status is requested.

The Court only authorised a refusal by a Member State to recognise a surname attributed to one of its nationals in another Member State because the surname included a title of nobility not allowed in the first Member State under its constitutional law (CJEU 22 Dec. 2010, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Case C-208/09).

3. OVERVIEW OF INTERNATIONAL LAW

Large international organisations, such as the United Nations Organisation and the Council of Europe, are mostly involved in issues of substantive law regarding surnames. They aim to ensure that everyone has a surname and to condemn any discrimination between men and women. It seems that only the International Commission on Civil Status (ICCS) has really faced the problems posed to private international law by surnames head on.

3.1. United Nations

Several important laws should be noted.

International Covenant on Civil and Political Rights (19 December 1966)

According to Article 23, paragraph 4: « *States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution [...]* ». Although this provision does not mention surnames, it has been interpreted by the United Nations Human Rights Committee as obliging States Parties to ensure the absence of discrimination between men and women, particularly in relation to the right of each spouse to continue to use their original family name or to participate on an equal footing in choosing a new family name.

Convention on the Elimination of all Forms of Discrimination Against Women (7 March 1966)

In paragraph 1(g) of Article 16, this Convention provides as follows: *'States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: [...]*

The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation'.

Convention on the Rights of the Child (20 November 1989).

Parts of Articles 7 and 8 regard the surname of the child:

*'Article 7, 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.*

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity. '

Even if this Convention is applied directly in some Member States and can be relied on by individuals, it does not establish any rule regarding the methods of determining a surname and relies on the national legislation of each State.

3.2. The Council of Europe

In the absence of any binding laws, it is important to cite Resolution (78) 37 of the Committee of Ministers of 27 September 1978 on Equality of Spouses in Civil Law.

The objective of this text is to invite Member States to eradicate forms of gender-based discrimination that still existed in their legislation and in practice in relation to the choice of a family name and in the conferring of the surnames of parents to their children. Paragraph 6 of the resolution proposes several solutions in this sense:

'6. (...) to regulate matters concerning the family name of the spouses to ensure that a spouse is not required by law to change his family name in order to adopt the family name of the other spouse and, in doing so, to be guided for instance by one of the following systems:

i. choice of a common family name in agreement with the other spouse, in particular the family name of one of the spouses, the family name formed by the addition of the family names of both spouses or a name other than the family name of either spouse;

ii. retention by each spouse of the family name possessed prior to the marriage;

iii. formation of a common family name by the operation of law by the addition of the family names of both spouses;'

The International Commission on Civil Status

This still little-known small international organisation was established in 1950 and has its headquarters in Strasbourg. Its objective is to facilitate international cooperation in civil status matters and to encourage the exchange of information between registration officers of the Member States. Aware of the difficulties encountered by citizens due to the diversity of national legislation, it has established five conventions on this subject. Two of these are of a technical nature and do not really affect substantive law. The three others do, but they have been ratified improperly or not at all. It is essential that they are nevertheless taken into consideration when discussing possible future European legislation on this subject as they reflect current thinking and ideas.

Conventions of a technical nature

Convention No 14 on the recording of surnames and forenames in civil status registers, signed at Berne on 13 September 1973 (7 ratifications). Its objective, though modest, is that of *'ensuring uniformity in the recording of surnames and forenames in civil status registers'* which concerns diacritic marks that vary from language to language and transliterations from one alphabet to another, which gave rise to difficulties between Germany and Greece¹.

- *Convention No 21 on the issue of a certificate of differing surnames*, signed at The Hague on 8 September 1982 (4 ratifications). This certificate is *'intended to facilitate proof of identity for persons who, owing to differences between the laws of certain States, particularly regarding marriage, filiation or adoption, are not designated by one and the same surname'* (Article 1, paragraph 1). The Convention thus provides a remedy for the hindrance caused by this diversity, but it does not lessen that hindrance in any way.

Conventions affecting substantive law

Convention No 4 on changes of surnames and forenames, signed at Istanbul on 4 September 1958 (9 ratifications) obliges the Contracting States *'not to authorise changes of surnames or forenames for nationals of another Contracting State, unless they are also nationals of the first-mentioned State'* (Article 2). The underlying idea, as seen from the legal expert's perspective, is that a change of name granted by the public authority is an Act of Sovereignty which may only be exercised over nationals or refugees and stateless people resident on the territory.

¹ Cf. CJEC 30 March 1993, Case C.168/91, *Konstantidinis*, cited above.

Convention No 19 on the law applicable to surnames and forenames, signed at Munich on 5 September 1980 (4 ratifications). Markedly more ambitious than the last, its objective is to establish common rules of private international law in this area and envisages that the '*surnames and forenames of a person shall be determined by the law of the State of which he or she is a national*' (Article 1), even if it is the law of a State which is not a Contracting State (Article 2).

Convention No 31 on the recognition of surnames, signed at Antalya on 16 September 2005 (not entered into force). Compared to earlier texts, this one deliberately adopts a different approach. Instead of rules of conflicts of law, it lays down rules for recognition. It therefore leaves Contracting States free to establish as they will the rules on the attribution of surnames, substantive rules and conflict rules, but it obliges them to recognise the name attributed to a person in another Contracting State, if that person had a connection which they establish. In this way, it shows the way forward.

4. PERSPECTIVES FOR EUROPEAN LEGISLATION

4.1. General considerations

Rejection of European legislation on the substantive law on surnames

Any future European legislation on surnames must remain within the confines of the principle of subsidiarity which requires that in areas which do not fall within its exclusive jurisdiction, the Union only intervenes if and to the extent that the objectives of the action envisaged cannot be achieved properly by the Member States (Article 5, paragraph 3 of the TEU). The Court of Justice constantly repeats in the judgments cited above that the rules governing the surname of a person fall within the jurisdiction of the Member States, even if they must nevertheless respect Community law in the exercise of this jurisdiction.

This principle should considerably limit any legislative intervention by the Union in substantive law on surnames. The rules for the attribution of surnames are rooted in the history, the culture and the beliefs of the Member States and their diversity is merely a reflection of the national and cultural identities of the Member States. Moreover, positive law, both international and European, already imposes the principle of non-discrimination and the respect of private life on the Member States in relation to surnames and other subjects (see *above*, in Chapter 2, Case-law of the European Court of Human Rights and, in Chapter 3, the international and European laws cited). It hardly seems possible nor desirable to go further.

Usefulness of European legislation on the substantive law on surnames

It is different for private international law on surnames. Specific difficulties are created by the diversity of legislation, both substantive and private international law. As already shown in another study¹, the main consequence of this is that one and the same person will not have the same name in different States with which they have a connection due to nationality, habitual residence, or their place of birth or marriage, which is capable, as emphasised for good reason by the previously cited judgments of the Court of Justice, of hindering their freedom of movement. A few examples, chosen from amongst those which have been discussed during the research of the ICCS, should suffice.

A Franco-German couple, a French woman and a German husband, have their habitual residence in Germany. The spouses make a declaration before the German registrar, in accordance with paragraph 1355 of the German Civil Code, in which they choose the husband's surname as their married name. As far as German law is concerned, the woman has lost her maiden name and has now assumed the matrimonial name. As far as French law is concerned, which does not authorise such a declaration, the woman keeps her maiden name.

¹ P. Lagarde, *L'œuvre de la Commission internationale de l'état civil en matière de nom des personnes*, Festschrift für Erik Jayme, Bd 2, 2004, p. 1291-1305.

The child of a Spanish father and a German mother is born in Germany. At the time of birth, the parents make a declaration before the German registrar, in accordance with paragraph 1617 of the German Civil Code, in which they choose the mother's surname as the surname of the child. This name will not be recognised in Spain, because according to Spanish law, a child's surname is composed of the father's first surname and the mother's first surname. The name appearing on the German birth certificate will therefore not be the same as the name appearing on official documents issued by the Spanish authorities.

From the moment that a unification of substantive law on surnames is excluded, European legislation could take either of the following pathways: a unification of conflict rules with the effect, at least in theory, that the surname would be attributed throughout the Member States based on one and the same law, or designing rules for the recognition in the Member States of surnames attributed in a different Member State. A recent study conducted by a working group of the German Federal Association of Registrars [hereinafter the German proposal] proposes following these two pathways at the same time¹.

Limitations of this European legislation in relation to the recognition of surnames

The suggestion here is to develop rules for the recognition of surnames and postpone the unification of conflict rules until later on. The unification of rules on the conflict of laws is a necessity in other areas. For example, in the area of successions, it is necessary that the same rules apply to the assets bequeathed, distributed throughout the territory of several Member States. This is not the case in the area of surnames. The advantage to be gained from a unified law applicable to surnames in all the States of the Union must not be exaggerated. In the example given above of the Franco-German couple, the fact that the woman keeps her surname under French law and that she changes it under German law in exchange for her married name is not in itself an obstacle to free movement. However, this freedom is hampered if the surname attributed to a woman in the State where she has got married, for example, is not recognised in another Member State, in other words, if the woman is obliged to use a different surname when passing from one State to another.

This paper proposes the main articles that could become a rule on the recognition of names. Unlike the German proposal, there is no proposal in relation to the rules of conflict on the subject as these rules are not necessary for the purpose in question.

4.2. Rules regarding recognition

General considerations

There are two legislative models regarding the recognition of surnames: ICCS Convention No 31 of 16 September 2005 and Chapter 3 of the previously cited German proposal.

The ICCS Convention is extremely detailed. It examines in turn declarations on surnames upon marriage or dissolution of marriage, the taking back of a surname by operation of the law in the event of divorce or annulment of marriage, and surnames attributed to children in the State of birth and changes to surnames. In these different situations, the Convention also provides solutions for cases of dual or multiple nationality. It is relatively limited insofar as it makes the recognition of surnames subject to conditions of proximity between the State of origin of the surname and the party concerned, combining nationality and habitual residence, which is undeniably complicated. The German proposal is on the other hand extremely brief and undoubtedly inadequate for the purpose of resolving all the difficulties. The suggestion would be to take what is best of both of them. This is the objective of the articles proposed for a regulation on the recognition of surnames which is to be found as an annex to this study.

It is useful to explain the scope of the recognition of surnames, conditions for the recognition of surnames and

¹ 'Ein Name in ganz Europa: Entwurf einer Europäischen Verordnung über das Internationale Namensrecht', *StAZ*, No 2/2014, p. 33. The authors of this study are A. Dutta, R. Frank, R. Freitag, T. Helms, K. Krömer and W. Pintens. See a significantly abridged version of this proposal under the title: 'Un nom dans toute l'Europe. Une proposition de règlement européen sur le droit international privé du nom', *Rev. crit. Droit International Privé*, 2014.733.

the related effects of such recognition.

Scope of recognition

The principle should be that any surname entered in the registers of a Member State must be recognised in other Member States. This is what is envisaged in Article 1 of the proposed regulation. Recognition should cover changes of surname, whether they result from a declaration by the person concerned, as is the case in the domain of marriage (Article 1), from a change in civil status (Article 2) or from a decision by the public authorities (Article 4). The varied nature of these situations may however call for different conditions.

Names attributed or changed in a third State is not directly envisaged by the ICCS Convention nor by the German proposal. The principle of mutual recognition, which would underlie a regulation on the recognition of surnames, is restricted to the territory of the European Union. Consequently, it is advisable to let each Member State resolve the recognition on its territory of surnames attributed in a third State in accordance with its national laws. However, if a Member State of the European Union recognises this name and registers it in its civil registers, each person, particularly every European citizen, has the same interest for their surname to be recognised, principally for the exercise of their right to free movement, whether their surname was attributed in a Member State of the European Union or a third State. From the moment that a surname established in a third State has been entered in the registers of a Member State, it must be recognised in the other Member States (Article 5).

Conditions for recognition

The main difference between ICCS Convention No 31 and the German proposal is that the first makes the recognition of surnames dependent on the existence of a connection (nationality or habitual residence) between the interested party or parties and the State where the surname was attributed or modified, whereas the German proposal does not establish any such conditions, except in the specific hypothesis of a change of surname by decision of the public authorities. To be recognised in a Member State, the only condition is that the surname has been entered in the registers of another Member State. The more liberal solution offered by the German proposal is preferable to that of the ICCS Convention. The latter was developed at a time when the method for recognising status was not familiar and conditions had to be made for it to be accepted.

Today, it is clear that the recognition of surnames is necessary for the European Union to facilitate the free movement of European citizens. This would be hindered if the condition was not satisfied, as the interested party could not bear the same surname in all the Member States. Free movement would again be hampered, even if the condition was satisfied, if the authority of the State in which the surname is requested was to delay its decision to check it. This authority must recognise the surname without having to check anything but the existence of the surname, namely the fact that it is entered in the registers of the State of origin, as inferred from their identity documents. It should not have to check whether the law applied in the first State was applicable, nor even whether it was applied correctly¹. The party concerned has a legitimate interest in seeing the surname that they bear recognised in all European Union Member States.

The only restriction to the obligation of recognising a surname can be the manifest contravention of doing so with the public order of the State in which it is requested (Article 6). This could be the case, at the request of the party concerned, if the surname to be recognised had been attributed in application of discriminatory legislation, for example one that obliged a woman to take her husband's surname.

Changes in surnames resulting from a decision by the public authority represent a more delicate matter. Member States generally consider that the process of changing the surnames entered in their registers falls under their sovereignty and do not accept that the decision of another Member State constrains them in this respect. That is why the Convention of Istanbul (ICCS Convention No 4 cited above) of 4 September 1958 provides that the Contracting States undertake not to allow such changes for nationals from another Contracting State, unless they are also nationals of their country (Article 2) and it restricts the obligation of

¹ In this respect, see the explanatory statement of the German proposal, StAZ, 2, 2014, p. 41, No 56 and 60.

recognition to these changes alone (Article 3). The German proposal goes one step further and also envisages the recognition of changes of surname granted by the authorities of the State of habitual residence of the person concerned (Article 13, paragraph 2). The proposal refers to the practice of several Scandinavian States in this regard, consistent with the *Grunkin and Paul Judgment*, of allowing a change of surname for foreign nationals who are habitually resident in their countries¹. It is recommended that the German proposal should be followed in this respect (Article 4).

Effects of recognition

The principle of the recognition of surnames signifies that the authorities of all the Member States other than the one in which the name was established must accept this name in their relations with the person concerned, particularly when providing official documents which they have occasion to issue to them. The ICCS Convention No 31 usefully specifies that a recognised surname is entered in the relevant official registers, without any special procedure being required (Article 8). It is proposed that this provision should be used (Article 7). Relevant official registers may be, if required and depending on the circumstances, civil status registers, population registers, land registers, etc.

The recognition of surnames must be disassociated from the recognition of family relations which determine the attribution of surnames, such as parent and child relationships, marriage, divorce, etc. The fact that the parent and child connection or the marriage connection (particularly between people of the same gender) is not recognised by the second State is not a reason for the surname attributed in the first State as a result of this connection not to be recognised. A similar separation is established in Article 22 of Regulation No 4/2009 of 18 December 2008 on maintenance obligations, which must be transposed into a regulation on the recognition of surnames (Article 3 of the proposal).

Finally, the proposal should also apply, by analogy, to the attribution of and changes to forenames (Article 8), which the European Court of Human Rights often has to rule on.

CONCLUSION

The legislation of the Member States of the European Union regarding surnames is extremely diverse.

As far as substantive law is concerned, some national legislation put the interests of private individuals first by allowing them the possibility, to a greater or lesser extent, of choosing and changing their surnames. Others are aimed at promoting family values and unity, the choice of family names being dependent upon developments in family law. Finally, the Member States assert more or less forcefully that it is in their interest that each individual has a surname, determined in accordance with precise and unchanging rules save well-defined exceptions.

In the domain of private international law, the majority of Member States link surnames to the national law of individuals, but this becomes difficult when they possess several nationalities or when family members are of different nationalities. Some States apply the law of the State of habitual residence of the person, whilst others, which may be the same, allow interested parties to choose which law will govern their name within certain limits.

This difference of approaches leads to deadlock, as illustrated in particular in the *Grunkin and Paul Case*, where the same person can, according to the law of the Member State of habitual residence, applicable by virtue of its private international law, use a different surname to that which is attributed to them by the law of their national State, which is in turn applicable pursuant to the conflict rules of said State.

To remedy this deadlock, there are three theoretically viable options: the unification of substantive rules, the unification of the rules of conflict of laws or the adoption of rules on the mutual recognition of surnames attributed in a Member State. The first is not appropriate and would probably go beyond the jurisdiction of the

¹ *Loc. cit.*, No 66.

European Union. The second is not necessary, nor sufficient, to obtain the objective desired, consisting in a person being able to bear the same name in all the States of the European Union, so as not to be hampered in exercising their right to free movement. The third solution - the adoption of rules on the recognition of surnames - is the most effective and simpler to develop. It would complement well the Commission's proposal of 24 April 2013 recommending a regulation to promote the free movement of citizens and companies by simplifying the acceptance of certain public documents within the European Union, which specifically does not include the recognition of the content of public documents issued by the authorities of other Member States (Article 2, paragraph 2).

ANNEX: ARTICLES PROPOSED FOR FUTURE LEGISLATION ON THE RECOGNITION OF NAMES

Article 1.

A surname attributed at birth or acquired by declaration, entered in the registers of civil status of a Member State, shall be recognised in other Member States.

Article 2.

A change of surname resulting from a change of civil status of a person, entered in the registers of civil status of a Member State, shall be recognised in other Member States.

Article 3.

The recognition of a surname by virtue of this regulation shall not by any means imply the recognition of the family relationships at the origin of this surname.

Article 4.

A change of surname resulting from a decision by the public authority of a Member State shall be recognised in other Member States if issued by the interested party's national Member State or Member State of habitual residence.

Article 5.

For surnames attributed to or obtained by a person in a third State, if they were recognised in a Member State in application of its national law and entered in the registers of civil status of that State, they shall be recognised in other Member States.

Article 6.

Recognition may only be refused if it is manifestly contrary to the law and order of the Member State in which it is requested.

Article 7.

Surnames recognised in application of this regulation shall be allowed by the authorities of the Member State in which it is requested and entered, where required, in the relevant official registers of that State, without any special procedure being required.

Article 8.

Articles 1 to 7 shall apply by analogy to forenames.

Biography

Paul Lagarde's stimulating contribution to the harmonisation of private international law, both at world and European level, is difficult to grasp. Professor since 1961, he taught in various French universities before joining Paris I (Sorbonne) from 1971 to 2001. He gave lectures at the Hague Academy of International Law. A delegate of France to many Sessions of the Hague Conference on Private International Law, he played a particular role as rapporteur for two relatively recent Hague Conventions (1996 on the Protection of Children and 2000 on the International Protection of Adults). As Secretary General, he steered the works of the International Commission on Civil Status from 2000 to 2008. A convinced European, he takes a very active part in the development of an EU private international law, e.g. very recently for the adoption and upcoming implementation of the 2012 Succession Regulation. A member of the Institute of International Law, he received the Hague Prize for International Law in 2011.



SESSION III - BUSINESS AND CONSUMER'S CONCERN

Harm Schepel

Private international law as a regulatory tool for global governance

Pablo Cortés

The European Small Claims Procedure and the new Commission proposal

Giuseppe De Palo

European Citizens' Initiative - assessment of first lessons

Gottfried Musger

European Citizens' Initiative - assessment of first lessons

Session III - Business and consumer's concern

Private international law as a regulatory tool for global governance?

Harm Schepel

Upon request by the JURI Committee, this paper provides an analysis of private international law in transnational litigation beyond the usual image of the discipline as a neutral tool facilitating the 'natural' operation of the market. Legitimate and functional global governance arises from the interaction of normative orders, be they public or private. Efforts to shield private global governance regimes from political and legal interference are, ultimately, as counterproductive as are efforts to 'protect' domestic and international legal systems from these regimes- both for business and consumers (and citizens). To regulate and manage this interaction, the concepts, methods, and tools of private international law are indispensable, if adapted to modern realities of private global governance.

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LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
FET	Fair and Equitable Treatment
ISO	International Organization for Standardization
NAFTA	North American Free Trade Agreement
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
WTO	World Trade Organization

EXECUTIVE SUMMARY

Private global governance and legal fragmentation have led to a world in a condition of legal pluralism. Different normative orders with competing claims and logics all strive for autonomy. Some of these regimes base their claims on their responsiveness to the needs of the global economy to isolate market-conform structures from the distortions caused by political contestation. This is true for both the regimes discussed in this paper. Global private standards-setters facilitate international trade by harmonizing technical standards for the quality and safety of goods and services and are seeking to impose their norms on States. Investment arbitration treaties provide insurance for foreign direct investment by allowing foreign investors direct access to international tribunals who decide on the legitimacy of State action under standards of public international law. But facile distinctions between 'the market' and politics, between nationals and foreigners, and between (market-facilitating) private law and (market-correcting) public law have been fatally undermined by the forces of globalization.

Private governance regimes strive for acceptance and recognition: if we are to 'make demands on the world', private international law has a vital role to play in ordering the interaction of the various claims exerted by diverse normative orders, and in setting out requirements for acts of recognition. As a discipline and a field of practice, private international law is used to the balancing acts involved with the need to take into account the effects of legislation on those beyond the realms of the political community by whom and in whose name the legislation was enacted; it is also attuned to the needs and demands of 'others' seeking protection by their own law in the face of adverse impacts of being subjected to foreign legal systems.

If we are to avoid either autonomy or subjection, to balance the demands of comity on the one hand and public policy on the other, and if we are to manage political conflict through the mediation of the law, we need productive mutual interaction of legal orders, not mutual indifference and political domination in the name of its absence. In that sense, private international law is a vital regulatory tool for global governance.

INTRODUCTION

Freer markets, more rules.¹ The title of Steven Vogel's classic evokes a central paradox of the denationalized economy: globalization comes not with the unleashing of market forces through massive deregulation, but with the expansion and differentiation of rules and agents performing regulatory and adjudicatory functions.² This has resulted in a state of legal fragmentation in which traditional and familiar distinctions between private and public law, and domestic and international law become unsettled.³ The bewildering array of interacting normative orders in transnational fields has led to the resurrection of the concept of legal pluralism, both among socio-legal scholars and legal theorists confronting the transnational,⁴ among international lawyers

¹ Steven Vogel, *Freer Markets, More Rules* (Ithaca: Cornell University Press 1998).

² See eg David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism', (2005) 598 *Annals of the American Academy of Political and Social Science* 12, Marc Schneiberg and Tim Bartley, 'Organizations, Regulation, and Economic Behavior: Regulatory Dynamics and Forms from the Nineteenth to Twenty-first Century', (2008) 4 *Annual Review of Law and Social Science* 31, and Marie-Laure Djelic, 'From the Rule of Law to the Law of Rules: The Dynamics of Transnational Governance and Their Local Impact', (2011) 41 *International Studies of Management and Organization* 35.

³ Important contributions to a legal theory of modern transnational law include Gunther Teubner, *Constitutional Fragments* (Oxford: OUP 2012), and Galf-Peter Callies and Peer Zumbansen, *Rough Consensus and Running Code- A Theory of Transnational Private Law* (Oxford: Hart 2010).

⁴ See eg Roger Cotterrell, 'Transnational Communities and the Concept of Law', (2008) 21 *Ratio Juris* 1; Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', (2008) 30 *Sydney Law Review* 375; Klaus Günther, 'Legal pluralism or uniform concept of law? Globalisation as a problem of legal theory', (2008) 5 *No Foundations* 5; Ralf Michaels, 'Global Legal Pluralism', (2009) 5 *Annual Review of Law and Social Science* 243; Peer Zumbansen, 'Transnational Legal Pluralism', (2010) 1 *Transnational Legal Theory* 141, and Paul Schiff Berman, *Global Legal Pluralism* (Cambridge: CUP 2012). But see Simon Roberts, 'After Government? On Representing Law Without the State', (2005) 68 *Modern Law Review* 1.

confronting a lack of unity and hierarchy,¹ and among private international lawyers coming out of their 'closets'.²

The term 'private international law' in global governance is ambiguous, as it is used to refer, sometimes indiscriminately, to two distinct phenomena. On the one hand, the term is sometimes used to refer to the rise of non-state actors in global economic governance; globalization and the privatization of governance functions seem to go hand in hand.³ On the other hand, it may see to the legal practice and discipline of private international law as a means of dealing with conflicts between different normative orders.

This latter use of the term may seem odd at first sight. 'Private international law' is not necessarily 'private' or 'international': it refers, rather, to the body of law that provides rules and standards to determine applicable law and competent courts to regulate relations between persons across different jurisdictions. As such, it is sometimes seen as a bastion of legal nationalism, where jurisdictions refuse to open up to foreign law in the name of 'public policy,' slowly eroded by the need for comity to accommodate the needs of the global economy. It is often also perceived as hopelessly stuck between the 'public' and the 'private', where the principled coherence of national legal systems is struggling to come to terms with party autonomy in transnational commercial contracts as regards choice-of-law and choice-of-forum clauses. Most of all, the doctrinal edifice of the discipline has been attacked for its inability to deal with 'non-law', that is, with precisely the rising importance of private international legal orders.⁴

And yet, the return to fashion of private international law in conditions of legal fragmentation and pluralism seems perfectly natural. If the problem of global economic governance lies partly in conflicts of legal orders, then it is only logical to turn to the discipline that was crafted to deal with just that- conflicts of laws.

This brief paper will use the term in both ways: it discusses two distinct classes of private institutions that play a fundamental role in modern economic governance: private standard- setters and investment arbitration tribunals. Both of these exert enormous influence on the global economy and constrain the scope of State regulatory measures considerably. Importantly, both of these exercise their functions under authority 'delegated' to them by States in public international law treaties.⁵ The WTO Agreement on Technical Barriers to Trade binds Members to 'international standards' in the preparation and adoption of technical regulations. Bilateral Investment Treaties allow foreign investors recourse to arbitration tribunals to settle their disputes with host States under public international law standards of protection. Both these arrangements 'privatize' international law and have profound effects on the scope of regulatory powers of the State. And both throw up intricate questions of 'conflicts of law', as they inevitably run up against questions of the interaction of different legal orders and regimes.

My argument is fairly straightforward: legitimate and functional global governance arises from the interaction of normative orders. Efforts to shield private global governance regimes from political and legal interference are, ultimately, as counterproductive as are efforts to 'protect' domestic and international legal systems from these regimes- both for business and consumers (and citizens).

¹ See Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', (2008) 6 *International Journal of Constitutional Law* 373, and Nico Krisch, *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (Oxford: OUP, 2011). 'Constitutionalism' versus 'pluralism' is now such a structuring device in debates that scholars from very different schools of thought have to find their way through it. Compare Alec Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes,' (2009) 16 *Indiana Journal of Global Legal Studies* 621, and Ruth Buchanan, 'Reconceptualizing Law and Politics in the Transnational: Constitutional and Legal Pluralist Approaches', (2009) 5 *Socio-Legal Review* 21.

² See eg Horatia Muir Watt, 'Private International Law beyond the Schism', (2011) 2 *Transnational Legal Theory* 347.

³ See eg Tim Büthe and Walter Mattli, *The New Global Rulers- The Privatization of Regulation in the World Economy* (Princeton: Princeton UP 2011), and Sol Picciotto, *Regulating Global Corporate Capitalism* (Cambridge: CUP 2012).

⁴ See generally Horatia Muir Watt and Diego Fernández Arroyo (eds.), *Private International Law and Global Governance* (Oxford: OUP 2014).

⁵ For a typology of global governance regimes, see Kenneth Abbott and Duncan Snidal, 'Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit,' (2009) 42 *Vanderbilt Journal of Transnational Law* 501.

1. INTERNATIONAL STANDARDS AND THE WTO

A large part of the accounting, quality, safety, social and environmental standards that regulate the global economy is set and monitored by private or hybrid associations and networks.¹ These 'new global rulers' go about the business of rulemaking according to highly formalized procedures laid down in hefty, detailed and regularly updated tomes of codes, manuals and 'standards for standards.'² Even if important differences exist between these, there is a surprisingly robust common core of requirements and principles: elaboration of a draft by consensus in a technical committee with a composition representing a balance of interests, a round of public notice-and-comment of that draft with the obligation on the committee to take received comments into account, a ratification vote with a requirement of consensus, not just a majority, among the constituent members of the standards body, and an obligation to review standards periodically. A growing body of work investigates and reflects on these decision-making procedures under various metrics and concepts of accountability and legitimacy.³ Although assessments about compliance and effect are far from uniformly positive,⁴ there is little doubt about the mechanisms underlying the diffusion of these core principles; standard-setters strive for their standards to be widely used, and public recognition is a necessary condition for widespread use. Adherence to fundamental principles of administrative process, in turn, is a necessary condition for public recognition.⁵ However 'legitimate' the private regulatory process, however, private standards are usually denied the status of law. Their relevance and legal effect come filtered through what have been termed 'mechanisms of degradation':⁶ standards are either incorporated into the legal system as law by re-enacting the rulemaking process as legislative process,⁷ or they are reduced to mere facts. *Tertium non datur*.⁸ The problem with this bright-line jurisprudence is that, to turn a phrase, it ceases to make demands on the

¹ These include the International Organization for Standardization (ISO), the International Accounting Standards Board (IASB), and the members of the International Social and Environmental Accreditation and Labeling Alliance (ISEAL), among them the Forest Stewardship Council, the Rainforest Alliance, the Marine Stewardship Council, and the Fair Trade Labelling Organization. See generally eg David Vogel, 'Global Private Business Regulation', (2008) 11 *Annual review of Political Science* 261, and Tim Büthe and Walter Mattli, *The New Global Rulers- The Privatization of Regulation in the World Economy* (Princeton: Princeton UP 2011).

² See eg International Social and Environmental Accreditation and Labelling Alliance, *Code of Good Practice for the Setting of Social and Environmental Standards* (2010)m and the International Organization for Standardization, *ISO/IEC Directives, Part I: procedures for the technical work* (2012). The latter are greatly influenced by, and influence, the regulations of national standards bodies. See for example the American National Standards Institute, *ANSI Essential Requirements: Due process requirements for American National Standards* (2010); the European Standards Organizations' *CEN/CENELEC Internal regulations Part 2: Common Rules for Standardization Work* (2012); the German DIN 820 (2009), and the British Standards Institute, *BS 0:2011, A standard for standards: principles of standardization* (2011).

³ See eg Errol Meidinger, 'The Administrative Law of Global Public-Private Regulation: The Case of Forestry', (2006) 17 *European Journal of International Law* 47; Lars Gulbrandsen, 'Accountability Arrangements in Non-State Standards Organizations: Instrumental Design and Imitation', (2008) 15 *Organization* 563; Alan Richardson and Burkhard Eberlein, 'Legitimizing Transnational Standard-setting: The Case of the International Accounting Standards Board', (2011) 98 *Journal of Business Ethics* 217, and Nicolas Hachez and Jan Wouters, 'A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GLOBALG.A.P.', (2011) 14 *Journal of International Economic Law* 677.

⁴ The *potential* for legitimate transnational private governance is, however, widely seen to lie in the very absence of traditional democratic hierarchical control: 'the necessity for transnational private regulatory regimes to find alternative sources of legitimacy based in procedural and other mechanisms may enable them to achieve stronger legitimacy than inter-governmental regimes.' Colin Scott, Fabrizio Cafaggi & Linda Senden, 'The Conceptual and Constitutional Challenge of Transnational Private Regulation', (2011) 38 *Journal of Law and Society* 1, 19. For 'comparisons' of legitimacy in public and private settings, see eg Steven Bernstein, 'Legitimacy in intergovernmental and non-state global governance', (2011) 18 *Review of International Political Economy* 17, and Ingo Take, 'Legitimacy in Global Governance: International, Transnational and Private Institutions Compared', (2012) 18 *Swiss Political Science Review* 220.

⁵ A striking example is the recent effort of ISO to distinguish its work from that of the ISEAL Alliance on the basis of its adherence to WTO disciplines. 'Any organization can claim to have developed a "standard"...but not all standards are created equal.' ISO, *International standards and 'private standards'*, Geneva 2010. Compare *Columbia Specialty Co v Breman* (1949) 90 Cal App 2d 372, 378: 'Manifestly, any association may adopt a "code" but the only code that constitutes the law is a code adopted by the people through the medium of their legislatures.'

⁶ Graft-Peter Callies and Peer Zumbansen, *Rough Consensus and Running Code- A Theory of Transnational Private Law* (Oxford: Hart 2010), 101, on the basis of the mechanisms identified and described by Ralf Michaels, 'The Re-State-ment of Non-State Law', (2005) 51 *Wayne Law Review* 1209, 1228 *et seq*. As these authors are aware, Robert Cover famously called the tendency 'jurispathos.' Robert Cover, 'Nomos and Narrative', (1983) 97 *Harvard Law Review* 4.

⁷ The most glorious example of this is surely still the evergreen of the Kansas Supreme Court in *State v Crawford*, 177 P 360, 361 (Kan 1919) ('If the Legislature desires to adopt a rule of the National Electrical Code as a law of this state, it should copy that rule, and give it a title and an enacting clause, and pass it through the Senate and the House of Representatives by a constitutional majority and give the Governor a chance to approve or veto it, and then hand it over to the secretary of state for publication.')

⁸ Gunther Teubner, 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy', (1997) 31 *Law and Society Review* 763, 768.

world.¹ One can hardly place normative requirements on the production of facts, even 'legal facts.'² And applying a coat of constitutionally approved veneer to private rulemaking may conceal cracks in the wall, but does nothing to improve construction.³

Both the WTO Agreements on Sanitary and Phytosanitary Measures (SPS) and on Technical Barriers to Trade (TBT) rely on 'international standards' in order to achieve harmonization and market integration.⁴ They take, however radically different approaches to the definition of these standards. The SPS Agreement grants a monopoly, in their respective areas of competence, to designated international bodies, most notably the *Codex Alimentarius* for food safety, and gives the SPS Committee the power to 'identify' other organizations for matters not covered by these bodies.⁵ This arrangement, one could argue, is simply a matter of parties to the Treaty consent to delegate powers to public international organizations they themselves are (usually) members of. The TBT Agreement, on the other hand, fails to define what an 'international standard' is, other than stipulating that an *international* standard is one produced by an organization whose membership is open to the relevant bodies of at least all Members. The explanatory note in its Annex 1.2 further notes that, while 'standards prepared by the international standardization community are based on consensus, this Agreement covers also documents that are not based on consensus.'⁶ The TBT Agreement conspicuously fails to designate or even mention the most obvious source of international product standards, the International Organization for Standardization (ISO). It seems clear, though, that the TBT Agreement contemplates the use of *private* international standards.⁷ In 2000, the TBT Committee enunciated a set of principles for the development of international standards including transparency, openness, impartiality and consensus.⁸

EC- Sardines dealt with a *Codex* standard for purposes of Article 2.4 TBT, requiring Members to use relevant international standards 'as a basis' for their technical regulations. This particular standard, argued the EC, was not adopted by consensus and should thus not be considered a 'relevant international standard.' The Panel dismissed the TBT Committee's Decision as a mere 'policy statement of preference', read the explanatory note in Annex 1.2 as acknowledging that consensus 'may not always be achieved,' and concluded that 'international standards that were not adopted by consensus are within the scope of the TBT Agreement.'⁹ The Appellate Body readily upheld the conclusion. Part of the Panel and the AB's thinking, one would assume, was underpinned by the overlap between the SPS and TBT regimes. To demand 'consensus' from *Codex* under the

¹ Martti Koskeniemi, 'The Fate of Public International Law: Between Politics and Technique', (2007) 70 *Modern Law Review* 1, 23 (criticizing legal pluralism for 'the ways in which it ceases to make demands on the world.')

² See Joost Pauwelyn, 'Is it International Law or Not and Does It Even Matter?', in Joost Pauwelyn *et al.*, (eds.), *Informal International Lawmaking* (Oxford: OUP 2012), 125 (distinguishing between 'being law' and 'having legal effects', and between law, facts and 'legal facts').

³ In the European Union, the IAS Regulation obliges all publicly traded companies in the European Union to prepare their accounts in accordance with international accounting standards, issued or adopted by the International Accounting Standards Board, a private international body. Articles 2 and 4, Regulation 1606/2002 on the application of international accounting standards, (2002) OJ L 243/1. These standards end up as Community law in the form of Regulations if the European Commission 'endorses' them, acting on the opinion of regulatory committee on the view of a non-governmental advisory group which, in turn, gives its view on the work of a private body which, in turn, gives its opinion on the actual standards produced by the IASB. *Ibid.*, Article 6 (2), and Commission decision setting up a Standards Advice Review Group to advise the Commission on the objectivity and neutrality of the European Financial Reporting Advisory Group's (EFRAG's) Opinion, (2006) L 199/3.

⁴ The system has been called 'a slow motion *coup d'état* against accountable, democratic governance.' See Lori Wallach, 'Accountable Governance in the Era of Globalization: the WTO, NAFTA, and International Harmonization of Standards', (2002) 50 *University of Kansas Law Review* 823, 826. See further eg Robert Howse, 'A new device for creating international legal normativity: the WTO Technical Barriers to Trade Agreement and "International Standards"', in Christian Joerges and Ernst-Ulrich Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford: Hart 2006) 383; Filippo Fontanelli, 'ISO and Codex standards and international trade law: what gets said is not what's heard', (2011) 60 *International & Comparative Law Quarterly* 895, and Steven Bernstein and Erin Hannah, 'Non-State Global Standard Setting and the WTO: legitimacy and the need for regulatory space', (2008) 11 *Journal of International Economic Law* 575.

⁵ Annex 1.3, SPS Agreement. For animal health, the Agreement refers to standards developed under the auspices of International Office of Epizootics; for plant health, to standards developed under the auspices of the Secretariat of the International Plant Protection Convention. See generally eg Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (Oxford: OUP 2007), 245 *et seq.*

⁶ Annex 1.2, TBT Agreement.

⁷ It certainly seeks to draw private *national* bodies into the harmonization drive. The Agreement annexes a Code of Good Practice for the Preparation, Adoption and Application of Standards, and requires Members in Article 4 to 'take such reasonable measures as may be available to them' to ensure that non-governmental bodies accept the Code.

⁸ The Decision appears as Annex 4 to G/TBT/9, the Second Triennial Review on the Operation and Implementation of the Agreement on Technical Barriers to Trade, 13 November 2000.

⁹ *EC- Sardines*, WT/DS 231/R, 29 May 2002, para 7.91.

TBT Agreement, where this is obviously not required for *Codex* standards to qualify as 'international standards' under the SPS Agreement, would have been awkward. To avoid differentiating procedural requirements of the very same organization under two different Treaties, the AB *could have* differentiated procedural requirements from different organizations under the same Treaty: Annex 2.1 could, after all, fairly plausibly be read to suggest that standards produced by the *private* standardization community are- and should be- adopted by consensus, whilst *public* organizations do- and may- adopt standards in ways falling short of consensus.¹ This, however, the Panel and the AB refused to do, with the result that the TBT Agreement seemed to require rather less of *private* international standardization than what the ISO demands of itself.² The AB at least seems to have been aware of the problem. It emphasized that its conclusion

is not intended to affect, in any way, the internal requirements that international standard-setting bodies may establish for themselves for the adoption of standards within their respective operations. In other words, the fact that we find that the TBT Agreement does not require approval by consensus for standards adopted by the international standardization community should not be interpreted to mean that we believe that an international standardization body should not require consensus for the adoption of standards. That is not for us to decide.³

Sardines stands as a prime example of *jurispathos* in global governance: it reduces 'international standards' to mere facts, and in the process both condemns States to conform their regulations to a normative benchmark which itself is unencumbered by any normative requirement whatsoever, *and* denies the potential of international law itself to demand minimum guarantees of legitimate rulemaking to bodies the WTO has delegated powers to.

The recent litigation between the US and Mexico in *Tuna II* offered an opportunity to revisit the matter. There, at issue was the status under the TBT Agreement of resolutions adopted under the Agreement on the International Dolphin Conservation Program, another public network. The Panel 'acknowledged' the AB's statement in *Sardines*, but observed 'nonetheless' that the resolutions at issue *were* adopted by consensus. It then went on, in the very next paragraph, to classify them as 'standards' for the purposes of the TBT Agreement.⁴ The Panel, deliberately one has to assume, left the import of its finding of 'consensus' for its conclusion perfectly ambiguous by noting it came to it 'from an analysis of the *content*' of the material at issue.⁵ The Appellate Body took a more radical step: it explicitly overturned *Sardines* by elevating the TBT Committee's Decision to the status of 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' within the meaning of Article 31 (3)(a) of the Vienna Convention on the Law of Treaties.⁶ Thus equipped, it could deduce from the TBT Agreement itself 'the imperative that international standardizing bodies ensure representative participation and transparency in the development of international standards.'⁷

However stunted, this brings us closer to establishing a 'rule of recognition' through which private governance regimes have to *earn* legal recognition by fulfilling requirements that are inherent in the very concept of law. For Kingsbury, that requirement is encapsulated by the notion of 'publicness', by which is meant 'the claim for law that it has been wrought by the whole of society, by the public, and the connected claim that law addresses matters of concern to the society as such.'⁸ The key idea, strangely familiar to private international lawyers, is that

¹ See Harm Schepel, 'The Empire's Drains: Sources of Legal Recognition of Private Standardization under the TBT Agreement', in Christian Joerges and Ernst-Ulrich Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford: Hart Publishing, 2006), 397.

² See ISO/IEC Directives Part I: procedures for the technical work (2011).

³ EC- *Sardines*, WT/DS 231/AB/R, 26 September 2002, para 227.

⁴ US- *Tuna Label*, WT/DS381/R, 15 September 2011, paragraphs 7.676 and 7.677.

⁵ *Ibid.*, paragraph 7.677. Emphasis added.

⁶ US- *Tuna Label*, WT/DS381/AB/R, 13 June 2012, paragraph 372.

⁷ *Ibid.*, paragraph 379.

⁸ Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law', (2009) 20 *European Journal of International Law* 23, 31. The reference is to Jeremy Waldron, 'Can There Be A Democratic Jurisprudence?', (2009) 58 *Emory Law Journal* 675.

in choosing to claim to be law, or in pursuing law-like practices dependent on law-like reasoning and attractions, or in being evaluated as a law-like normative order by other actors determining what weight to give to the norms and decisions of a particular global governance entity, a particular global governance entity or regime embraces or is assessed by reference to the attributes, constraints and normative commitments that are immanent in public law.¹

2. INVESTMENT ARBITRATION AS GLOBAL GOVERNANCE

The *lex mercatoria* has long bewitched and bewildered international private lawyers and legal theorists: does it even exist, is it 'law', what does it consist of, should it be recognized by domestic legal systems?² Under conditions of economic globalization, business transactions among 'strangers' are increasing rapidly. From that light, it should not be surprising that there has been a boom in international commercial arbitration- and that international arbitration now has taken on a significant role in global economic governance.³ Perhaps less obvious is the recent rapid growth of the investment arbitration industry, coming on the heels, with a logical lag, of the explosion of the number of Bilateral Investment Treaties concluded in the 1990s.⁴ On the one hand, investment arbitration borrows largely from the machinery, ethos, and even personnel of commercial arbitration: on the other hand, investment arbitration applies public international law and cannot rely on the doctrines of party autonomy and privity in the same way as commercial arbitration does. Indeed, it has been suggested with force that investment arbitration should really be seen as a species of public law- a global administrative of sorts.⁵

This is not, obviously, the place for an assessment of the investment arbitration regime.⁶ Instead, one issue with particular implications for the regime's interaction with other legal orders will be briefly discussed. Investment treaties generally provide for two different kinds of standards of protection. The *relative* norm of non-discrimination prohibits host states from treating foreign investors worse than domestic investors. The *absolute* obligations of compensation for expropriation and of providing 'fair and equitable' (FET) treatment, on the other hand, apply regardless of whether domestic investors are entitled to similar treatment under domestic law. For the FET standard, in particular, there was traditionally little doubt that it was triggered only in cases where the treatment afforded the investor was so awful and shocking that it would have offended international fundamental rights standards regardless of the nationality of the investor. In the hands of investment arbitration tribunals, however, the FET standard has been stretched far beyond the minimum standard of treatment of aliens under customary international law, and has been taken to imply an obligation on the host state to guarantee a 'stable legal and business framework.'⁷ This, in turn, leads to the situation where investment tribunals hold host States to fall foul of international law obligations for treatment afforded *foreign* investors that would raise no issues at all under international law when afforded to domestic investors: an 'international public policy' exception of sorts to the application of domestic regulation to foreign nationals.

Tribunals have taken to defend this stance theoretically by an argument based on the absence of participation rights for foreigners in the political process.⁸ As the *Loewen* Tribunal argued in the context of NAFTA's Chapter 11, the object of investment law is to 'protect outsiders who do not have access to the political or other avenues

¹ *Ibid.*, 30. See also Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', (2008) 9 *German Law Journal* 1375, 1384.

² See eg Gunther Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems', (1997) 45 *American Journal of Comparative Law* 149, and Ralf Michaels, 'The Real Lex Mercatoria: Law Beyond the State', (2008) 14 *Indiana Journal of Global Legal Studies* 447.

³ See eg A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: CUP 2003), and Walter Mattli and Thomas Dietz (eds.), *International Arbitration and Global Governance* (Oxford: OUP 2014).

⁴ See eg Jeswald Salacuse, *The Law of Investment Treaties* (Oxford: OUP 2010).

⁵ See Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: OUP 2008), and Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Oxford: Hart 2012).

⁶ See eg M. Sornarajah, 'Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness', in Kate Miles and Chester Brown (eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge: CUP 2012), 631.

⁷ See eg Ronald Kläger, 'Fair and Equitable Treatment' in *International Investment Law* (Cambridge: CUP 2011).

⁸ See David Schneiderman, 'Compensating for Democracy's "Defects": The Case of International Investment Law', in Christian Joerges and Carola Glinski (eds.), *The European Crisis and the Transformation of Transnational Governance* (Oxford: Hart 2014), 47.

by which to seek relief from the nefarious practices of governmental units.¹ Usually, the argument is limited to balancing exercises between the legitimate property rights of investors on the one hand, and the legitimate right of States to legislate and regulate in the public interest, on the other. As the *Quasar* Tribunal recently held in the context of the alleged expropriation of *Yukos*:

Moreover, where the value of an investment has been substantially impaired by state action, albeit a bona fide regulation in the public interest, one can see the force in the proposition that investment protection treaties might not allow a host state to place such a high individual burden on a foreign investor to contribute, without the payment of compensation, to the accomplishment of regulatory objectives for the benefit of a national community of which the investor is not a member.²

The *Yukos* litigation, however, pushed the argument much further. After all, the very same facts had been considered by the European Court of Human Rights which had held *against* a finding of an infringement of Article 1 Protocol 1 of the ECHR.³ It was thus up to investment tribunals to explain why investment treaties would go further than human rights law in protecting the property of foreign investors. The *Quasar* Tribunal came up with this:

human rights conventions establish minimum standards to which all individuals are entitled irrespective of any act of volition on their part, whereas investment-protection treaties contain undertakings which are explicitly designed to induce foreigners to make investments in reliance upon them. It therefore makes sense that the reliability of an instrument of the latter kind should not be diluted by precisely the same notions of "margins of appreciation" that apply to the former.⁴

This is, of course, an extraordinary ruling- from a very distinguished Tribunal. The implication is that international investment law affords foreign investors standards of protection that are higher not just than the ones demanded of States in the treatment of their own nationals, but higher than the ones demanded of States under internationally agreed human rights standards. It poses several questions, both general and specific, about the interaction between investment law and other legal orders. Is a court, when called upon to enforce an award based on this type of reasoning, to accept that a foreign State is to be liable for treatment to an investor that, had it occurred in its own jurisdiction at the hands of its own public authorities, would not have given rise to concerns not just under domestic law but under international human rights law? Or, in the context of European Union law, can this reasoning to be reconciled with the Court of Justice's insistence on the autonomy of EU law in Opinion 2/13?

In that Opinion, the Court of Justice famously objected to arrangements for the accession of the EU to the ECHR on the basis that it would affect the autonomy of EU law. This may seem strange, at first sight, in the light of Article 53 of the Charter of Fundamental Rights of the European Union, which reads as follows:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Obviously, then, the rights recognized by the ECHR itself can be no cause of concern. The Court of Justice, however, was anxious about the effects of the similar 'valve' clause in the Convention, Article 53 ECHR, which reads:

¹ *Loewen v United States*, Award of 26 June 2003, ICSID Case No ARB (AF)/98/3, 224.

² *Quasar v Russia*, Stockholm Chamber of Commerce, Award, 20 July 2012, paragraph 23.

³ ECtHR, *OAO Neftyanaya Kompaniya Yukos v Russia*, Application 14902/04, Judgment of 20 September 2011.

⁴ *Quasar v Russia*, Stockholm Chamber of Commerce, Award, 20 July 2012, paragraph 22.

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

The Court's fear is that, through the 'backdoor' of Article 53 ECHR, standards of protection of fundamental rights norms could be 'imported' into the EU legal order that go beyond those of the ECHR itself and that go beyond what 'is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.'¹ In the light of Opinion 2/13, then, it is hard to see how the Court of Justice could endorse the conclusion by the European Union of Investment Treaties that grant foreign investors portable rights to property that go far beyond either Article 16 of the Charter or Article 1 Protocol 1 of the ECHR.

CONCLUSION

Private global governance and legal fragmentation have led to a world in a condition of legal pluralism. Different normative orders with competing claims and logics all strive for autonomy. Some of these regimes- the ones at issue in this paper- base their claims on their responsiveness to the needs of the global economy to isolate market-conform structures from the distortions caused by political contestation. But facile distinctions between 'the market' and politics, between nationals and foreigners, and between (market-facilitating) private law and (market-correcting) public law have been fatally undermined by the forces of globalization. Private governance regimes strive for acceptance and recognition: if we are to 'make demands on the world', private international law has a vital role to play in ordering the interaction of the various claims exerted by diverse normative orders, and in setting out requirements for acts of recognition.

As a discipline and a field of practice, private international law is used to the balancing acts involved with the need to take into account the effects of legislation on those beyond the realms of the political community by whom and in whose name the legislation was enacted; it is also attuned to the needs and demands of 'others' seeking protection by their own law in the face of adverse impacts of being subjected to foreign legal systems. If we are to avoid either autonomy or subjection, and if we are to manage political conflict through the mediation of the law, we need productive mutual interaction of legal orders, not mutual indifference and political domination in the name of its absence. In that sense, private international law is a vital regulatory tool for global governance.

¹ CJEU, Opinion 2/13 of 18 December 2014, paragraph 189.

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Biography

Dr Harm Schepel is Professor of Economic Law and Director of Law Programs at BSIS. He holds degrees from the University of Amsterdam (Drs.), the International Institute for the Sociology of Law in Oñati (LLM), and the EUI Florence (PhD), and was attached to the Centre for European Law and Politics in Bremen and the Centre de Théorie Politique at the ULB before joining Kent Law School in 2000. He has held visiting positions at the Catholic University of Portugal, the University of Amsterdam, and Columbia Law School. He sits on the Board of editors of the *European Law Journal*.

Session III - Business and consumer's concern

The European small claims procedure and the commission proposal of 19 November 2013?

Pablo Cortés

Upon request by the JURI Committee, this study provides an analysis of the operation of the Regulation for a European Small Claims Procedure. It examines the 2013 Commission proposal and its rationale for the changes while it also identifies a number of recommendations that should be included in the amendments of the Regulation. The study highlights that more efforts should be made in order to facilitate enforcement in consumer cases as well as in promoting and interconnecting out-of-court processes with the European Small Claims Procedure, particularly when these processes operate at national level and rely on distance means of communications.

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
ECC-Net	European Consumer Centre Network
ESCP	European Small Claims Procedure
FIN-Net	Financial Dispute Resolution Network
ICT	Information and Communications Technology
ODR	Online Dispute Resolution
The Regulation	Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, (OJ 2007 L 1999/1)
Brussels I	Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12/1)
Brussels Ia	Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L351/1)

EXECUTIVE SUMMARY

Background

The European Small Claims Procedure Regulation (EC) 861/2007, implemented since January 2009, allows cross-border litigants to use a European written process with standard forms. The European procedure is available in all the Member States, except in Denmark, as an alternative to the national procedure for resolving civil claims under €2,000. The Regulation aims to provide an informal procedure, which does not require parties to have legal representation and sets short deadlines to ensure the expeditious resolution of cross-border claims. Judgments from the European procedure are enforceable in another Member State without the need for a declaration of enforceability (*exequatur*). After a number of studies were carried out, the European Commission decided in November 2013 to present a legislative proposal to expand its use.

Aim

- To examine critically the European Small Claims Procedure Regulation (EC) 861/2007 and the Commission proposal of 19 November 2013 as well as the existing studies which informed the Commission's proposal.
 - To propose what further issues should be included when amending the Regulation.
 - The study briefly examines best practices in domestic small claims procedures in England and Ireland, particularly in the context of informal dispute settlement options, and proposes pathways so that the two redress options can complement each other.

Proposals

- Commission's proposal is welcome, but this study found that more has to be done in terms of facilitating parties with information on where to obtain further assistance to enforce a judgment and in enabling links with ADR schemes.
- The synergy between the ESCP and ADR mechanisms would increase awareness and empower EU citizens.
- Consumers who cannot resolve their cross-border complaints through the European ODR platform should be invited to submit their claims directly, and preferably online, to the competent court.
- Claim and response forms should include clear provisions requesting parties to consider the use of ADR before and during the ESCP.
- National court-annexed ADR schemes that operate through distance means of communication should be extended for cross-border claims. These schemes should cooperate with the ECCs and nationally certified ADR schemes in order to provide these services in English and in other major EU languages.

GENERAL INFORMATION

KEY FINDINGS

- The European Small Claims Procedure (ESCP) is offered as an alternative to the national procedures to resolve cross-border claims up to €2,000.
- It is a written procedure that only allows oral hearings in exceptional circumstances.
- The procedure is intended to be informal. Litigants can participate without legal representation using standard forms available in all the EU official languages.
- Judgments are enforceable without the need for an intermediary procedure to declare their enforceability.

Small claims procedures provide a middle ground between formal litigation and Alternative Dispute Resolution (ADR) methods, where low-value disputes can be resolved in courts through a less formal and expeditious judicial procedure.¹ The European Small Claims Procedure (ESCP) is **intended to be a user-friendly procedure** that allows parties to resolve cross-border low-value civil and commercial disputes (**up to €2,000**) through a simplified procedure **without the need for legal representation**.² This procedure is usually carried out **entirely in writing**, using standard forms available online in all languages.³ The ESCP is available to parties as an **alternative to the procedures existing under the laws** of the EU countries.

Member States determine which national courts have jurisdiction to give judgment in the ESCP and the Member States jurisdiction is subject to the rules of the Brussels I Regulation.⁴ Subject to the exceptions laid down in the Brussels I, the *actor sequitur forum rei* principle applies, meaning that defendants shall normally be sued in the courts of the Member State where they are domiciled. An important exception applies to consumers, who in many cases are given the option of bringing claims to their local courts.⁵ Member States must allow **the submission of claims and other documents by post or via electronic means**, removing the need to travel to another country. **Oral hearings can only be required in exceptional circumstances**, and they are encouraged to be held using distance means of communication in order to obviate the parties' need to travel to the hearing. Furthermore, the main advantage of the ESCP is that **judgments can be enforced without the need for an intermediary procedure to declare their enforceability** –i.e. the *exequatur*.

¹ P. Cortés 'Small Claims in Ireland and the EU: The Need for Synergy between National Courts and Extrajudicial Redress' in N. Neuwahl and S. Hammamoun *The European Small Claims Procedure and the Philosophy of Small Change* (Les Éditions Thémis, 2014).

² Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, O.J. 2007 L 1999/1. Hereinafter, ESCP.

³ P. Cortés 'Does the Proposed European Procedure Enhance the Resolution of Small Claims?' (2008) 27(1) *Civil Justice Quarterly* 83-97.

⁴ Brussels I Regulation (EC) 44/2001.

⁵ Art. 15 Brussels I Regulation allows consumers to use their own jurisdiction when the business activity had been directed to the consumers' domicile. See generally, N. Marchal Escalona 'La Protección del Consumidor en los Litigios Transfronterizos de Escasa Cuantía en la Unión Europea y en América Latina' in F. Esteban de la Rosa, *La Resolución Alternativa de Litigios de Consumo en los Estados Miembros de la UE: Impacto del Nuevo Derecho Europeo* (2015, Tirant) and R. Miquel Sala, *El Proceso Europeo de Escasa Cuantía* (Aranzadi, 2009) 81-85.

1. EVALUATION OF THE EUROPEAN SMALL CLAIMS PROCEDURE

KEY FINDINGS

- On average the ESCP has reduced the cost of litigating cross-border cases up to 40% and the duration from 2 years and 5 months, to 5 months only –while this is a significant improvement, it is often too expensive and too long for many small claims.
- The use of the ESCP has been very low.
- It removes the parties' requirement to have legal representation –though in practice one third of users employ a lawyer.
- Lack of legal representation can impact on the principle of equality of arms of an adversarial judicial process.
- The main obstacles identified by the Commission were the lack of awareness about its existence as well as unpredictable costs and time in litigating small claims.
- Unlike with ADR processes, EU citizens still find the ESCP too complicated and they do not feel confident to start it on their own.
- It will be important that research is carried out to find out who the beneficiaries of the ESCP are –as currently it is unclear whether these are consumers, SMEs or others –and which steps, if any, can be taken to make the procedure more user-friendly, faster and more cost-effective.
- ECC-Net and many other consumer bodies have observed that the main obstacle to the effectiveness of the ESCP is the enforcement in consumer cases.
- There is a need to complement the ESCP with more effective and informal out-of-court redress options.

The ESCP increases access to justice as it makes it easier to bring a cross-border claim within the EU. The Commission has reported that **on average the ESCP has reduced the cost of litigating cross-border cases up to 40% and the duration from 2 years and 5 months, to 5 months only.**¹ This is a significant improvement, but it is still too expensive and too long for many small claims, which could benefit from quicker and more informal resolution. Indeed, during this time consumers complainant will feel frustrated and they will be encouraged to publish negative postings that will damage businesses reputation, while businesses complainants with unpaid invoices may not survive the wait.

Two-thirds of those who used it were overall satisfied with the procedure.² Some of the most obvious advantages are that the ESCP offers claimants a judicial procedure that is the same in every Member State. It is also a fast track process with strict deadlines.

The Regulation removes the parties' requirement to have legal representation –though in practice one third of users had to employ a lawyer.³ This feature of the Regulation has affected the national small claims procedures –for instance, in Spain the requirement to have legal representation was increased for claims over €900 to claims over €2000.⁴ In addition, the claim and response forms are available online in all the EU languages and just over half of the users (62%) found them easy to fill in.⁵ The ESCP thus attempts to facilitate

¹ European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) 861/2007 of the European Parliament and the Council establishing a European Small Claims Procedure COM(2013) 795 final. Hereinafter, the Commission Report.

² Special Eurobarometer 395, European Small Claims Procedure (April 2013). Hereinafter, Eurobarometer 395. Available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_395_en.pdf.

³ Ibid.

⁴ Arts. 23, 31 and 539 Ley 1/2000 de Enjuiciamiento Civil. See generally, J.C. Ortiz, 'La Aplicación en España de los Procesos Europeos Monitorio y de Escasa Cuantía: La Reforma de la Legislación Española en Virtud de la Ley 4/2011, de 24 d Marzo' (2011) 24 *Revista General de Derecho Procesal* 2.

⁵ Also 16% of users reported difficulties in filling-in the forms. See Commission Report p. 6.

self-representation, and so it does not require parties to make any legal assessment to support their claims. It is however obvious that submitting a claim presupposes that claimants are at least aware of their legal rights.¹ It must be noted that while limiting and discouraging legal representation may keep costs down, making the process more proportionate to the value of the claim, it could also raise access to justice concerns. Indeed, consumers as claimants are more likely self-represented, which **can impact on the principle of equality of arms in an adversarial judicial process** to their detriment.

Great expectations have been put on the ESCP to increase access to justice for European litigants with cross-border claims.² However **its use has been very low** –it has been estimated 3,500 cases in the year 2012.³ **The three main obstacles identified by the Commission were: (i) the lack of awareness about the ESCP; (ii) disproportionate costs and time in litigating small claims; and (iii) the lack of transparency about the costs of litigation and the methods of payment.**⁴

Research carried out in the EU concluded that there was a **significant lack of awareness**,⁵ where only 12% of EU citizens are aware of the ESCP. More surprisingly, only half (53%) of the judges and courts of the Member States are aware of the ESCP; and out of those courts that are aware, many are not fully informed about the ESCP.⁶ The European Parliament has called for the Commission to take immediate steps to ensure that consumers and businesses are made aware of the availability of the ESCP.⁷ In its response, the Commission developed a number of activities to increase awareness:⁸ the publication of general information about the ESCP and the court forms in various European websites (e.g. European Judicial Network, European Judicial Atlas, and e-Justice portal); running a number of training modules for judges and lawyers and workshops for trainers; the provision of a user guide for citizens and lawyers; and financial support to the European Consumer Centres (ECCs), which in turn provide consumers assistance on how to participate in the ESCP.

The other two obstacles identified are related to the **unpredictability of costs and time employed for resolving a cross-border claim** of small value. Parties often face uncertainty about the potential costs related to translations, travelling, lawyers' fees, and there is a lack of clarity about the details of the procedure.⁹ Previous research has already noted that national small claims procedures generally only benefit well-informed and articulate individuals.¹⁰ As a result, not only vulnerable consumers, but a large portion of society may not see the ESCP as an accessible redress option, which explains why research shows that the ESCP is rarely used.¹¹ This situation contrasts with that of some national small claims procedures and ADR processes which are proving to be more effective.¹²

¹ M. Loos, 'Individual Private Enforcement of Consumer Rights in Civil Courts in Europe' Centre for the Study of European Contract Law Working Paper Series No. 2010/01. p.4

² The European e-Justice Portal is a single point of entry to all relevant information about the ESCP. Forms to be used in the European Small Claims Procedure can be accessed at https://e-justice.europa.eu/content_small_claims_forms-177-en.do and to find out which court has jurisdiction over a ESCP see http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_courtsjurisd_en.jsp#statePage0

³ Deloitte, 'An Assessment of the Socio-Economic Impacts of the Policy Options for the Future of the European Small Claims Regulation' Final Report (19 July 2013) p. v. Hereinafter, the Deloitte Report.

⁴ Ibid.

⁵ Ibid and ECC-Net, European Small Claims Procedure Report (September 2012). Hereinafter ECC-Net. Available at http://ec.europa.eu/consumers/ecc/docs/small_claims_210992012_en.pdf

⁶ European Commission, Impact Assessment of the Proposal for a Regulation of the European Small Claims Procedure SWD(2013) 460, p. 24. Hereinafter, Impact Assessment.

⁷ See European Parliament resolution of 25 October 2011 on Alternative Dispute Resolution in Civil, Commercial and Family Matters (2011/2117(INI)) para. 40.

⁸ Commission Report p. 8.

⁹ F. Alleweldt et al, 'Cross-Border Alternative Dispute Resolution in the European Union' IMCO (June 2011) IP/A/IMCO/ST/2010-15, pp. 52-63; ECC-Net (2012) pp. 3-6.

¹⁰ J. Balwin 'The Small Claims Procedure and the Consumer' (1995) Office of Fair Trading, London. See also F. Cownie, A. Bradney and M. Burton *English Legal System in Context* (5th ed, 2010, OUP) 208; C. Hodges, I. Benohr, and N. Creutzfeldt-Banda, *Consumer ADR in Europe* (2012, Hart) 397.

¹¹ Eurobarometer 395 p. 82; Hodges et al. (2012) op. cit. p. 127; European Parliament, Cross-border ADR Final Report (2011) IP/A/IMCO/ST/2010-15. pp. 52-63.

¹² ECC Ireland, The Development of Alternative Dispute Resolution in Ireland – An Analysis of Complaints, Best Practices and Future Recommendations, 2008.

Another key reason that neither the Commission, nor the Deloitte report mentioned as a main obstacle, is that, **unlike with ADR processes, EU citizens still find the procedure too complicated and they do not feel confident to start it on their own.**¹ Accordingly, before further investment is poured into the system to raise awareness **it will important that research is carried out first to find out who the beneficiaries of the ESCP are –as currently it is unclear whether these are consumers, SMEs or others– and which steps, if any, can be taken to make the procedure more user-friendly, faster and more cost-effective.**²

For instance, as it is discussed below in this report, both, the **Eurobarometer and the Deloitte report found that there were no problems with the enforcement of judgments.**³ **This finding clearly suggests that the ESCP is mainly used by businesses** which have legal representation and are often required to sue in the defendant's forum. **Hence, it is not used by consumers in their own jurisdictions,** because if they used it, then they will surely have found great difficulties in seeking the enforcement of judgments in a different language and through a foreign enforcement procedure. This is why the **ECC-Net and many other consumer bodies have observed that the main obstacle to the effectiveness of the ESCP is the enforcement.**⁴

Although there is limited empirical research comparing the ESCP with extra-judicial or ADR options (e.g. mediation or ombudsman schemes) to resolve low value claims, it appears that the latter, when available, is a more informal and cost-effective option that offers a higher degree of satisfaction amongst its users.⁵ Judicial and ADR options (saved for arbitration) are not often mutually exclusive, rather they complement each other. Indeed, best practices recommend parties to consider the most informal and cost-efficient way of resolving disputes, which is often ADR, and only when they cannot find a satisfactory resolution, then to choose the court avenue. The European Commission also concluded that **there is a need to complement court access to justice with more effective and informal out-of-court redress options.**⁶ Yet, with regards to the ESCP, there does not seem to be any articulated channels to complement these redress options.

2. COMMISSION'S PROPOSAL OF 19 NOVEMBER 2013

KEY FINDINGS

- The Commission proposal amends the European Order for Payment so that, when a defence is submitted, the procedure will continue through the ESCP when the claim falls within its scope.
- Lifting the financial limit from €2,000 to €10,000 will benefit mainly small and medium enterprises, while the costs of litigating these claims are likely to remain similar. The threshold should be the same for natural and legal persons.
- Expanding the definition of cross-border cases to include all cases that are not entirely domestic. With the entry in force of Brussels I Bis, the removal of the exequatur from national procedures may encourage the use of the national small claims procedures instead of the ESCP, especially so when the claimant is able to sue from his own jurisdiction. If this happens, it may put an additional burden on defendants, who in most cases will not have benefited from participating in a written procedure.
- Requiring courts to use electronic means of communication is welcome but it will require investment and Member States may need additional time to install the new equipment. A pan European system, such as the e-Codex pilot, or a centralised single national court would benefit from economies of scale and the use of a specialised court.

¹ Eurobarometer 395 p. 79.

² I would like to thank Prof Christopher Hodges for raising this point.

³ Eurobarometer 395 p. 8 and Deloitte Report p. v.

⁴ ECC-Net, 'European Small Claims Procedure Report' (2012) p. 22. See also the discussion below in part 3 of this Study.

⁵ Hodges et al (2012) op. cit. p. 385.

⁶ European Commission Staff Working Paper, Impact Assessment Accompanying the document of the Proposal for a Directive on Alternative Dispute Resolution for Consumer Disputes and the Proposal for a Regulation on Online Dispute Resolution for Consumer Disputes SEC(2011) 1408 final.

- Requiring courts to use distance means of communication for conducting oral hearings and taking of evidence will remove the need to travel for oral hearings. The right to a fair trial will be respected as long as the individuals retain the right to appear in court.
- A €35 as the minimum fee can be effective in discouraging frivolous claims while allowing small claims. However, setting a maximum limitation on court fees at 10% may still be too high for the highest value claims. The cap could be set by the Member States, but it should never be higher than that required in their national procedures. Alternatively, a progressive fee scheme should be established, lowering the cap to 5% when claims go over €2,000. To ensure the effectiveness of the processes, these caps could also be extended to the enforcement process.
- Requiring Member States to ensure the availability of distance means of payment of court fees may find opposition in some Member States, but remains essential to enable an effective ESCP.
- Limiting the requirement to translate the part of the judgment of Form D will cut down on the costs of enforcement.
- Increasing the information obligations in respect of court fees, methods of payment of court fees and the availability of assistance in filling in the forms are a welcome development. But it remains unclear whether a party who has to submit the claim or a response in another jurisdiction would be able to obtain this assistance in his local court. Also, lack of information on enforcement can be an obstacle.

On 19 November 2013 the Commission published a proposal to amend the ESCP Regulation.¹ In doing so, it has also proposed to **reform the European Order for Payment so that when a defence is submitted by the debtor**, instead of going automatically to the national procedure, **it will go to the ESCP** if the claim falls within the scope of the ESCP Regulation.² This is a welcome change, but it will not be addressed in this study, which focuses exclusively on the amendments made to the ESCP. The Commission has proposed the following key amendments:

- Lifting the financial limit from €2,000 to €10,000;
- Expanding the definition of cross-border cases;
- Requiring more use of electronic communication;
- Requiring courts to use means of distance communication for conducting oral hearings and taking of evidence;
- Setting a maximum limitation on court fees at 10% of the value of the claim;
- Requiring the availability of distance means of payment of court fees;
- Limiting the translation of the enforcement form to the actual judgment;
- Incrementing the information obligations of the Member States

2.1 Increasing the Small Claims Limit to €10,000

The ESCP Regulation has maintained the initial economic threshold at €2,000. This limit contrasts with that of some Member States, which have increased their limits for their national small claims procedures.³ The Commission noted that these changes have left the current limit outdated for dealing with civil and commercial cross-border claims.⁴ Arguably, this limit has always been too low. Although the ESCP reduces the costs of litigating cross-border claims, this cost remains disproportionately high, particularly for the lowest-value claims. According to the data collected on behalf of the Commission, presently costs range from €579 to €1,511 for

¹ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) 1896/2006 of the European Parliament and the Council of 12 December 2006 creating a European Order for Payment Procedure COM(2013) 794 final.

² Art. 17 of Regulation (EC) 1896/2006.

³ Impact Statement pp. 15-16. The thresholds in national procedures vary greatly, from €600 in Germany to €25,000 in the Netherlands.

⁴ Ibid, p. 17.

parties without legal representation, and €3,011 for parties who have hired a lawyer.¹ Leaving legal representation aside, the bulk of the remaining costs come from the translation of documents, court fees, costs for servicing documents, and, sometimes, the travel costs for attending hearings.

The formality of a judicial process can in itself be a barrier for small claims. The Commission noted that 45% of businesses would not take a case to court because the cost of doing so was disproportionate in terms of costs and lengthy proceedings.² Similarly, most consumers are also unlikely to go to court for a small claim, especially if it is one under €786.³ Yet, it must be noted that while 71% of consumer claims are below €2,000 only 20% of business disputes fall under the €2,000 bracket. For that reason, as it is noted below in this study, litigants dealing with small claims should be offered more informal means of dispute resolution when these are available.

The proposal increases the economic threshold from €2,000 to €10,000.⁴ This increase is a welcome reform as lifting the economic threshold does not necessarily increase the cost of litigating higher value disputes. In fact, **the estimated cost of litigating a cross-border claim of €5,000 is very similar (and sometimes the same) to the cost of litigating a claim of €10,000.**⁵ This change has also found support from the majority of stakeholders. According to a public consultation carried out by the Commission, 66% of respondents supported the extension of the economic threshold up to €10,000.⁶ **This change is expected to benefit mainly small and medium enterprises** since about 30% of cross-border commercial claims fall within the new bracket of €2,000 to €10,000.⁷ Yet, **the same economic threshold should be maintained for natural and legal persons**⁸ –this approach would avoid confusion amongst its users while it will provide litigants with a more cost-effective process without removing their rights to a fair trial.

Increasing the economic threshold will in turn increase access to justice for these cross-border claims which are often left as unmet legal needs. This amendment would therefore capture cross-border claims that would be otherwise withdrawn as well as claims that were never submitted in court, **increasing the number of cases using the ESCP, and as a result its awareness.**

2.2 Broadening the Definition of Cross-Border Cases

The Regulation applies when one of the parties is domiciled or habitually resident in a different Member State of the competent court. **The proposal extends the scope of cross-border claims to include all cases that are not entirely domestic.** The proposal includes cases where both parties are domiciled in the same Member State, but where the cross-border element of another Member State comes from the performance of the contract, the tort, or the country of enforcement.⁹ Similar to national judicial procedures, the proposed amendment would also allow claims to be lodged against third country residents.

The Regulation, similar to other EU instruments,¹⁰ states that Member States could extend the use of the ESCP for domestic cases. Although at the time of writing the ESCP has not been adopted for domestic claims in any of the Member States, a higher use of this procedure might increase the interest in expanding its use for national disputes. Conversely, the Regulation remains as an alternative procedure to the national ones offered for settling cross-border claims. However, until very recently the ESCP had an important advantage to the national

¹ Deloitte (2013) p. iv.

² Commission Report p. 3.

³ Eurobarometer 395.

⁴ Draft art. 2(1) ESCP. It must be noted that the method calculation in other currency remains with the national laws. See R. Manko, 'European Small Claims Procedure –Legal Analysis of the Commission's Proposal to Remedy Weakness in the Current System' In-depth Analysis, November 2014, PE 542.137. para. 5.2.2.

⁵ Deloitte Report, Executive Summary, p. x.

⁶ The online consultation was carried out between March and June 2013.

⁷ European Commission Impact Assessment SWD(2013) 460 final. p. 2.

⁸ Cf. European Parliament JURI Amendments 13-86 Draft Report (27 November 2014).

⁹ Draft art. 2(2) ESCP.

¹⁰ E.g. Mediation Directive (2008/52/EC).

procedure: the removal of the exequatur. This situation changes on 1 January 2015 with the coming into force of **Brussels I a** as it removes the exequatur for most national civil and commercial judgments.¹ It must be noted that some differences remain in the enforcement process. Namely, the ESCP contains a review mechanism in the country of origin, which is further restricted under the Commission proposals setting a time limit of 30 days from when the defendant becomes aware of the judgment or from the commencement of the enforcement, while the Brussels I Bis maintains a public policy exception in the country of enforcement.² Yet, **the removal of the exequatur from national procedures may encourage the use of the national small claims procedures instead of the ESCP, especially so when the claimant is able to sue in his own jurisdiction. If this happens, it may put an additional burden on defendants, who in most cases will not benefit from participating in a written procedure.**

2.3 More Use of Electronic Communications

There are many reasons for introducing ICT in the courts, including the delivery of a more efficient justice system making the process cheaper and simpler as well as facilitating the collection and analysis of data. The use of technology in the court system was expected to grow organically as it did in other economic sectors, such as in communications and business transactions. However, the provision of ICT in the courts largely depends upon the political will to invest in it, and in times of economic turbulence, investment in e-Justice across the EU has been rather limited, often reducing, rather than increasing, in the investment of their civil justice systems. Furthermore, inserting ICT in the courts is a challenging task, where the expectations of those investments often proved too optimistic as many attempts to implement technology based projects achieved moderate improvements if not failures.³

The full potential of the ESCP however will only be met once its written procedure becomes user-friendly and is assisted by online communications as foreseen by the ESCP Regulation.⁴ This is also what court users would want. According to a public consultation carried out by the Commission, **63% of respondents were in favour of using electronic means in the procedure and 71% in favour of equipping courts with videoconferencing facilities.** This figure changes depending on the level of access to the Internet that citizens have. Currently, half of EU consumers shop online. This is particularly so in those countries where there is a high level of Internet penetration and where the majority of the population uses Internet services, such as online banking. However, the use of ICT has not been translated into the court system. Some Member States have provided in their national laws for the electronic submission of the ESCP claims and other documents, yet most Member States have not actually implemented this technology in their courts.⁵

Currently the availability of electronic means of communications varies greatly amongst the Member States. While in some jurisdictions there is very limited or no possibility for the use of ICT in the courts, others have ICT tools in all the courts.⁶ In general terms, the incorporation of ICT in the court system can be carried out at two levels. On one hand, it can facilitate litigants and their representatives to communicate with the court through e-mail or online filing of documents, the use of video-conferencing for hearing, the electronic payment of fees, etc. On the other hand, courts may use an electronic means to communicate with other courts and enforcement bodies; they can also use case management tools for their own internal communications and access to files and databases.

The use of electronic communications is further encouraged in the Commission proposal as it believes that the greater use of technology would decrease the time involved in exchanging documents and the cost of

¹ Regulation (EC) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), OJ 2012, L 351/1.

² See generally, X. Kramer 'Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance Between Mutual Trust and National Control over Fundamental Rights' (2013) 60(3) *Netherlands International Law Review* 343-373.

³ R. Staudt, 'All the Wild Possibilities: Technology that Attacks Barriers to Justice' (2008-2009) 42 *Loyola of Los Angeles Law Review* 1117, 1121-1122.

⁴ See Cortés (2008) above pp. 94-95 arguing that the ESCP will become more accessible if parties could employ electronic communications.

⁵ See e.g. art. 33 of the Civil Procedure Code (Netherlands), art. 130a ZPO (Germany), and 135(5) Civil Procedure Code (Spain). See generally, Miquel Sala (2009) op. cit. 105-106.

⁶ See Deloitte Report and Commission Report 2014, para. 4.2.

attendance at hearings through the use of telephone and video conferencing. It is thus not surprising that online access to the ESCP has been listed as one of the top factors for encouraging litigants to take the case to court.¹ With the aim of promoting the use of electronic communications the Commission has proposed the following requirements:

First, **when a national court offers electronic means of communications through its national proceedings, including the lodging of claims, then they must extend its use for the ESCP where a party has accepted such electronic means of communications.**² Presently, there are a number of jurisdictions, such as Ireland, England and Wales, which offer claimants the possibility of submitting their claims online through a website platform. In Ireland under its Small Claims Procedure parties may submit the claims under €3,000 (and the response or defence) online. In England and Wales parties cannot submit all types of small claims online, but they can use the Money Claim Online to submit money claims under £100,000 (c. €127,000).³ However, it must be highlighted that both parties must have a domicile in the same country in order to use the online features of these procedures. So, although these two national procedures have been running successfully for nearly a decade, they have not been extended to cross-border cases, where litigants could also reap the benefits of using electronic means of communications.

Secondly, when documents need to be served, the Commission proposal gives the **choice to the national laws to choose between the postal service and the electronic service.** Under the current Regulation the electronic service can only be used when the postal service is not available. The amendment allows for electronic service under two conditions: (i) when a party has expressly accepted to be serviced electronically, and (ii) when the service is accompanied by an electronic means to attest an acknowledgement of receipt that includes the date of delivery.⁴ However **it would be preferable to encourage electronic communications as the preferred method**, while recognising it valid only when the respondent acknowledges electronically the receipt within the specified timeframe. Only when the respondent does not acknowledge the receipt, the postal delivery should then be required.⁵ Fee discounts could be used for parties who decide to use the digital channel in order to discourage less efficient and more expensive paper and telephone options.⁶ This is what Money Claims Online does in England and Wales.⁷

Lastly, for **the rest of written communications between the courts and the parties, electronic means of communications will be preferred to the postal service.** Yet, importantly, when the electronic means are available, parties would still be able to choose the traditional postal service for all the communications, including the submission of a claim, the service of documents, as well as the rest of communications. Therefore, the Commission's proposal is welcome as the use of ICT is not imposed on to the litigants, but only to the courts.

It thus remains questionable whether Council will accept a proposal that makes mandatory the provision of ICT in all their courts.⁸ **Requiring courts to use of electronic means of communication is welcome but it will**

¹ Eurobarometer 395.

² Draft art. 13(2) ESCP.

³ It should be noted that the Deloitte Study incorrectly states that it is possible to submit small claims in England and Wales; this is only the case for money claims. Deloitte Report, Executive Summary, p. xii.

⁴ Draft art. 13(1) ESCP.

⁵ Darin Thompson observes that this approach should be extended to other elements of the judicial process, such as with the identification of the parties, using electronic versions of evidence, and text-based testimonies submitted electronically –and only when this is not possible, to require physical or video verification. D. Thompson 'Legal and Procedural Aspects of ODR in a Justice System' Society for Computers & Law (8 September 2014). Available at <http://www.scl.org/site.aspx?i=ed38444>.

⁶ D. Thompson 'Addressing 'New' Challenges to ODR Implementation' Society for Computers & Law (24 September 2014). Available at <http://www.scl.org/site.aspx?i=ed38571>.

⁷ <https://www.moneyclaim.gov.uk/web/mcol/welcome> Money Claims are simplified procedures which are particularly suited for being supported by technology means. In Money Claims the claimant –who is a creditor– has written evidence of the debt and requests the court to make an order of payment. The debtor may choose to contest the creditor's right, in which case an ordinary civil procedure will be initiated. In practice, however, the great majority of claims are not contested. In these cases the court order affirming the creditor's right is issued without the need of a hearing. The online system issues more claims (133,546 in 2010/11) than any county court in England and Wales. See R. Susskind, 'Virtual Courts for the Internet Generation' *The Times* (24 April 2014) <http://www.thetimes.co.uk/tto/law/columnists/article4070943.ece>.

⁸ Deloitte Report, Executive Summary, p. xvii.

require investment and Member States may need additional time (at least 12 months after its approval) to install the new equipment. Providing a centralised system, such as e-Codex,¹ would make it easier for national governments to agree to the change as it will not affect their national budget for civil justice.

Another option to reduce costs would be for Member States to concentrate all the claims into a single court, which would benefit from economies of scale. The Commission reported that a number of Member States have introduced a few specialised courts to deal with ESCP (e.g. Finland and Malta).² Similarly, other jurisdictions, such as England and Wales, have developed specialised courts for money claims, which are also fully equipped with ICT tools. An additional benefit of having a single or even a small group of competent courts is that it would address the important issue of the lack of awareness about the ESCP amongst the court staff, though this approach would not necessarily raise awareness amongst potential litigants.³ Another advantage of a single court is that they may have adequate expertise on how to apply the Brussels I, as it has been noted that currently not all courts apply it correctly.⁴ A final advantage of having a single court is that, with the aim of cutting the costs of translation, it may be feasible that these courts would operate in a second common language,⁵ which would inevitably be English.

2.4 Imposing the Use of Distance Communications for Public Hearings

The ESCP is essentially a written process, but in exceptional circumstances, when the competent court considers it necessary it may require an oral hearing. Although the Regulation encourages the use of electronic communications for the oral hearing,⁶ **currently the majority of the hearings require the presence of the parties, witnesses and experts.** According to the Commission, travel costs to attend an oral hearing are between €400 and €800, which discourages low-value claims as the costs for these claims would be disproportionate. The ESCP Regulation states that the rules of the ESCP are to be supplemented by the procedural law of the Member States in which the procedure is conducted.⁷ The national procedural law will also be relevant at the time of determining the necessity of the oral hearing and the collection and validity of evidence in compliance with the right of fair trial.⁸

In general terms, the types of cases that are appropriate for a written procedure (online or by post) are those where the key documentation for assessing the merits is accessible in writing, such as with money claims. By contrast, **cases where there is little or no reliable documentation are less suited to written processes.** Interestingly, the Financial Ombudsman Services, which is the largest ombudsman scheme in the world, reported that it conducted three telephone hearings over its half million complaints received in the past year.

¹ e-Codex pilot project on small claims is assessing the feasibility of a centralised online system for the ESCP, hence enabling European Union citizens and companies to process civil claims and deliver related documents online. The pilot enables European Union citizens and companies with a digital signature to process civil claims and deliver related documents online through the e-Justice Portal. The pilot took place in the autumn of 2014 with several participant Member States (Austria, Czech Republic, Estonia, France, Germany and the Netherlands). Similarly, in July, Austria, Estonia, Germany and Italy started piloting on the European Order for Payment. See <http://www.e-codex.eu/about-the-project.html>.

² European Commission Report 2014, para. 4.1.

³ ECC-Net Report 2012, p. 20.

⁴ ECC-Net 2012 Report p. 22.

⁵ ECC-Net 2012 Report p. 4 and Guinchard, p. 305.

⁶ Art. 8 and 9.1. National courts can also take advantage of the provisions set in the Evidence Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters seeks to improve, which simplifies and accelerates the cooperation between courts in the taking of evidence. The support of ICT has also been reinforced by all the EU institutions. See Opinion of Advocate General Jääskinen delivered on 6 September 2012 (1) in Case C-332/11 at para. 64 which states "Member States should encourage the use of modern communication technology. The court or tribunal should use the simplest and least costly means of taking evidence." See DG JUSTICE, European Commission 'Practice Guide for the Application of the European Small Claims Procedure' p. 47 Available at

<https://e-justice.europa.eu/fileDownload.do?id=1bc12074-2018-440f-b6bb-570d03f341f2> Practical Guide on Using Video-Conferencing under the Evidence Regulation http://ec.europa.eu/civiljustice/publications/docs/guide_videoconferencing_en.pdf.

⁷ Art. 19 ESCP.

⁸ Recital 9 ESCP. See also X. Kramer, 'A Major Step in the Harmonization of Procedural Law in Europe: The European Small Claims Procedure. Accomplishments, New Features and Some Fundamental Questions of European Harmonisation' in A.W. Jongbloed *The XIII World Congress of Procedural Law: The Belgian and Dutch Reports* (2008, Intersentia) 265.

Thus, nearly all its cases were resolved through shuttle negotiation, where an adjudicator or an ombudsman communicated with the parties separately, by either email or by phone.

The Commission's proposal further restricts the use of public hearings and requires the availability of distance communications for the oral hearings with witnesses, experts, and the parties.¹ Expert evidence and oral testimony would only be allowed when the evidence submitted by the parties is insufficient to render a judgment.² Under the proposal an oral hearing can only be held when one of the following factors occurs: (i) when the written evidence is insufficient for the court to render a judgment; (ii) when it is requested by at least one of the parties and the value of the claim exceeds €2,000; and (iii) when both parties request it to conclude a court settlement.³ **However, parties retain their right to appear in court if they decide to do so.**⁴ This is in line with the interpretation of the right to a fair trial (article 6 of the European Convention of Human Rights and article 47 of the EU Charter of Fundamental Rights) which require that access to a hearing should be incorporated at least at an appeal or review route.

2.5 Capping Court Fees

Currently, court fees vary significantly depending on Member State.⁵ The Commission believes that high court fees may be a factor for citizens' decision not to pursue legal action,⁶ so it has proposed to set a maximum limitation for court fees.⁷ According to the proposal, court fees cannot be higher than 10% of the value of the claim and the minimum fee to discourage frivolous claims cannot be higher than €35. Member States can decide on the method of calculation and the amount of court fees, but such calculation cannot include the interest, the expenses and the disbursements. This cap may encounter opposition in the Council. For instance, although the UK has announced that it is opting into measures to expand the use of the ESCP,⁸ it has also singled out its opposition to the capping of court fees.⁹ Concerns may be related to budgetary issues and the interest of applying a strict interpretation to Article 81 of the Treaty on the Functioning of the European Union.

A minimum fee of €35 may be effective in discouraging frivolous claims while allowing to process most small claims. However, setting a maximum limitation on court fees at 10% may still be too high for the highest value claims (e.g. €1,000 in fees for a claim of €10,000). **The cap could be set by the Member States, but should never be higher than that required in their national procedures. Alternatively, a progressive fee scheme should be established, lowering the cap to 5% when claims go over €2,000** (e.g. the cap for a claim of €3,000 would be €250, while for a claim of €10,000 would be €600).

The proposed cap for **the court fees does not appear to extend to the enforcement stage**, which takes place in a court of a different Member State. This fee would vary depending of the Member State. For example, in England and Wales this fee is normally £60 (c. €75). It must be noted that even though this fee would be an additional cost added in the process, such fee may be recoverable from the defendant at the point of the enforcement. The same rule is applicable to court fees, which may be recoverable according to the judgment issued by the country of origin. Thus, the cost rule remains unchanged, allowing the successful party to recover the costs, though the national court may not allow the recovery of costs in so far as these were unnecessarily incurred or are disproportionate to the claim.¹⁰ The recovery of costs may also include legal representation and expert witnesses, but these are often strictly limited with the aim of discouraging legal representation. In

¹ Draft art. 8(1) ESCP.

² Draft art. 9(2) ESCP.

³ Draft art. 5 ESCP.

⁴ Draft art. 8(2) ESCP.

⁵ Deloitte Report, Executive Summary, p. xiii.

⁶ Impact Assessment p. 3.

⁷ Draft art. 15a ESCP.

⁸ Hansard, House of Lords Debate (25 Feb 2014) Column WS97. See also M. Cross, Government Opts in to Expanded EU Small Claims Track, Law Society Gazette (25 February 2014). Under a protocol of the 1997 Treaty of Amsterdam, EU legislative measures covering civil judicial cooperation do not apply to the UK unless it expressly opts in.

⁹ Hansard, House of Lords Debate (25 Feb 2014) Column WS97.

¹⁰ Art. 16 ESCP.

England and Wales the cap is set at £270 (c. €330) for legal representation and £750 (c. €950) for each expert witness.¹

2.6 Availability of Distance Means of Payment of Court Fees

At present some national courts require the payment of the court fees in their premises. In some cases the payment has to be done in cash, with cheques or by lawyers –these obstacle add more hurdles making claims unworthy to pursue.² The proposal requires Member States to put in place distance means of payment of court fees, which can be processed through bank transfers, debit or credit card payments, or through online payments.³ It has been noted that the mandatory use of distance means of payments, as well as the capping of court fees and imposing distance means of communications, are amongst the **sensitive issues for the Member States as these will affect their national budgets for civil justice**.⁴ Unfortunately, electronic payments are not always as common as one might expect. For instance, in England and Wales county courts do not accept online payments for the ESCP, nor for its national small claims procedure, which has to be paid in the court house or sent by cheque –a payment method which is not common in many Member States. Hence, **we welcome the Commission proposal for accepting distance means of payment of court fees**. In this time and age, this type of facility in the courts is expected by the majority of European citizens and businesses, which can already send and accept electronic payments.

2.7 Limiting the Requirement to Translate only the Substance of the Judgment of the Enforcement Form D

When a judgment is served on a defendant based in another Member State other than that of the court seized, the service must be done in a language that the defendant understands or in the language of the Member State where the service is affected.⁵ Hence, **a translation is often required for an effective service**.

A party who seeks to enforce a judgement will need to produce an original copy of the judgment and a certificate contained in Form D. Where a translation is required, often parties are required to translate the whole Form D. Indeed, only a small number of Member States accept Form D in more than one language. Since the Form D is a standard form already available in all the EU languages, the Commission has proposed to **limit the translation requirement to Section 4.3 of the form**, which contains the substance of the judgement.⁶ This is a welcome amendment as it would cut down on the costs of those seeking the enforcement.

2.8 Information Obligations

The ESCP Regulation already requires Member States to provide information on a number of issues, such as the competent courts, valid means of communications, the possibility of appeals, the accepted languages for the enforcement, the competent enforcement authorities, and the availability of practical assistance to litigants for filling the forms;⁷ though the latter information is not always available in practice. The Commission has reported that 41% of Member States do not provide such assistance to the parties and that 10% of citizens that requested this assistance did not receive it.⁸ Furthermore, the Regulation does not require Member States to provide information on court fees and payment methods, which in practice represent an obstacle for lodging a claim.

¹ Practice Direction 27 –Small Claims Track.

² Impact Assessment p. 3.

³ Draft art. 15a ESCP.

⁴ A. Maniaki-Griva, 'Initial Appraisal of a European Commission Impact Assessment: European Small Claims Procedure' (March 2014) PE 514.109.

⁵ Regulation (EC) 1393/2007 on the Service in the Member States of Judicial and Non-Judicial Documents in Civil or Commercial Matters.

⁶ Draft art. 26 ESCP.

⁷ Arts. 11 and 25 ESCP.

⁸ Commission Report p. 7. See also ECC-Net Report and Eurobarometer 395.

The proposal imposes information obligations on the Member States in respect of court fees, methods of payment of court fees and the availability of assistance in filling in the forms. This information should be free of charge and easily available on the Internet through both, online guidance and contact details on how to obtain personal advice. In addition, standard claim forms should be available in paper form and online in all courts with jurisdiction to process cases through the ESCP.¹ It is hoped that greater information would improve transparency and, ultimately, access to justice.

In order to determine the jurisdiction the claimant will need to apply the Brussels I Regulation, so it is very unrealistic that an average consumer, even a well-informed one, would be able to do so without the assistance of someone with legal expertise.² Indeed, sometimes even national courts dealing with small claims are not often acquainted with Brussels I. Under the Commission proposal the practical assistance will extend not only to determining the court with jurisdiction, but also to filling out the forms, calculating the interests, and identifying the documents that need to be attached when submitting the forms.³

It is unclear whether a party who has to submit the claim or a defence in another jurisdiction would be able to obtain this assistance in his local court. Nothing in the proposal impedes this assistance, but it would be helpful if the amendments spell out the extension of this obligation to assist individuals who have to submit a claim or a defence in another Member State. In addition, a number of ECCs have provided some free legal advice to consumers on the use of the ESCP. Yet, national ECCs have competence to provide advice to consumers only, which excludes small traders and businesses that could also benefit from this assistance. Thus, if the ECCs are expected to provide a more extensive and individualised support, especially to SMEs which often face similar barriers to those of consumers, this may require an increase in their budgets.⁴

A more important issue is the information about the enforcement. Despite the fact that the Regulation requires Member States to provide information on the enforcement authorities, **applicants often face difficulties in identifying not only the competent court, but also in the ability to understand the national procedure** in the country of enforcement. This issue however has not been included in the Commission proposal.

The Commission proposal has developed the conditions for reviewing a judgment in the jurisdiction of origin (i.e. where the judgment was given) if the defendant was not served adequately or when there were extraordinary circumstances that did not enable him to contest the claim.⁵ The judgment will be void if one of the former two circumstances are met, and if the defendant raises the issue within 30 days from the moment the defendant was aware of the judgment or the beginning of the enforcement. The limitation periods will be suspended during this period, but the review procedure itself remains governed by the national law.⁶

¹ Draft art. 4 and 11(2) ESCP.

² E. Guinchard, '¿Hacia una Reforma Falsamente Técnica del Reglamento sobre el Proceso Europeo de Escasa Cuantía y Superficial del Reglamento sobre el Proceso Monitorio Europeo?' (2013) *XII Anuario Español de Derecho Internacional Privado* 229-308, 303.

³ Draft art. 11(1) ESCP.

⁴ Ibid, p. 304.

⁵ Draft art. 18 ESCP.

⁶ Art. 21 ESCP.

3. THE NEED TO FACILITATE ENFORCEMENT

KEY FINDINGS

- Research findings on the effectiveness of the enforcement appear to be contradictory.
- Empirical research should distinguish between those applicants who find out about the process of enforcement (when, for instance, the enforcement takes place in the same jurisdiction of the court which issued the judgment, or when the applicant has hired a lawyer) to those cases where applicants do not seek enforcement because of the lack of information and resources.
- Member States should facilitate details of how to contact lawyers who can assist applicants during the enforcement process. There would also be important improvements made if the enforcement procedures in the Member States could be accessible online.
- Another strategy which would diminish the problems related to enforcement is to divert suitable claims (but not judgments) to ADR schemes.
- An amendment should be included for appealed judgments to be enforced under the ESCP regime.

Judgments from a ESCP are enforceable in any Member State (with the exception of Denmark)¹ without the need of going through the formal mutual recognition procedure for judgements.² The enforcement requires an official translation of the judgment and it is subject to the national procedure –in other words, national court orders will be enforced in the same manner as those coming from other Member States.³ A key issue in the enforcement stage is finding the appropriate court in the enforcing Member State. For example, Irish courts refer consumers who seek to enforce an order in their favour outside Ireland to the Irish ECC, which assists claimants through their ECC partners to identify the enforcement authorities in the country where the respondent is based.⁴

When a judgment from the ESCP needs to be enforced in another European jurisdiction, it can result in unforeseen costs, as the enforcing party may require legal advice in order to secure the enforcement. **Research findings on the effectiveness of the enforcement of the ESCP seem to be very contradictory.** The study carried out by Deloitte for the Commission found that there were no difficulties in the enforcement of judgments, with 97% of judgments enforced (23% of respondents said that the defendants complied voluntarily while 74% obtained a successful enforcement order).⁵ This information led the Deloitte Report to state that there were no difficulties with the enforcement,⁶ and accordingly, the Commission did not take measures to tackle this problem. However, the Deloitte study also stated that in more than four out of ten cases (42%) the case was still ongoing, without clarifying for how long these cases have been opened. A key question would be to assess which percentage of these cases were in the enforcement stage and who the parties who used the ESCP were. Indeed, the argument for lack of enforcement problems contrasts with the ECC-Net 2012 Report which stated that “a much bigger problem than the lack of awareness and other issues described before is the question concerning the enforcement of judgments.”⁷ This is because the difficulty with the enforcement mainly arises when it is the consumer who uses the ESCP in his country of residence and then needs to enforce

¹ Art. 2(3) ESCP.

² Art. 18 ESCP abolishes the intermediate measures of exequatur, whereby under the Brussels Regulation 44/2001 a second judgement is necessary before recognising a judgement from another country.[is this up to date with the entry into force of Brussels Ia? Please check]

³ Art. 21(1) ESCP.

⁴ ECC-Net, European Small Claims Procedure Report (September 2012) p.27.

⁵ Eurobarometer 395, p. 35.

⁶ Deloitte Report p. 65.

⁷ ECC-Net, ‘European Small Claims Procedure Report’ (2012) p. 22.

the judgment in a different Member State.¹ The enforcement stage will often be in a different language and subject to a foreign national procedure. This problem has also been addressed in other ECC-Net reports which noted that “only a minority of the positive rulings made by the courts in consumers’ home countries are actually enforced across borders.”² Although this challenge has been noted by the Commission,³ the proposal has not taken any measures to overcome hurdles during the enforcement.

Empirical research should distinguish between those applicants who find out about the process of enforcement (when, for instance, the enforcement takes place in the same jurisdiction of the court which issued the judgment, or when the applicant has hired a lawyer) to those cases where applicants do not seek enforcement because of the lack of information and resources. Accordingly, it seems that the first group do not face difficulties in the enforcement, but the policy priority should be to find out how large the second group is.

Furthermore, a measure that would help with the enforcement is if **Member States facilitate details on how to contact lawyers who can assist claimants in the enforcement process. There would also be important improvements made if the enforcement procedures in the Member States could be accessible online.**

Another strategy that would diminish the problems related to enforcement is to **divert suitable claims (but not judgments) to consensual ADR schemes**, as settlements from these out-of-court schemes do not present problems with the enforcement.⁴

The appeal process, if available, remains subject to the national procedure. Hence, it remains unlikely that an appellate court decisions from an ESCP judgment could benefit from using the standard form D for its enforcement in another Member States since the court decision would be delivered not by the ESCP, but by a national procedure.⁵ The enforcement process would also fall under the Brussels I bis rules, and not under the ESCP Regulation that restricts the grounds for refusal. **It would therefore be desirable if the amendment included a provision that states that appealed judgments will be enforced under the ESCP regime.**

¹ Research found that only a minority of ESCP judgments made in the consumer’s jurisdictions in the UK are enforced in a different Member State. See A. Bradney and F. Cowrie, ‘Access to Justice?: The European Small Claims Procedure in the United Kingdom’ in N. Neuwahl and S. Hammamoun *The European Small Claims Procedure and the Philosophy of Small Change* (Les Éditions Thémis, 2014) p. 118.

² See European Commission Press Release ‘EU Consumers: Settling Small Cross-Border Disputes Without Any Hassle’ (20 September 2012) Available at http://europa.eu/rapid/press-release_IP-12-985_en.htm

³ See Answer given by Ms Reding on behalf of the Commission to Ms Flasikova Benova’s Parliamentary Question E-003638-13 (6 June 2013) and to Mr Melo’s Parliamentary Question E-009293-12 (22 October 2012).

⁴ A study carried out on behalf of the European Commission found that ADR schemes that comply with the due process criteria established by the Commission have a compliance rate averaging 99%. See Civil Consulting, ‘A Study on the Use of Alternative Dispute Resolution in the European Union’ 16 October 2009.

⁵ X. Kramer, ‘Small Claim, Simple Recovery? The European Small Claims Procedure and its Implementation in the Member States’ (2011) 12 *ERA Forum* 119-133, 126.

4. THE PROMOTION OF ALTERNATIVE DISPUTE RESOLUTION OPTIONS

KEY FINDINGS

- The ESCP should encourage parties to consider ADR options and see court litigation as a last resort.
- Claimants should be asked in the claim form whether ADR was attempted and whether they would consider an ADR option if this were available as part of a court-annexed program. The respondent should be asked the same questions, and in the event that both parties agree to it, then ADR should be attempted.
- Parties should also have the option to request the court to stop proceedings for a short period of time while they participate in an ADR scheme. In addition, courts should have the discretion in recommending parties to attempt ADR.
- If parties have already reached an agreement, such settlement should be given the court's stamp of approval obviating the need for a hearing.
- Court-annexed ADR schemes available for domestic disputes should be extended to cross-border claims falling within the scope of the ESCP. In order to deal effectively with cross-border claims, these ADR services should offer the use of distance means of communications and specialised third neutral parties (e.g. court-annexed mediators) who, in addition to their own national languages, can also offer the ADR services in English, and ideally in another major EU language.
- These ADR services could be provided by the ECCs on consumer matters and by other nationally certified ADR schemes for civil and commercial matters.
- ADR options should not be mandatory, especially if there is a fee involved.
- Courts' power to impose cost sanctions should only be used exceptionally when they consider that one party has behaved wholly unreasonably in rejecting a settlement or in refusing to attempt an ADR scheme.
- The Online Dispute Resolution (ODR) Platform will be an optimum instrument to increase awareness about the ESCP by channelling consumer disputes, which could not have been resolved through ADR, to the competent national courts.
- The ODR platform could in due course incorporate a plug-in to e-Codex, enabling litigants and the courts to communicate through electronic means.
- A central online platform could be a very useful instrument for the public authorities to monitor the types of cases that go to the ESCP.

4.1. Alternative Dispute Resolution Methods are Suitable for Settling Small Claims

Access to justice, particularly in cross-border cases, is identified in connection, not only with the courts, but also with ADR/ODR schemes, especially in the consumer context as these extrajudicial processes are becoming the main route to ensure compliance, and hence enforce consumer law. Courts are increasingly seen as a last resort, performing a supervisory function rather than a default redress option for small claims. Litigants should be expected to explore more informal and cost-efficient redress options before embarking on a judicial process and thus settle more efficiently those claims that are ripe for early resolution.¹ A higher level of voluntary settlements will not only increase parties' satisfaction in the redress process, but will also facilitate a swifter and more effective compliance of resolutions. **The advantage of an ADR process, such as mediation, is not**

¹ C. Hodges, 'Collective Redress in Europe: The New Model' (2010) 29(3) *Civil Justice Quarterly* 370.

simply offering the parties the possibility of achieving a quicker and cheaper resolution, but it is also a more informal process that often delivers higher parties' satisfaction levels. These ADR processes are better adapted to deal with the new way of how claimants (especially consumers) complain. Often online forums, such as TripAdvisor, Twitter and Facebook, can be used to damage businesses reputation, but also they can operate as important incentives to bring parties with small claims to the negotiating table.

The EU has recently approved legislation to ensure the availability of quality ADR schemes for consumers across the EU.¹ The European Commission has also expressed its commitment to see the **courts at the last resort and to promote settlements when this is possible.**² **Accordingly, the ESCP should promote a more holistic redress model that combines judicial procedures with ADR options.** This synergy would also assist in meeting the (often exaggerated)³ political claim that small claims procedures provide greater access to justice to the population.

The rationale behind the policy of setting the courts as the last resort varies depending on the countries, but there are two main drivers: the high cost of litigation and the time spent in resolving claims by overloaded courts. While English courts are often blamed for being too costly and Italian courts for being too slow, other jurisdictions with more cost-effective and efficient courts, such as Germany, still appreciate the appeal of ADR schemes given its informality and expertise.⁴ Whatever the reasons behind the need to promote ADR and discourage litigation, there is a common policy that seeks to identify which cases are suited for ADR and which cases are better suited for court litigation. One of the frequent methods to put this strategy into practice has been the use of court-annexed ADR schemes. Furthermore, consumer ADR schemes can process many more claims than small claims courts. In the England and Wales last year there were under 30,000 small claims that adjudicated by the court, while consumer ADR schemes resolved over half million claims.⁵

Consensual ADR methods can be effective in resolving those disputes where both parties are acting in good faith and are willing to reach an agreement. When two parties settle a dispute amongst themselves the result will be convenient for both of them; by contrast, when a dispute is resolved in court the final judgment is unlikely to satisfy both parties. As a result parties are more likely to comply with settlements crafted amongst them than when the outcomes are imposed by a court. The use of ADR is limited however to the parties' willingness to participate in the process. Yet, ADR is more effective when combined with accessible and efficient civil court processes as they represent the most persuasive incentives for parties to sit at the negotiating table.⁶ While consensual ADR should be a complement, and not a substitute, to effective judicial redress,⁷ when effective ADR schemes are available they should be offered before the judicial options.⁸ This view is in line with those jurisdictions that justify in certain cases the use of mandatory mediation and are tilted towards the promotion of appropriate dispute resolution, which in any event leaves the courts as the final forum for adjudicating unresolved disputes.

It is particularly important for small claims to be channelled through an appropriate process, which should typically be the most cost-effective of those available to the parties. If this line of argument is to be followed,

¹ Directive 2013/11/EU on Consumer Alternative Dispute Resolution OJ L165/63 and Regulation (EC) 524/2013 on Consumer Online Dispute Resolution OJ L165/1.

² Viviane Reding, Vice-President of the European Commission and EU Commissioner for Justice 'Towards a More Coherent Enforcement of EU Consumer Rules' (19 of March 2013). Available at http://europa.eu/rapid/press-release_SPEECH-13-237_en.htm

³ Bradney and Cownie (2014) op. cit. 123.

⁴ It must be noted that there is an academic movement against consumer ADR in Germany. See G. Wagner, 'Private Law Enforcement Through ADR: Wonder Drug Or Snake Oil?' (2014) 51(1) *Common Market Law Review*. 174 and H. Eidenmullery and M. Engel, 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe' (July 7, 2013) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290654.

⁵ C. Hodges, N. Creutzfeldt and S. Macleod, 'Reforming the EU Consumer ADR Landscape: Implementation and its Issues' Third Oxford Consumer Conference Report (30-31 October 2014) p. 7.

⁶ Ibid.

⁷ Speech by Lord Neuberger of Abbotsbury, Master of the Rolls (The Gordon Slynn Memorial Lecture 2010, 10 November 2010) para. 17.

⁸ Hodges (2010) above p. 386.

then it would be desirable for the ESCP to encourage more clearly the use of ADR and ODR. Currently, the only reference to ADR is made in Art. 12.3 of the ESCP Regulation, which simply states: “Whenever appropriate, the court or tribunal shall seek to reach a settlement between the parties.”

The Deloitte Report, upon which the Commission based its proposal, found that mediation offers “a quicker and less expensive solution for the creditor than initiating [ESCP] proceedings [...] if the mediation process can be expected to be successful. On the other hand, the existence of the ESCP protects the weaker party, offering him/her the possibility to take the stronger party to court if he/she refuses to engage in mediation. The ESCP thus functions as an incentive for the stronger party to contribute to a successful outcome of the mediation process.”¹ Similarly, a number of ECC reports suggested that consumers often prefer informal redress processes than court processes, which are inevitably more formal than ADR schemes.²

Yet, the only measure that the Commission proposal has introduced is contained in the proposed article 5(1), which states that national courts should offer parties an oral hearing when both parties declare their willingness to reach a court settlement. It is however unclear why an oral hearing would be necessary for this purpose. **If parties have already reached an agreement, such settlement should be given the court’s stamp of approval obviating the need for a hearing.** On the contrary, if parties need the assistance of a third neutral party to reach a settlement, then the instructing judge may not be the best person to provide this service as the judge may be required to adjudicate the case if parties were unable to reach an amicable settlement. Indeed, a preferred option would be a court-annexed scheme, such as those that already operate in some Member States such as in Ireland and England, which offer parties the services of a professional mediator or another third neutral party who assists litigants in reaching a settlement.

4.2. Court-Annexed Schemes for Small Claims in Ireland and England

Under the pre-action protocols in England and Wales parties must consider the suitability of resolving their dispute through ADR (i.e. negotiation or mediation) before they lodge a claim in court. If this option is not considered, or if it is refused unreasonably by one of the parties, the judge has the discretion to impose legal fees on that party (regardless of whether they are successful in the proceedings).³ In addition, once a claim has been allocated to the national small claims procedure, the Small Claims Track, litigants are invited to participate in a mediation service, which is free of cost for the both parties. The mediation service is not means tested, so it is often abused by some large companies, such as a number of airlines, which as a rule do not comply with the pre-action protocol of considering mediation (when proposed by the claimant) but then opt in the free court mediation service once a claim has been lodged in the court.⁴ The service is normally done over the phone and has obtained very high satisfaction levels amongst users. The satisfaction is very high with both the service and the mediation (97%).⁵ Nearly 80% of those who attempt the mediation settle their claims successfully.⁶ Interestingly, the great majority (91%) of those who did not settle in mediation were still satisfied with the scheme, and most users (94.4%) stated that they would use the small claims mediation again.⁷

¹ Deloitte Report p. vi.

² ECC-Net, ADR in the APR sector (2012) and ECC Ireland (2008) above. Available at http://www.eccireland.ie/pub_reports.php.

³ HMCS leaflet EX301 ‘Making a claim- some questions to ask yourself’ p.1 “Court rules require you to think about whether alternative dispute resolution is a better way to reach an agreement before going to court. If you refuse to consider this, you may not get your costs back, or the court may order you to pay the other party’s costs, even if you win the case.” This has also become a practice in ordinary English civil procedures. See *Burchell v Bullard* [2005] EWCA Civ 358 and *Halsey v Milton Keynes General NHS Trust* [2004] 1WLR 3002. See generally S. Prince, ‘ADR After The CPR: Have ADR Initiatives Now Assured Mediation an Integral Role in the Civil Justice System in England and Wales?’ in Dwyer D (eds) *Civil Procedure Rules: 10 Years On* (OUP, 2009) 316-343.

⁴ I thank Jo Holland for raising this point.

⁵ J. Rustidge ‘Analysis of Qualitative Data Small Claims Mediation Service – April 2011 – March 2012’ HM Courts & Tribunals Service (11 April 2012) p. 4. The survey upon which this study is made received just over 2,200 responses.

⁶ Ibid, p. 5. It must be noted that this figure appears to have dropped over the last year. According to a recent report from the UK Ministry of Justice the settlement rate from April to October 2013 was 65%.

⁷ Ibid, p. 6.

In Ireland, in the event that a respondent contests the claim, the court clerk, called the Registrar, if he speaks the same language as the parties (e.g. when the disputes are between parties based in Ireland and the UK) will contact the parties and negotiate with each of them separately with the intention of reaching a pre-trial settlement.¹ The same as the small claims mediators in England, the Irish Registrars may propose solutions when so requested by the parties. There is no officially available data for the settlement of ESCP claims, but over half of admitted domestic cases are settled by the Registrars before the trial. However, according to the Registrar in Dublin District Court, which accounts for nearly a quarter of the population in Ireland, during the first six months of 2013, the Registrar settled six out of the 26 claims received; out of the remaining, seven claims were undefended so a judgment was granted, and the remaining ones were at the time of the consultation at various stages of the process.² These figures suggest that court-annexed mediation, if we can classify the Registrar's role at that akin to a court mediator, carries out an effective role in settling cross-border cases.

The role of the Irish Registrars is more informal than that of the English mediators. In England each party is asked at the time of completing the allocation questionnaire whether they are prepared to attempt mediation.³ Hence, the mediation service in England is more tightly regulated: parties are offered free of cost a one-hour shuttle mediation session (i.e. when the mediator speaks to the parties separately), which is normally provided over the phone by a professional mediator. In sum, litigants are invited to settlement talks once the day for the trial has been set. Respondents are often more willing to compromise and settle a meritorious claim than to have to participate in an oral hearing in front of the judge. Thus, since the ESCP is a mainly written procedure with oral hearings being exceptional, it may be more difficult for the neutrals to convince a respondent to settle a meritorious claim.

Although the overall percentage of claims settled is higher in Ireland (around half of all the defended claims), the settlement rate in mediations in England and Wales is higher for those claims where parties have agreed to participate in mediation (around two thirds of the mediations).⁴ It must be noted that there is a significant disparity in the economic threshold of small claims in these two jurisdictions –while in Ireland the limit is €3,000, in England and Wales the threshold is set at £10,000 (c. €12,7000). It may be argued that the higher the economic stake, the more likely will be the appetite to fight the case in a court hearing. However, adequate incentives, such as progressive costs fees and exchange of information can also contribute to higher number of settlements. Indeed, most common law jurisdictions are characterised for having a very small number of civil claims reaching a hearing followed by a final judgment.⁵

Unlike in Ireland, presently, **the small claims mediation in England and Wales is not used for dealing with cross-border claims of the ESCP. In fact, mediators are not allowed to make international phone-calls.** Moreover, mediators are not trained to deal with litigants based in different jurisdictions –let alone, with litigants who speak different languages.

¹ SCP [is this the Irish code of SCP? please clarify abbreviation] (1999) Rule 4 and 8 (1).

² Email received by the Ms Bernie Moran, Registrar of the Dublin District Court (26 of June 2013). On file with author.

³ Pt 27 Civil Procedure Rules (England and Wales) 1998.

⁴ According to the UK Ministry of Justice from April to October 2013 there were 26,670 claims referred to the HM Small Claims Service, but only 5,792 claims ended in mediation –the settlement rate of these cases was 65%.

⁵ For instance, in 2013 English and Welsh courts received 1,445,344 claims, out of which around 10 per cent (149,637) were allocated to tracks, only around 3 per cent (43,087) of the claims went to trial and received a judgment. The rest of the claims are either withdrawn or settled. In the last decade there has been some fluctuation in the number of claims submitted in courts, but certainly in England there seems to be some consistency in the decline of cases reaching the trial or hearing stage. This decline is particularly pronounced in small claims, which account by almost 70 per cent of the total number of hearings. S. Prince, Draft Report for the ODR Advisory Group, Working Paper on Policy Issues (July 2014) p. 5.

4.3. A Proposal

The ESCP Regulation should encourage, but not compel, parties to attempt ADR options where these are available. To that end the Regulation should be amended in order to ensure that parties are well-informed and able to identify the most suitable method to resolve their dispute. It is recommended that when filling out the standard forms parties should be required to consider the suitability of ADR/ODR for resolving their claims. At this point parties should be informed about the availability of ADR methods, and the cost of these options if any, and how these would differ from a judicial process, so that litigants are empowered to make an informed choice. **The claimant should be asked in the Claim Form A whether ADR was attempted, and if it was not attempted, the claimant should be asked whether he would like to attempt an ADR option if this is available as part of a court-annexed program. The respondent should be asked the same questions, and in the event that both parties agree to it, then ADR should be attempted.**

In addition, **parties should also have the option to request the court to stay proceedings for a short period of time (e.g. 14 days) while they attempt to use an ADR scheme.** Also, **courts should be able to recommend parties to attempt ADR** when they consider that it would be beneficial for them and when these ADR processes can be carried out by distance means of communication. In this regard the Court of Justice of the EU held that judicial protection was secured as long as electronic means are not the only means of accessing a settlement procedure for those parties without access to those means.¹ This approach follows the line of the Mediation Directive and the EC Recommendation on Collective Redress. Both recommend and encourage parties to attempt mediation and other ADR processes before and during the judicial process. Furthermore, the Mediation Directive empowers courts to recommend mediation during the judicial process.

The ESCP Regulation should encourage Member States to enable channels so that disputes can be resolved by ADR through distance means of communication. Furthermore, **in compliance with the principles of equivalence and effectiveness the ESCP Regulation should extend the offer of court-annexed ADR schemes to cross-border disputes if these services are available for domestic disputes**, e.g. the one-hour free telephone mediation in England or the registrar's mediation in Ireland. The ADR option could be offered either in parallel to the court system or as a model integrated in the court system. When settlements cannot be reached, cases should automatically return to the ESCP.

In order to deal effectively with cross-border claims, ADR services should be offered by specialised third neutral parties (e.g. court-annexed mediators) that in addition to their own national languages can also offer their services in English, and ideally in another major EU language. The specialised ADR schemes should also rely on the use of distance means of communications, such as the use of telephone and online case management tools complemented by translation software.

These ADR services should be provided with the **support of the national ECCs when parties are involved in a consumer dispute and by other nationally certified ADR schemes when parties are involved with other civil and commercial matters.** The name of court-annexed specialised ADR schemes should be communicated to the European Commission who should ensure that information is available in the EU websites.

ADR options should not be mandatory but offered to parties who have opted into these options, especially so if there is a fee involved. The consideration of ADR could be strengthened if courts have the power to impose **cost sanctions when they consider that one party has behaved wholly unreasonably in rejecting a settlement or in refusing to attempt an ADR scheme.** These sanctions should however be proportional and imposed only in exceptional cases.

¹ *Rosalba Alassini v Italia Telecom SpA* (C-317/08) Para. 60.

The European ODR Platform, which the European Commission is due to launch in 2016, can be instrumental in increasing consumers' access to justice as it could divert those consumers with cross-border disputes that could not have been resolved through ADR to the competent national courts. Ideally, this should be done through an online submission, though exceptionally regular post submissions may need to be allowed as the courts of most Member States may not be equipped to receive claims online.

The ODR Platform could also incorporate a plug-in to e-Codex, enabling litigants and the courts to communicate through electronic means. Furthermore, **the ODR Platform could be instrumental in raising awareness about the ESCP.** In so doing, the ODR Platform could improve consumer redress in a holistic manner, firstly, asking parties to explore the suitability of ADR schemes, and secondly, when out-of-court redress options are not available, to channel consumer claims to the competent court. Raising consumer awareness will have also a positive impact on businesses level of awareness about the ESCP.

Last, but not least, **a central online platform could be a very useful instrument for the public authorities to monitor the types of cases that go to the ESCP.** This information, if adequately captured, would be useful to the European Union when developing legal responses to improve cross-border trade. Monitoring frequent disputes will help to identify patterns upon which to build legal and practical responses that can lead to avoid the arrival of new disputes. This strategy will be more effectively than resolving disputes as isolated events.

5. CONCLUSION

KEY FINDINGS

- The Commission proposal is welcome, but this study found that more has to be done in terms of facilitating information on where to obtain further assistance to enforce a judgment and in enabling links with ADR schemes.
- Consumers who cannot resolve their cross-border complaints through the European ODR platform should be invited to submit their claims directly, and preferably online, to the competent court.
- Claim and response forms should include clear provisions requesting parties to consider the use of ADR before and during the ESCP.
- National court-annexed ADR schemes that operate through distance means of communication should be extended for cross-border claims. These schemes should cooperate with the ECCs and nationally certified ADR schemes in order to provide these services in English and in other major EU languages.
- The synergy between the ESCP and ADR mechanisms would increase awareness and empower EU citizens.

The development of effective enforcement mechanisms, such as the ESCP, should become a policy priority to stimulate the internal market. Cumbersome judicial processes for resolving cross-border claims drive out of the court system many individuals with valid claims who are left with unmet legal needs in an inefficient internal market. The rationale behind the Commission's proposal is on one hand to tackle the lack of awareness and low use of the ESCP, and on the other hand aims to overcome certain deficiencies in the Regulation, such as its limited scope and the lack of use of distance means of communications.

The Commission proposal is welcome, but more has to be done in terms of increasing awareness. It is submitted that further amendments are necessary to facilitate information on where to obtain further assistance to enforce a judgment and in enabling links with ADR schemes. The promotion of ADR options is justified because parties' satisfaction levels are often higher in settlements than they are in court adjudicated

judgments. In addition, ADR helps litigants avoid overburdened courts and enables win-win solutions that can sometimes facilitate the continuance of cross-border transactions.

Consumers who cannot resolve their cross-border complaints through the European ODR platform should be invited to submit their claims directly, and preferably online, to the competent court.

The claim and response forms should include clear provisions requesting the parties to consider the use of ADR before commencing the ESCP as well as during the court process if there is a court-annexed ADR scheme available in the Member State of the seized court. **National court-annexed ADR schemes** available through distance means of communications should be extended to cross-border claims. These schemes **should cooperate with the ECCs and nationally certified ADR schemes in order to provide these services in English and in other major EU languages.**

Yet, if litigants cannot find a resolution in an ADR process, they should be able to escalate the claim to the ESCP. **The synergy between the ESCP and ADR mechanisms would in turn increase awareness and empower EU citizens.**

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Session III - Business and consumer's concern

Mediation as Alternative Dispute Resolution (the functioning of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters)

Giuseppe De Palo

Mediation as a form of Alternative Dispute Resolution offers substantial quantifiable and non-quantifiable benefits. The EU has played a valuable role promoting it among Member States, particularly through the Mediation Directive (2008/52/EC). Studies show that the most effective way to build reliance on mediation is to integrate a mediation step into appropriate civil and commercial cases. Yet, in its current form, the Mediation Directive leaves this to Member States to decide. Mediation levels are a fraction of what they could be, resulting in tens of billions of Euros wasted each year. Seven years after its adoption, it may be time to upgrade the Directive to incorporate an integrated mediation obligation for Member States.

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CEDR	Centre for Effective Dispute Resolution
CEPEJ	European Commission for the Efficiency of Justice
CMC	Civil Mediation Council
CPR	Civil Procedure Rules
MESO	Mediation Enforcement Settlement Order
MIAM	Mediation Information Assessment Meeting
ODR	Online Dispute Resolution

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EXECUTIVE SUMMARY

Background

Alternative dispute resolution (ADR), particularly mediation, is making life easier for the citizens of the European Union (EU), but further reform and development are necessary to achieve its potential. The Mediation Directive of 2008 was issued by the European Parliament and the Council *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* (the Mediation Directive). The Mediation Directive builds upon nearly a decade of ADR reform in Europe with the aim to provide access to justice for citizens of the EU by establishing a balanced relationship between mediation and judicial proceedings. Citing a need for judicial cooperation and the proper market functioning of the European Community, the Mediation Directive provides a broad framework for Member States to adopt mediation into their domestic legal systems.

Today, Member States have effectively transposed the requirements of the Mediation Directive to varying degrees, yet the actual number of cases being mediated have remained disproportionately, and disappointingly low. To address this issue, the European Parliament commissioned a study to examine the cost-impact of mediation in the commercial context. The study, *Quantifying the Cost of Not Using Mediation – a Data Analysis*, (the 2011 Cost Study), found that even with very low mediation success rates, mediation could produce significant time and cost savings if integrated into the litigation process. The “EU Mediation Paradox” became apparent—if increasing the use of mediation brings such significant time and cost savings to the parties (and to the judiciary), why were Member States experiencing such low rates of mediation? This finding was particularly pronounced in the context of a global recession. The Legal Affairs Committee of the European Parliament went so far as to ask the European Parliament whether legal action was needed against Member States for their failure to achieve a “balanced relationship between the number of mediations and judicial proceedings” sought by the Mediation Directive. Consequently, a “Balanced Relationship Target Number” (BRTN) for Member States to achieve was suggested to realize this balance. As an outgrowth of this research, in 2013, the European Parliament commissioned a study to examine the status of mediation in Member States and establish the root causes of low levels of mediation. This study – *“Rebooting” the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*, (the Rebooting Study), which surveyed over 1,000 professionals in the EU and conducted case studies on each Member State, found that the most effective regulatory feature associated with a significant increase in the number of mediations domestically was an element of mandatory mediation.

The 2011 Cost Study and the Rebooting Study, read together, indicate that mediation objectively saved significant time and money, but in order to realize these savings, an element of mandatory mediation integrated into a Member States judiciary (Integrated Mediation) may be necessary to achieve a balanced relationship between the total number of mediations and judicial cases. Italy, for instance, requires parties to meet with a mediator before litigating in court at which point the party may opt-out of mediation and proceed to the judiciary. Once this system was adopted in Italy, the number of mediations jumped from a few hundred cases per year to over 200,000. Some mandatory mediation schemes, however, may not be practical. In Romania, parties were required to attend a mediation information meeting prior to initiating certain civil disputes outside of court. The Romanian Constitutional Court found the mandatory information meeting put an undue burden on litigants by causing them to “opt-in” to the court system. An instructive approach between Italy’s “opt-out” method of integrated mandatory mediation and Romania’s “opt-in” may have been struck in the Alassini case of the European Court of Justice (ECJ). In that case the ECJ ruled on a challenge to Italy’s Electronic Communications Code, which mandated an attempt at out of court settlement prior to commencing a case. The ECJ in that case established a bright line, “safe harbour,” for mandatory out of court settlement systems. The bright line established mandatory out of court settlement must not: (1) result in a decision binding on the parties by the mediator; (2) not cause a substantial delay; (3) not suspend the period for time barring of claims; and (4) not give rise to cost, or are low cost.

Aim

Moving forward, since mediation has been defined, analysed, accepted and implemented, it may now be time to realize the result. To do so, establishing a Balanced Relationship Target Number, as suggested in the 2011 Cost Study, should be considered. The BRTN would require each Member State develop a target percentage or number of cases in proportion to the total number of civil and commercial cases – including cross-border – and report annually on their performance providing a key performance indicator (KPI). The BRTN would ensure Member States are in compliance with the Directive and allow for a quantifiable measure of the progress.

In addition, consideration should be given to adoption of an integrated mediation approach providing mandatory elements in mediation into their judiciary like those of Italy and in compliance with the Alassini framework. This approach has been shown to dramatically increase the number of mediations domestically with the potential to save disputants significant resources in the form of time and money. Member States may also wish to not take action on the Mediation Directive to avoid risk until more data can be obtained. An in-depth analysis is currently being written as a follow-up on the Rebooting Study to gather information on whether a balanced relationship exists now between mediation and the judiciary and whether integrated mediation would increase the number of mediations.

While Member States by and large have appropriate regulatory structures in place as required by the Mediation Directive, a balance between mediation and judicial procedures in Member States remains to be seen. It is now time for Member States to give thorough consideration of whether and how integrated mediation processes should be established in the Mediation Directive as a Member State requirement for appropriate civil and commercial cases.

1. INTRODUCTION

1.1. Mediation as Access to Justice

Mediation can be viewed as part of the most recent wave of development within the “access to justice” movement. In the European Union, although access to justice is recognized as a fundamental right, there are no codified definitions or comprehensive statements of the elements needed to constitute access to justice.¹ But the phrase “access to justice” does currently have a generally understood meaning, originally recognized in the 1970’s, that broadly refers to claimants’ ability to avail themselves of the various institutions through which a claimant might pursue justice.

Before the 1970’s, however, the concept of access to justice had been much narrower, consisting only of the right to access to the courts.² This more restrictive view would exclude alternative dispute resolution (ADR), such as arbitration and mediation, because ADR methods are, by definition, outside of the courts. Unfortunately, this institution-tied view still exerts residual influence today: opponents of integrating a mediation step into the judicial process often argue that mediation would constitute an obstacle to the parties’ rights of “access to justice”.

The more modern and encompassing view of access to justice has been well elaborated by Mauro Cappelletti, a leading Italian jurist and scholar, who describes it as *“the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state ... [which] ... must be equally accessible to all ... [and] ... must lead to results that are individually and socially just.”*³ Thus, under this more liberal view, access to justice has two aspects: equality of access and just outcomes, regardless of whether redress is sought through a court or through other means.

Overall, access to justice has evolved over three successive waves of development.⁴ The access to justice movement originally emerged in most western countries during the immediate post-World War II era. The “first wave” was the emergence of legal aid. This wave focused on providing access to legal representation in the courts for the economically disadvantaged, especially through the creation of more efficient systems of legal aid or advice. A “second wave” of change focused on group and collective rights. This stage of development brought class actions and public interest litigation to address systemic problems of inequality. Representation was also extended to diverse interest groups, such as environmentalists and consumers. It was in the “third wave” of development that access to justice began to include a range of alternatives to litigation in court for dispute resolution, as well as reforms to simplify the justice system and facilitate greater accessibility. In this phase ADR emerged as a means of securing access to justice. Cappelletti and Garth refer to this third wave as signifying the emergence of a fully-developed access to justice approach.⁵

1.2. Mediation as a Means to Alleviate Judicial Burden

As various studies for the European Parliament and Commission have shown, traditional judicial systems in Europe are heavily burdened by the costs and delays associated with courts and the litigation process. In addition, power imbalances and unfair treatment have significantly impacted citizens’ access to justice.⁶ Across

¹ M. Pinedo, *Access to Justice as Hope in the Dark in Search for a New Concept in European Law*, International Journal of Humanities and Social Science, Vol. I, No.19, 2011.

² Pinedo

³ M. Cappelletti and B. Garth (eds.), *Access to Justice: A World Survey*, Vol. I, Sitjoff and Noordhoff - Alphenaaandenrijn, Milan, 1978.

⁴ Cappelletti and Garth. The notion of access to justice developing in waves was first introduced by Cappelletti and Garth.

⁵ Cappelletti and Garth.

⁶ *Quantifying the Cost of Not Using Mediation – a Data Analysis*, by Prof. Giuseppe De Palo, Ashley Feasley, and Flavia Orecchini (European Parliament Manuscript completed in April 2011). Also see, *“Rebooting” the Mediation Directive: Assessing the Limited Impact of its*

the EU in 2013, the average time of resolution through the court system was 566 days—over a year and a half. The average cost of court litigation was over 9,000 Euros, effectively blocking many citizens from access to the formal court system to seek redress.¹

As a result of these and other systemic problems in accessing justice, the ADR movement has been steadily growing in both civil and common law jurisdictions. Over the last two decades, the EU has increasingly promoted mediation and other forms of ADR as mechanisms for achieving access to justice; in its 2002 Green Paper, the European Commission noted the “increasing awareness of ADR as a means of improving general access to justice.”

In previous reports, the European Commission for the Efficiency of Justice (CEPEJ) has stated not only that “[a]ccess to justice may . . . be facilitated through the promotion of Alternative Dispute Resolution,” but also that “these policies . . . should be further developed.”² Of all the various ADR processes, mediation, in particular, has been at the forefront of EU discussions about access to justice and efficient dispute resolution. Notably, the Committee of Ministers of the Council of Europe has adopted several recommendations promoting mediation and CEPEJ has recommended that member states should be encouraged to further develop mediation procedures.³

This shift toward mediation, in preference to other methods of ADR, suggests that mediation is advancing the access to justice movement. Mediation can serve as a process that complements and works alongside the formal justice system. As has been shown in various studies, mediation not only reduces the workload of the courts (thus improving the availability of judges for cases that must go through the traditional justice system), it also significantly reduces the time and cost of dispute resolution.

Access to justice, especially for the poor and disadvantaged, is best facilitated through mediation, which is well equipped to address many of the key obstacles facing these groups. As the most recent CEPEJ report notes, a majority of the Member States provide some form of legal aid for mediation procedures. In addition, from a rights-based perspective, successful mediation results in a settlement, which often provides a *win-win* solution, with both parties satisfied with the result. More broadly, the expanded use of mediation and alternative dispute resolution mechanisms has become a significant factor in ensuring confidence in the legal framework as a whole, thus allowing more citizens to feel confident seeking redress.

Mediation’s prominence as an access to justice vehicle in the EU was enhanced by the Mediation Directive issued in 2008 by the European Parliament and the Council. Among the stated goals of the Mediation Directive is improving access to justice (especially for the average citizen with low-value claims) by simplifying the mediation process. The Mediation Directive, whose features will be explained in detail below, required Member States to implement structures to support mediation of cross-border commercial disputes in the EU by May 2011. The Mediation Directive highlighted the importance of facilitating access to ADR and promoting the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial procedures (required in Article 1). Consequently, securing better access to justice through mediation, as well as through other methods of alternative dispute resolution, can now be said to be part of the established policy of the European Union.

Implementation and Proposing Measures to Increase the Number of Mediations in the EU, by Prof. Giuseppe De Palo, Leonardo D’Urso, Prof. Mary Trevor, Bryan Branon, Romina Canessa, Beverly Cawyer, and Reagan Florence (European Parliament, manuscript completed in January 2014).

¹ Rebooting Study

² CEPEJ Report on “European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice”

³ CEPEJ 2014 Report

1.3 Non-Quantifiable Benefits

This In-Depth Analysis explores mediation as a form of access to justice, and seeks means to maximize the benefits by exploring ways to increase the use of mediation to resolve disputes. In doing so, it focuses on significant opportunities for cost savings and time savings if mediation were used more. In addition to very substantial cost and time savings benefits set out below, mediation also brings many benefits that are unquantifiable, but are just as important. These include mutual satisfaction of the parties to a settlement agreement, specially tailored solutions, greater compliance, win-win outcomes (rather than win-lose), empowerment of the parties, equalization of weak/strong party imbalances, preservation (or reestablishment) of relationships, and amicable termination of relationships, to name a few. While this In-Depth Analysis emphasizes cost and time savings opportunities, these very significant non-quantifiable benefits should be considered as well.

2. MEDIATION AND ARBITRATION DEFINED AND DESCRIBED

This In-Depth Analysis addresses mediation as a general form of ADR in civil and commercial cases in the EU.¹ Mediation within the EU, however, is only one option on a rather large range of services available to disputing parties, each addressing the various needs of the parties and the peculiarities of the underlying dispute.

A relatively broad list of modern ADR mechanisms ranges from arbitration, to mediation, to negotiation, and to facilitated discussions, and includes some hybrid methods. The principal shared characteristics among all ADR mechanisms are that they:

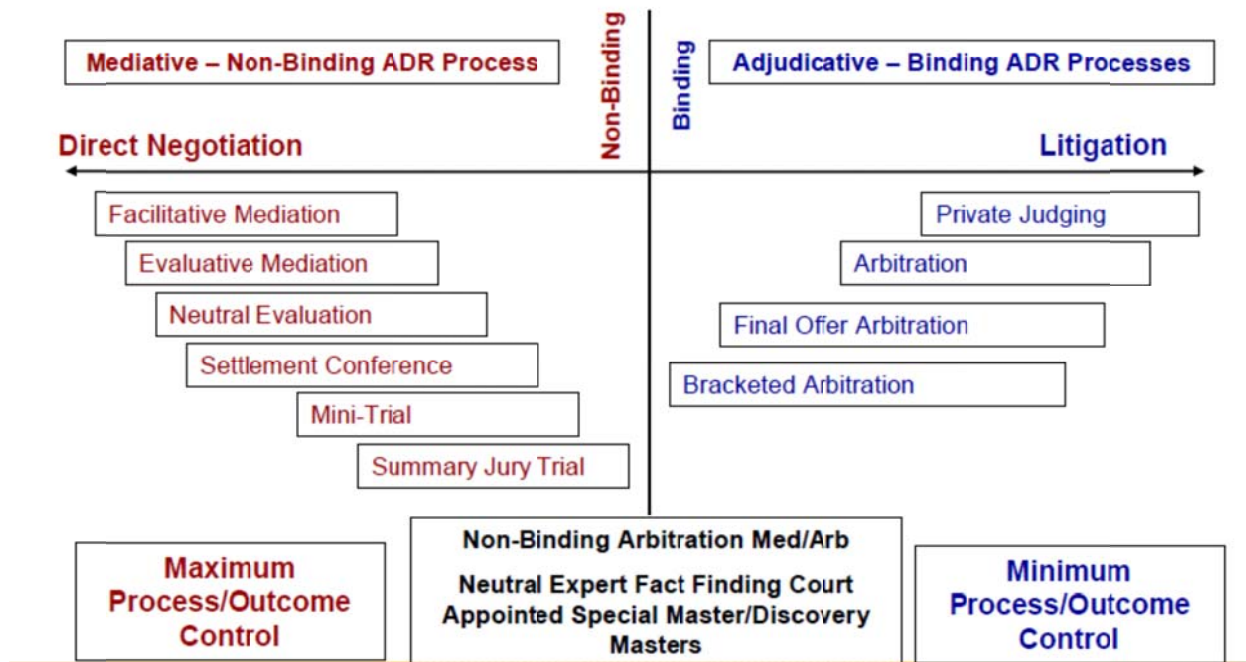
- 1) involve addressing disputes outside of, or at least partially outside of, the formal judicial system (and, consequently, reduce reliance on traditional judges and complex civil procedures and appeal processes);
- 2) involve engaging a professional or panel of professionals who are neutral and independent in order to address the dispute; and
- 3) depend upon agreement among the parties at the outset (arbitration) or throughout the process (mediation) in order to carry out the process.

The types of ADR vary significantly but can be viewed on a spectrum tracking the decision-making power of the neutral versus the control by the parties over the process. At one end of the spectrum, the neutral's decision-making power is absolute and binding, and the procedures tend to be rigid and formalistic. At the other end, the neutral has no decision-making power at all, and the parties retain much more control over the process.

Figure 1: The ADR Spectrum

¹ The discussion of ADR in this In-Depth Analysis encompasses ADR in the civil and commercial dispute context. There are ADR mechanisms and possibilities in criminal justice, but these are beyond the scope of this In-Depth Analysis. Except where specified otherwise, references to ADR address ADR in the civil and commercial dispute resolution context.

The ADR Spectrum



2.1 Arbitration

Arbitration represents the strongest decision-making power on the part of the neutral. The neutral serves as a final decision-maker, issuing binding and non-appealable decisions on the dispute or on critical issues within the dispute. Arbitration has enjoyed general awareness and formal recognition extending back into the eighteenth century, and it is, consequently, more deeply established. In arbitration, parties usually agree on detailed rules of information-sharing, applicable rules of evidence, the role of expert witnesses, direct and cross-examination of witnesses, and other formalities. There are various types of arbitration, ranging from those where the decision determines specific issues or facts, applicable law, and/or range of damages in a larger dispute (Special Issue Arbitration) to those where the decision resolves the entire dispute (General Arbitration).

Some arbitrations employ a variant of game theory to resolve disputes. For example, in **bracketed arbitration**, the parties establish a result range that is not shared with the arbitrator, and they agree to be bound by the arbitrator's decision but only to the extent of the range agreed to among themselves. Overall, the neutral's role in arbitration processes is to issue a decision, not to broker an arrangement between the parties. The decision is not appealable and is usually available to register and enforce as a court judgment.

2.2. Mediation and Hybrid Models

Developed more recently, in the second half of the twentieth century, mediation also offers a broad range of types that vary based upon the needs of the parties. Common to all types, however, is that there is no binding decision by the neutral, although any agreement reached by the parties may include provisions for enforcement as a court judgment where provided for by law.

Pure facilitative mediation represents the far end of the mediation side of the spectrum. The neutral is normally called a "mediator" and works to get the parties to reach agreement on some or all of the disputed issues between them. In pure facilitative mediation, the parties have significant power to shape the process and

have agreed that the mediator exercises no decision-making power. The mediator works to build communication between the parties and to break down barriers with an ultimate goal of reaching agreement on the dispute or on key issues in the dispute.

Evaluative mediation is similar to facilitative mediation in that the neutral (sometimes called a conciliator) has no decision-making power. However, in evaluative mediation sometimes the neutral is provided with some degree of authority to evaluate the parties' relative positions and provide opinions on the relative merits of the case or on particular issues. The evaluative mediator sometimes may offer a prediction on a likely outcome and urge discussion based upon that prediction. Based on the particulars of the case, the evaluator may also suggest value ranges for discussion. Nevertheless, it is still an entirely voluntary process, and no decisions are issued; the parties must still reach agreement if the dispute is to be resolved.

There are other, hybrid models that appear on the spectrum between pure arbitration and pure mediation methods. For example, **Early Neutral Evaluation**, involves presenting cases to an independent party, often called a "neutral evaluator", who then renders a non-binding decision on the merits of the issues or dispute. The decision is usually written and accompanied by a detailed rationale. Since it is non-binding, the parties may then use the decision as a basis for further discussion. Early neutral evaluation can help parties identify and understand the relative strengths and weaknesses of their case and is often used where there are complex factual disputes or relatively ambiguous applicable rules. The procedures for early neutral evaluation are far less formal than they are for arbitration; the goal is for the parties to understand each party's case, and there can be a fair amount of free-flowing, back and forth discussion. The result is usually a better understanding by each side of their relative merits, which can lead to settlement discussions and eventual settlement out of court.

The **Mini-trial**, or mock trial, is a more formalized method of ADR that still does not involve a binding decision. In a mini-trial, the parties agree upon a neutral, or panel of neutrals, and rules, and they present their case with relative formality that is similar to, but still far less rigid than, a court proceeding. The idea is for the parties to mimic the experience of a trial by exchanging exhibits, briefs that present each side's case, and rebuttal documents that address the other side's contentions. Formalized and rigid rules of evidence do not apply as they would in court. After presenting their respective cases, the parties may ask the neutral panel to issue a reasoned, non-binding decision. The parties may then use the decision to evaluate their respective positions.

No matter the particular type of mediation, the key elements of mediation that distinguish it from arbitration and other more formal types of ADR are that mediation-based mechanisms involve no power to impose decisions over the parties, and parties retain a greater degree of control over the process applied. Before there can be any enforceable result to mediation, the parties must reach agreement on the terms of settlement.

2.3. Best Practices in Mediation Systems

Over the years, professionals have developed relatively wide agreement on practices that are crucial for mediation to function effectively as a form of ADR. These practices are intended to assure parties that they will not be prejudiced by participating in the process. This assurance is important, because mediation is an entirely voluntary process. If the parties do not have confidence in the process, they will not participate in it. Although identified as "best" practices, the practices should instead be viewed as minimum requirements critical to the effective functioning of a mediation system. This section identifies those practices and discusses why they are important.

Protection of Confidentiality

The mediation process encourages parties to mutually disclose private information and opinions in order to generate possibilities for settlement. This information may need to be protected from public disclosure by the mediator as well as from disclosure to the opposing side. For example, a key technique used by mediators is to conduct a colloquy, or separate meeting, individually with each side in order to hear private concerns and learn private motivations or goals that apply to the dispute. In order to ensure this information can be shared in

confidence, the mediator is bound by an agreement, or by applicable rules, to respect confidentiality. If there are no rules in place, or the rules in place are inadequate to protect this confidentiality, parties may find it very difficult to share private information with the mediator. True, a mediator that breaches confidentiality may find it very difficult to get future business, but the legal system must do its part as well. The legal system must provide that confidence, usually through effective penalties for unauthorized disclosure to the other side or in public.

Another aspect of confidentiality is an evidentiary one. In mediations, parties may make offers to settle or may take a position on a key issue that is ultimately unsuccessful. In the event the mediation is not successful and the dispute winds up in court, the discussions and offers made during the proceedings should not be admissible as evidence in the court case. To allow otherwise would greatly inhibit the flow of information during the mediation, as each party would constantly have to evaluate the risks of each disclosure. Mediation agreements almost always include waivers by each side stipulating that they will not be able to present as evidence in a later court procedure any information disclosed during the mediation process. A legal system's rules should enforce these waivers. Evidentiary rules in a judicial system should prohibit discussions held during mediation from being raised as evidence in later court proceedings on the dispute, or at least limit the extent to which they may be.

A corollary to this prohibition is to preclude the mediator from being called as a witness in a later court case addressing the dispute between the parties. Parties are usually required by the mediator to waive any potential right to call the mediator as a witness in a later court proceeding on the dispute. Best practice legal systems will respect that waiver. To allow otherwise can significantly inhibit the flow of information critical to facilitating an agreement.

Time Limitations

Mediations take time to apply for, schedule, and conduct, and therefore mediation agreements usually provide for the tolling (pausing) of any limitations periods—periods in which a court case must be brought—during the pendency of the mediation. Failure to toll these time periods may work to the disadvantage of one or more parties, particularly if a period is expected to expire in the near future or if the mediation is expected to take significant time. Consequently, mediation rules and mediation agreements often provide for applicable limitations periods to stop running during the pendency of the mediation. Best practice legal systems provide for these agreements to be honoured or otherwise automatically suspend the running of these time periods.

Enforceability

Settlement agreements reached in mediation often must be enforceable. The ability to enforce the agreement with the force and effect of a court judgment may be the difference between a full settlement and a failed mediation. If one side can offer a quick, certain, and enforceable judgment, it can be a powerful incentive for the other side to settle. Consequently, enforceability should be available as a negotiation tool for mediation settlement discussions. Providing for enforceability of most settlement agreements reached through mediation is a best practice for mediation-enabling environments.

Quality Control

As should already be clear from other best practices in mediation environments, the parties' confidence in the quality of the process and the neutrality and professionalism of the mediator are critical to the role that mediators can play. Standardization and quality control mechanisms, public and private, play a role in establishing this confidence. State-level quality control mechanisms, such as required professional training, testing, and certification requirements, help establish minimum levels of professionalism in mediation and provide public confidence in this professionalism.

The degree and types of controls vary among systems, with some jurisdictions depending entirely upon privately-established certification and training systems, analogous to a guild or institute, and others imposing these controls through state or quasi-state entities, such as Ministries of Justice. Alternatively, they may be

provided for at the mediation provider level, such as court-connected mediation programs or mediation referral programs. Whatever the form, quality control usually includes establishing codes of conduct for mediators and mediation providers, guidance on mediation agreements and standard waivers and protections, regularized training to enter the profession, and continuing education training to remain in the profession.

Active Public Awareness

While mediation availability in developed economies is often high, awareness of and reliance on mediation are often lower than might be expected relative to the potential benefits that can accrue to the parties. As discussed elsewhere in this In-Depth Analysis, the capacity to provide mediation does not mean that mediation is widely relied upon. The factors influencing mediation use are likely many, ranging from lack of awareness by the parties to active resistance by legal representatives. Many systems include training programs and clinics as part of lawyer education programs, while others depend upon active referral of certain types of cases by courts to mediation. Some of these court referral programs are developed within the court system, such as court-annexed programs, while others are outside the courts, such as mediation referral programs or mandated mediation requirements as a pre-condition to case initiation or court hearings. Some mediation providers market their services through meaningful channels, such as networking, websites, and very occasionally, active advertising.

3. MEDIATION IN THE EU

Mediation is addressed and regulated at the EU level, and Member States largely have legislation and rules in place that allow for mediation and address the best practice/minimum requirements discussed above. Due to years of mounting concern about court costs, court congestion, and other obstacles to cross-border dispute resolution in the single market, the focus on mediation in the EU has steadily increased. A Directive addressing mediation regulatory environment is currently in place, and Member States are largely in compliance with the specific requirements. Nevertheless, there is still a long way to go: the number of mediations remains extremely low in relation to the number of court cases in Member States. How the Mediation Directive is addressed in the near future may have a significant effect on the rate at which parties will rely on mediation in the European Union.

3.1. Brief History of Mediation Regulation in the EU

The regulatory push at the EU level started with the October 1999 European Council of Tampere, which shifted from a “laissez-faire” approach to mediation and called for the Member States to create alternative, extrajudicial dispute resolution procedures. The efforts that followed spanned nearly a decade and culminated in the adoption of *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* (the Mediation Directive).

To fully cover the mediation regulatory environment in the EU, however, there are other relevant instruments that should be addressed.

The Recommendations

Before the adoption of the 2008 Mediation Directive, the European Commission had already endeavoured to promote greater use of ADR procedures in resolving consumer disputes by issuing two Recommendations: 98/257/EC¹² and 2001/310/EC.

The 1998 Recommendation contains principles designed for ADR providers (bodies responsible for out-of-court consumer dispute resolution) to adhere to. This recommendation was designed to ensure that out-of-court procedures offer the parties minimum guarantees such as independence, transparency, adversarial principle, effectiveness, legality, liberty, and representation. However, this recommendation did not concern procedures that merely involved an attempt to bring the parties together to find a solution by common consent; instead, it

only concerned those procedures designed to lead to settlement of a dispute through active intervention of a third party. Thus, mediation did not fall under the scope of this recommendation.

In 2001 the Commission issued another recommendation, adopting a new set of principles that also applied to consensual out-of-court consumer complaint resolution schemes, such as mediation. The principles of this recommendation were impartiality, transparency, effectiveness, and fairness.

The Consumer ADR Directive

In 2013, the European Parliament adopted a sector-specific Directive on consumer ADR – *Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC* (the Consumer ADR Directive). The Consumer ADR Directive aimed to increase consumer protection. Member States were given two years to implement the Directive, with the Directive coming into force by July 2015. According to Article 1, the Directive aims “to contribute to the proper functioning of the internal market by ensuring that consumers can ... submit complaints against traders to entities offering independent, impartial, transparent, effective and fair alternative dispute resolution procedures.”

The Consumer ADR Directive applies to domestic and cross border disputes that arise out of sales or service contracts (online and offline) between EU resident consumers and established EU traders. It applies in all economic sectors (subject to certain exceptions such as health and education) but does not apply to trader to consumer disputes and trader-to-trader disputes.

The Consumer ADR Directive requires Member States to ensure that:

- consumers have access to quality out of court ADR procedures to deal with any contractual dispute arising from the sale of goods or the provision of services between a consumer and a business;
- entities acting as ADR entities meet certain quality criteria including independence, transparency, expertise, effectiveness, and fairness, etc.;
- traders inform customers about ADR entities/schemes which cover the trader’s sector and whether or not the trader subscribes to those ADR schemes;
- the appointment of a competent authority charged with the monitoring the functioning of ADR entities established in its territory;
- qualified ADR entities resolve disputes within 90 days; and
- ADR procedures be free of charge or of moderate costs for consumers.

The Consumer ADR Directive is supported by the Regulation on Online Dispute Resolution (ODR). The Regulation, which provides the mechanisms for resolving consumer disputes online, will come into force by January 2016. The Regulation requires the establishment of an online, interactive portal (the 'ODR Platform') for contractual disputes to be resolved out of court, using techniques such as 'e-negotiation' and 'e-mediation'. Once EU consumers submit their disputes online, they are linked with national ADR providers who will help to resolve the dispute. The Regulation applies to consumer to trader, domestic and cross border disputes, and certain disputes brought against a consumer by a trader. Each member state must propose an ODR contact to assist with disputes submitted through the ODR Platform. Online traders must inform customers of the ADR option and provide a link to the ODR Platform on their website.

Ultimately it is hoped that both of these new measures will increase competition within the EU and give consumers better access to and confidence in alternative methods of dispute resolution.

3.2 The Mediation Directive

Scope of Application

Citing a need to adopt measures for judicial cooperation and proper market functioning in the European Community, the European Parliament and the Council of the European Union issued the 2008 Mediation Directive 2008/52/EC ("the Mediation Directive"). The Directive sought to simplify and provide access to justice by utilizing mediation as a cost-effective and quick judicial resolution mechanism in civil, commercial and cross-border contexts. While expressly stating that it applied only to cross-border disputes, the Mediation Directive also provided in its Recital 8 that *"nothing should prevent Member States from applying [its] provisions also to internal mediation processes."* Thus, while specifically only addressing cross-border disputes, it is clear that the Directive's requirements are also applicable, though not required, in addressing internal disputes. The Mediation Directive provided a three-year period of transposition, until May 21, 2011, for Member States to bring legislation into conformity with the Directive.

The Mediation Directive's definitions establish a broad framework for Member States' use in drafting legislation to implement the Directive. With the goal of achieving a balanced relationship between mediation and judicial proceedings, the Directive focuses on quality, sovereignty, enforceability, and confidentiality to achieve its ends. Mediation is defined in Article 3 as, *"a structured process however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis to reach an agreement on the settlement of their dispute with the assistance of a mediator."* Article 3 leaves open the possibility for mediation to be voluntarily initiated among the parties, court initiated, or prescribed by Member State legislation. A mediator is deemed to be, *"any third person who is asked to conduct a mediation in an effective, impartial and competent way."*

Structural Requirements in Mediation Regulation

The Mediation Directive establishes minimum requirements for the best practices mediation regulatory environment discussed above: **Confidentiality, Time Limitations, Enforceability, Quality Control, and Public Awareness.**

Article 7 addresses confidentiality as a fundamental requirement for the mediation process to encourage parties to exchange ideas freely in attempting to reach a mutually acceptable resolution. With limited exceptions to confidentiality based on public policy or enforcement concerns, Article 7 provides, *"Member States shall ensure that, unless the parties agree otherwise, neither mediator nor those involved in the administration of mediation shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration . . ."* As discussed above, this presumption of immunity from disclosure in future adversarial proceedings is critical to ensure full, effective and meaningful engagement by the parties to a mediation.

Tolling of time limitations is addressed in Article 8, which provides, *"Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process."* The function of this minimum requirement is to ensure the broad availability of mediation even where concerns about statutes of limitations might otherwise preclude parties from engaging in mediation.

Enforceability of settlement agreements arising from mediations, and the principle of reciprocity, are aspects critical to the functional, community-wide implementation of mediation. Accordingly, in Article 6, *"Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable."* This affords parties access to the powerful settlement tool of an enforceable agreement.

Quality Control is addressed somewhat more loosely in the Directive. Rather than a mandatory requirement to establish a system, Article 4 provides that, *"Member States shall encourage, by any means*

which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services." Member States are also "encouraged" to provide training for mediators to ensure the integrity of mediation, i.e. that mediations are "*conducted in an effective, impartial and competent way.*" Finally, quality, competence, and professionalism are also addressed in Recital 17 of the introduction of the Directive, which provides, "*Mediators should be made aware of the existence of the European Code of Conduct of Mediators.*"

Public awareness is also addressed. Article 9 provides, "*Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.*" While the language of "*by any means which they consider appropriate*" is a significant qualifier, this article sends a clear signal that Member States are expected to promote mediation.

Mandatory Mediation

The Mediation Directive also addresses mandatory mediation in its Article 5(2), which expressly allows Member States to mandate mediation: "*This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial systems.*" In the future, this permission may play a significant role in bringing mediation practice in Member States up to a meaningful level—in other words, a level that achieves the "balance" between mediation and judicial procedures identified in Article 1 as a core objective of the Directive.

4. THE FUNCTIONING OF THE MEDIATION DIRECTIVE IN MEMBER STATES – CASE STUDIES

Member States have by and large successfully transposed the requirements of the Mediation Directive. The following discussion includes a representative cross-section of Member State mediation regulatory environments that provides a picture of how the best practices addressed in the Mediation Directive are actually carried out. Importantly, while the Directive expressly only applies to cross-border disputes, states largely apply the requirements to both internal and cross-border disputes. As such, the Mediation Directive serves a very beneficial role on propagating best practices throughout Member States.

4.1. Greece¹

Greece implemented the EU directive by enacting Law 3898/2010, which came into force on December 16th, 2010². This law, which bears the title "Mediation in Civil and Commercial Matters" (hereinafter referred to as the "Greek Mediation Law") has already undergone two reforms³ and was soon followed by a series of other legislative acts, including Presidential Decree 123/2011 on "the licensing and operation of mediation training providers" and several ministerial decisions regulating particular aspects on mediation.

¹ This subsection was derived from material generously contributed to the authors by Elena Koltsaki, PhD, an attorney, accredited mediator and mediator trainer in Greece.

² Government's Gazette (Fyllo Efimeridos tis Kiverniseos—FEK A 211/16.12.2010)

³ Act of Legislative Content (FEK A 237/5.12.2012) and Law 4254/2014 (FEK 85/7.4.2014)

Although the Directive is limited to cross border mediations and applies to civil and commercial matters—expressly excluding those rights and obligations which are not at the parties’ disposal under the relevant applicable law—Greece applies the Directive to internal disputes on civil and commercial matters.

The Greek Mediation Law establishes quality controls. The standards set by the Greek legal framework to ensure quality in mediation in accordance to the Directive’s requirements refer to (a) regulation of the training and accreditation of mediators¹ (b) adherence to a specific code of conduct and (c) the existence of effective quality control mechanisms concerning the provision of mediation services. Mediators are accredited by the Administration Directorate General of the Greek Ministry of Justice, Transparency and Human Rights. There is a Mediators Code of Conduct that is almost identical to the European Code of Conduct for Mediators.

The Directive’s requirement for enforceability is respected by Article 9 of the Greek Mediation Law, which provides that once the settlement agreement² is signed by the mediator, the parties, and their attorneys, the mediator may, upon request of one of the parties—even without the consent of the other—submit it to the court of first instance of the jurisdiction where the mediation took place. It becomes an enforceable title.

To ensure protection of confidentiality, the Greek Mediation Law provides in its Article 10 that mediation should be conducted in a way that should not compromise confidentiality, unless the parties agree otherwise. All persons participating in mediation commit themselves in writing, before attending, to respect the confidentiality of the process and, should they wish, they may also agree to preserve the confidentiality of the content of any agreement they might reach during the mediation. The law also provides that mediators, parties, their attorneys, and anyone attending the mediation proceedings may not be summoned as witnesses nor may they be compelled to give evidence in any subsequent legal or arbitration proceedings regarding information resulting from or in connection with the mediation process (unlike the respective provision of the Directive, where the scope is limited to civil and commercial proceedings). Nevertheless, exactly as prescribed in the Directive, the Greek law provides for a few exceptions, namely where necessary for overriding considerations of public policy. Such considerations are: a) for ensuring the best interest of children or to prevent the harm to physical or psychological integrity of a person; and b) where disclosure to the courts of the content of the agreement arising from mediation is necessary in order to enforce or implement the agreement.

Finally, in line with the Mediation Directive’s provisions on limitation and prescription periods, Article 11 of the Greek Mediation Law ensures that parties who use mediation as an alternative way of resolving their dispute are not prevented from initiating court proceedings by the expiry of limitation or prescription periods during the mediation process. More particularly, the Greek Mediation Law provides that the initiation of a mediation process has the effect of suspending the prescription period for the right of action by either party during the mediation process. The limitation period is resumed once the mediation attempt has been unsuccessful either by virtue of a unilateral termination served by one party to the mediator and to the other party or of the minutes signed by the mediator testifying the termination or by any other way.

¹ Presidential Decree 123/2011 on “the licensing and operation of mediation training providers”

² Minimum content of the minutes is also provided by law and requires the name and surname of the mediator, the time and place of the mediation proceedings, the names and surnames of all participating in the mediation proceedings, the agreement to mediate which confirms the parties decision for the mediation to take place and the settlement agreement.

4.2. Italy¹

The Italian Parliament has attempted to regulate mediation for decades. Mediation was first mentioned in the Italian Civil Code in 1865. In 1931, mediation was used in the context of public safety provisions. Then in 1940, mediation was added to the Code of Civil Procedure as an internal procedure conducted by judges in court. Italy later began using mediation in labour disputes during the 1960s. In 1973, pursuant to Law No. 533, mediation and conciliation were established in the Code of Civil Procedure. In December 1993, the chambers of commerce established mediation and arbitration commissions for the purpose of resolving disputes among companies and between companies and their clients. And in 2003, Legislative Decree 5/2003 initiated mediation for dispute resolution in certain financial matters and in all corporate matters.

Although mediation had been used in certain sectors until 2003, it was not used by the general public as a method of alternative dispute resolution. After the adoption of the EU Mediation Directive, the public became aware of mediation as a result of the Directive's implementation. In June 2009, the Italian Parliament issued Law 69, which recognized mediation as a dispute resolution option for civil and commercial disputes. It also granted the Italian government the power to issue a legislative decree on mediation, which resulted in the enactment of Legislative Decree 28 in 2010. Eighteen months later, in October 2012, Legislative Decree 28 was invalidated on the technical basis that the mediation rules had been implemented by a government act that had not been passed as a statute by Parliament. Parliament remedied this by adopting into law the underlying delegation of authority to the government, with the result that the previous mediation rules came back into effect, with the force of law, on September 20, 2013.

In Italy, mediation is regulated by law, but the mediation procedures are regulated by mediation organizations and service providers. Italy's law regulating mediation applies to both internal and cross-border disputes.

The law sets out the basic best practice requirements for a mediation-enabling regulatory environment. Mediation confidentiality is regulated by Article 9 of Legislative Decree 28. Under it, each individual involved in the mediation process, including parties, counsel and the mediator, has an obligation of confidentiality. This obligation is also applicable to documented statements and information acquired during the proceedings. However, if the parties have consented to the disclosure of information, the mediator is exempt from the obligation of confidentiality. The mediator is also exempt if keeping the information confidential would be in violation of the law. Finally, as regulated by Legislative Decree 28 and Article 200 of the Italian Code of Criminal Procedure, a mediator cannot be required to testify about information obtained during mediation.

The law also provides that mediated settlement agreements are automatically enforceable. When the parties have reached an agreement, it is summarised in the minutes. The minutes are then signed by the mediator, both parties, and counsel for both parties, and then attached to the agreement. According to Article 12 of Legislative Decree 28, each of the parties may file the mediated settlement agreement with the court. It then becomes an executable document with the same legal effect as a court judgment. The reviewing judge checks to ensure that the agreement does not violate public policy or mandatory rules.

Article 5 of Legislative Decree 28 addresses statutes of limitation. When parties mediate their dispute, the mediation proceedings will suspend the applicable statute of limitation for a period of up to four months following the receipt by the mediation service provider of the request to mediate. This limitation suspension only happens once. If mediation fails but the parties start another mediation, the initiation of the subsequent mediation will not suspend the running of the statute of limitations.

¹ The description of Italy is derived and updated from a larger analysis of Italy law and mediation contained in the 2013 Study, which analysis was based on information from Giuseppe De Palo and Chiara Massidda's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille, and "Lead 5.4 Million Thirsty Horses to Water, and the Vast Majority Will Drink" by Giuseppe De Palo.

Mediator quality control processes are also in place in Italy. The law establishes detailed legal rules governing accreditation and training of mediators and registration of mediation organizations. Mediation organizations that are registered with the Ministry of Justice regulate the certification of mediators. Mediators must be registered with one of the many Ministry-approved mediation organizations. Local bar associations, chambers of commerce, and various professional organizations can establish mediation organizations. Training of mediators can be provided by registered mediation organizations.

4.3 Romania¹

Romania has a stand-alone law on Mediation. Two years before the adoption of the EU Directive, the Romanian Parliament adopted Law No. 192/2006 on mediation and the organization of the mediator profession, published in the Romanian Official Journal On May 22nd, 2006. The adopted draft was the fifth version of Romanian mediation law since 2000. This law regulated the issues of the place of mediation within the dispute resolution field, and the role and obligations of the mediator. It also clarified how to access mediation services and who can act as a mediator. Finally, the law included several key aspects that were then also required by the Directive regarding quality of mediation services, recourse to mediation, enforceability of mediation agreements, process confidentiality and effects on limitation and prescription periods.

Romania has implemented Article 4 of the Directive through a national accreditation scheme that is based on specific training standards (80 hours). To date, one hundred and twenty-two trainers are authorized to train mediators within twenty-three training providers. The whole system is facilitated by the Romanian Mediation Council, a quality control body that, among other things, sets and enables training standards and a code of ethics and deontology, authorizes mediators, and updates the National Panel of Mediators. This independent panel, which is established in the Romanian Mediation Law, has resulted in almost ten thousand mediators that are authorized to provide mediation services in Romania.

The Directive gives every judge in the EU, at any stage of the procedure, the right to invite the parties to have recourse to mediation if they consider it appropriate in the case in question. The judge can also suggest that the parties attend an information meeting on mediation. The Romanian mediation legislation is built on the principle of free will participation. Parties can voluntarily opt for mediation in order to resolve their disputes. Simultaneously, all judicial bodies have the obligation to inform the disputing parties about the mediation process and its advantages and to recommend them its use.

Law No. 202/2010 adopted by the Romanian Parliament allowed the court to invite the parties to use mediation in order to settle a dispute or to attend an information session on the mediation benefits. In enforcing the provisions of Article 5 of the EU Directive, under Article 2 of Mediation Law in Romania (no. 192/2006), parties with certain types of disputes (consumer, family, malpractice, civil/commercial - under approximately 10.000 Euro) have a duty to attend an information session on the benefits of mediation. Thus, beginning on August 1, 2013, the courts rejected a claim as inadmissible if a claimant had not complied with the duty to participate in an information session on mediation prior to filing the claim, or after the trial filing until the deadline assigned by the court for this purpose. However, the Constitutional Court's Decision No. 266/25 June 2014, found the provisions of Article 2 (1) and Article 2 (1[^]2) of the Law No. 192/2006 unconstitutional, disabling this opt-out system of referring cases to mediation.

The Directive, through Article 6, obliges Member States to set up a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request. In Romania, the Mediation Agreement becomes enforceable by presenting it to the notarial or judicial authorization (Art. 438-441 of the New Romanian Civil Procedure Code). Moreover, such an authentication of the mediation agreement by a notarial deed or by court approval is directly required in certain situations.

¹ This subsection was developed from material generously contributed to the authors by Adi Gavrilă, an attorney, accredited mediator, and mediation center founder in Romania.

The principle of confidentiality stands at the foundation of the Romanian mediation model and it is even acknowledged in the legal definition of mediation. The assurance of confidentiality is fully implemented in the Romanian mediation law and it creates a safe area for the parties and motivates them to participate in the mediation proceedings. The mediator becomes the holder of the secret information jointly shared by the parties and a recipient of any individual communication of a confidential nature from or among them.

Article 2532 point 6 from the Romanian Civil Code codifies the Directive's requirements about limitations periods. The limitation period will be suspended for the duration of the mediation process if the mediation takes place in the last six months of the limitation period. There is an exception to this rule: point 7 of the same Article applies to the case when the person entitled to act must or could, according to law or contract, try mediation as a pre-trial condition. The limitation period is then suspended during the mediation procedure up to a maximum of three months.

4.4 Spain¹

Spain has implemented the EU directive by enacting the Real Decreto - Ley 5/2012 ("Law 5/2012") on internal and cross-border mediation in civil and commercial matters. It became effective on 28 July, 2012. In addition, the Catalan legislature had already passed act 15/2009, of 22 July 2009, regarding mediation in the sphere of private law. It has been recently further developed by Decree 135/2012, of 23 October 2012, for matters in the Catalonia region. According to sections 6.1 and 6.3 of Law 5/2012, mediation in Spain is always a voluntary process and therefore there is no obligation to participate or reach an agreement.

Law 5/2012 includes an amendment to article 414 of the Civil Procedure Act (LEC), requiring the court to inform the parties of the possibility of resolving their dispute through negotiation, including mediation, and the court may invite the parties to attend an information session. According to section 12.2 of Catalan Act 15/2009 and Section 29 of Catalan Decree 135/2012, mediation may also be initiated at the request of the court in any stage of the judicial proceedings or on referral by a justice of the peace, who may propose mediation to the parties and contact the Centre for Mediation in Private Law of Catalonia in order to conduct an information session. The parties may request suspension of the court hearing by agreement (Article 415 LEC as amended by Law 5/2012) in order to proceed to mediation. In the event the mediation ends without a settlement, either of the parties can request cancellation of the suspension and the resumption of the court proceedings.

Confidentiality is also addressed in the law. Article 9.1 of Law 5/2012 provides that the mediation process and the documents used during it are confidential. Mediators are exempt from the obligation to give evidence in civil and commercial judicial proceedings regarding information arising out of or in connection with a mediation procedure (Article 9.2, Law 5/2012). Section 7 of Catalan Act 15/2009 states that any professional participating in mediation proceedings is obligated to refrain from disclosing information obtained through mediation. However, there are two express exceptions to the duty of confidentiality: written approval by the parties and a reasoned court order issued by a criminal court (Article 9.2, Law 5/2012).

Mediated settlement agreements are not automatically enforceable. If no judicial proceedings are pending, enforcement of mediation agreements is subject to their conversion into public deeds (Article 23.3, Law 5/2012). If the mediation settlement agreement is reached after the start of a judicial proceeding, under Article 25.4, the parties may request its recognition ("homologacion") by the court.

¹ The description of Spain is derived and updated from a larger analysis of Spain's law and mediation contained in the 2013 Study, which analysis was based on information from Antonio Sanchez Pedreno's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille.

For limitations, Article 4 provides that the start of a mediation procedure will suspend the running of any applicable statute of limitations. If the initial minutes establishing the scope of the dispute and other issues are not executed within 15 days from the mediation's start, the statute of limitations will start running again. Suspension of the relevant statute of limitations will extend until the execution of the mediation settlement agreement, the signing of the Final Minutes, or the termination of the mediation by any of the termination causes established in Law 5/2012.

Finally, for quality controls, according to section 11 of Law 5/2012, three requirements must be fulfilled by individuals in order to be a mediator: first, they must be able to freely exercise their civil rights; second, they must have an official university degree (or equivalent professional studies) and specific training in mediation (Article 2, section 11); and third, they must take out civil liability insurance or an equivalent guarantee. The training should be acquired through one or more courses provided by a duly accredited training institution. According to sections 5 and 6 of Royal Decree 980/2013, mediation training programs must have a minimum duration of 100 hours and they must include both theoretical and practical contents. A Registry of Mediators and Mediation Institutions overseen by the Ministry of Justice has been created and regulated by sections 8-25 of Royal Decree 980/2013. However, registration is voluntary, except for bankruptcy mediators.

4.5 United Kingdom¹

In the UK, there is no separately standing Mediation Act controlling the procedure or practice of mediation, and there are no current state controls for training, performance, or appointments of mediators. Instead, there are private companies, as well as judicial and government initiatives, to promote mediation and to persuade parties to use mediation. While mediation has existed in the UK for decades as a recognized practice, its formalization in legislation came much more recently. The Civil Procedure Act of 1997, c. 12, introduced the Civil Procedure Rules (CPR), which were intended to enable courts to deal with cases justly, manage cases actively, and require parties to help the courts do so – while encouraging the use of ADR. Since mediation's introduction into the civil justice system in 1997, the judiciary has encouraged mediation, and reforms to the civil justice system have stimulated the use of mediation. The regulatory environment is growing, but as in many Member States, mediation is still used relatively infrequently.

The Directive has been implemented differently in the three UK jurisdictions (England and Wales, Scotland, and Northern Ireland). In England and Wales, it was implemented only for civil and commercial cross-border disputes. It was implemented through two statutory instruments: the Cross-Border Mediation (EU Directive) Regulations ('the Cross-Border Regulations') and the Civil Procedure (Amendment) Rules ('the Civil Procedure Amendment Rules'). In both Scotland and Northern Ireland, it was implemented only in relation to cross-border mediation (as opposed to internal domestic mediation).

Enforcement of mediated settlement agreements is addressed effectively. Following the implementation into UK law of the Directive, an agreement reached in a cross-border mediation (as defined by the Directive) may be enforced by way of an application to a court under the CPR. Where a dispute is cross-border, and there are no existing proceedings, a court application can now be made under rule 78.24 of the CPR for a new type of order, called a mediation settlement enforcement order (MSEO). The settlement agreement is attached to the MSEO and the court will require evidence that each party has given its explicit consent to the application being sought.

In response to Article 4 of the Directive regarding either voluntary codes of conduct by mediators and mediation provider organizations or additional training requirements, no additional legislation has been introduced in England and Wales, either for civil cross-border or domestic mediation. However, the Civil

¹ This sub-section was derived from Andrew Hildebrand's contribution to *EU Mediation Law and Practice*, edited by Professors Giuseppe De Palo and Mary B. Trevor.

Mediation Council (CMC) is planning on introducing a mediator registration scheme that will also cover individual mediators and mediation training.

In England and Wales, confidentiality is key to the concept of mediation, and courts have generally been unwilling to pierce the mediation veil of confidentiality. Regulations 9 and 10 of the Cross-Border Regulations broadly echo Article 7 of the Directive. Regulation 9 states that a mediator has a right to withhold mediation evidence in civil cross-border proceedings (and in arbitration) and makes that right subject to regulation. Regulation 10(b) states that the test as to whether a mediator can be ordered to disclose mediation evidence is whether 'the giving or disclosure of the mediation evidence is necessary for overriding reasons of public policy'. This gives mediators in civil and commercial cross-border disputes greater protection than the 'interests of justice' test that applies in purely domestic disputes.

In general, it is not only the mediation itself that is confidential, but also the sessions between the mediator and each party. Mediations in the UK are conducted on a "without prejudice" basis, meaning that submissions made in an attempt to reach settlement will not usually be admissible in later court proceedings relating to the same subject matter, subject to some limited exceptions (such as agreement of all the parties or a legal obligation to disclose the information). Any express confidentiality provisions in essence reinforce the "without prejudice" nature of the mediation.

While there are no official statistics for the number of mediations that take place in England and Wales, or that record their success rates in settling disputes, there have been various informal studies. Most recently, according to a 2014 Mediation Audit conducted by Centre for Effect Dispute Resolution (CEDR), 9,500 commercial and civil cases are now mediated annually, an increase of 1,500 cases, or 9%, in the past two years. The collective value of the cases mediated each year is around £9 billion. Of these cases, 86% settled, either on the day (over 75%) or shortly thereafter. CEDR also estimates that "by achieving earlier resolution of cases that would otherwise have proceeded through litigation, the commercial mediation profession ... save(s) the British Economy around £2.4 billion a year in wasted management time, damaged relationships, lost productivity and legal fees".

Mediation in the UK is the choice of the parties as a voluntary process. Subject to any pre-existing contractual arrangement between parties to mediate a dispute, there is no obligation on litigants to mediate commercial disputes. However, courts are increasingly encouraging mediation and legal representatives are required to confirm that they have explained the various ADR options to their clients. A court may, on its own initiative, stay a hearing to allow a party to participate in mediation. Additionally, a court can impose costs sanctions where it decides that a party has unreasonably refused to engage in ADR.

5. RESULTS OF THE DIRECTIVE'S IMPLEMENTATION AND POSSIBLE PROBLEM AREAS TO ADDRESS

While the Mediation Directive now provides a strong "best practices" guide for unifying mediation systems across Member States, the number of mediations actually occurring varies significantly among the states. Overall, however, the numbers of mediations are very low, representing just a tiny fraction of the total number of cases in the judicial systems of the Member States. The current low number of mediations is referred to as the EU Mediation Paradox.

This paradox suggests a development question and opportunity: How can access to justice be further enhanced in determining the next steps for EU legislation on Mediation in Member States?

5.1. The EU Mediation Paradox

As is seen from the case studies above, adoption of the Mediation Directive in 2008 provided a great deal of guidance and standardization about mediation in the EU. As is good practice, in 2011 (shortly after the Directive's requirements went into effect), the European Parliament began examining the mediation environment within the EU.

By that time, a great range of regulatory responses could be observed among Member States, with some expressly opting to apply the Directive only to cross border disputes. But many others sought, to varying degrees, to apply it to domestic disputes as well. Nevertheless, as two key studies show, while the functional requirements of the Mediation Directive have been largely transposed within Member States, the actual numbers of cases being mediated have been disappointingly low.

The 2011 Cost Study

The European Parliament adopted a Resolution in 2011, noting that the Mediation Directive appeared to have produced only “modest” results. At that time, even the countries experiencing the largest impact hovered in the mere hundreds of mediations per annum, instead of the tens of thousands, or hundreds of thousands, needed to achieve “the balanced relationship between mediation and judicial proceedings” sought by the Mediation Directive. With millions of cases still entering Member State judicial systems each year, the number of mediations would have to grow by several orders of magnitude to achieve that balance.

The European Parliament first sought to understand the problem by quantifying it. In the fall of 2011 it commissioned a study to examine the potential impact of mediation use by determining the cost of commercial litigation and projecting from that the range of economic cost for not using mediation.

The study, *Quantifying the Cost of Not Using Mediation – a Data Analysis*, (the 2011 Study) examined time and cost figures for certain types of litigation across the EU and sought to determine what would happen if mediation were *integrated as a step in the litigation process*. Specifically, the 2011 Study posited various scenarios of possible early settlement due to mediation and found very low “break-even” points for settlement rates, beyond which time and costs would increasingly be saved. EU-wide, the break-even point for time savings was found to be 19%, while the break-even point for cost savings was 24%. These findings were profound, showing that even with very low mediation success rates, mediation could produce significant time and cost savings if integrated into the litigation process.

The obvious lost economic opportunities brought to the fore the EU Mediation Paradox – if increasing the use of mediation brings such significant time and cost savings to the parties (and to the judiciary), why were Member States experiencing such low rates of mediation? Seemingly, the parties and Member States were acting irrationally, *all other things being equal*. But in actuality, other things are *not* equal. There are many, perhaps countless, factors impacting how mediation is used—key among them being regulatory environment rules, incentive rules, concerns about quality of service and professionalism, and levels of awareness among parties.

The 2011 discussions began a broader-based examination of why the Mediation Directive had not produced a significant increase in mediation use. More than a year later, during a formal hearing in December 2012, the Legal Affairs Committee of the European Parliament asked the European Commission whether legal action needed to be taken against the Member States for their *de facto* failure in implementing the Directive. Three and half years after its issuance—and one and a half years after the deadline for its implementation—mediation was still being used far less often than one case out of a thousand.

Raising the question established a principal focal point for the discussion—whether Member States should be held responsible for the absence of a “balanced relationship between the number of mediations and judicial proceedings” sought by the Mediation Directive. Based on this balanced relationship goal, a Balanced

Relationship Target Number (BRTN) theory had been introduced in a compendium examining Member States' mediation systems that had been published earlier in the year.¹ The BRTN theory suggested that, under the Mediation Directive, Member States could each set a target minimum percentage of judicial cases that would need to be mediated for there to be a balance between mediation and judicial proceedings. In other words, the BRTN theory asked whether Member States should each establish performance indicators for their respective mediation systems.

The immediate response was that because only one year had passed since the Directive's implementation deadline, it would be too soon to pass judgment as to the Directive's effectiveness in implementation. But it was clear that the apparent lack of impact was a matter of concern.

The 2013 Rebooting Study

Following up on this line of concern, in 2013 the European Parliament commissioned a study to examine the status of mediation in Member States and establish the root causes of low levels of mediation. This study – *"Rebooting" the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*, (the Rebooting Study) involved conducting a survey of over one thousand professionals in the EU to: 1) estimate numbers, cost, and time of mediations (as there are no uniformly collected data on these across all Member States); and 2) seek opinions about regulatory and non-regulatory methods to increase mediation.

The first key finding of the Rebooting Study was to reconfirm the findings of the 2011 Study that even a very modest mediation success rate of 30% settled cases to total cases mediated would save significant time and money for parties. If accurate, this would mean that, effectively, billions of Euros were being needlessly spent in litigation. The other key finding, based on a review of estimated numbers of mediations, showed that a large number of states were *still experiencing 2000 or fewer mediations per year* – again, a very small percentage of total eligible judicial cases. Only five Member States stood out: Germany, Italy, the United Kingdom, and The Netherlands, with over 10,000 estimated cases per annum, and Italy, with more than 200,000 cases per annum. The Italy experience, discussed below, depicts in sharp relief methods of raising the number of mediated cases.

The Rebooting Study survey's questions regarding regulatory and non-regulatory methods of increasing numbers of mediated cases generated very interesting results. First, it appeared that improved regulatory features for mediation, such as confidentiality of proceedings, effective enforceability of agreements, and accreditation of mediators did not appear to be significant or decisive factors enhancing the use of mediation. Instead, by far the single most effective regulatory feature associated with significant increase in mediations was the introduction of "mandatory mediation elements" in Member State legal systems. In other words, while mediation is a voluntary process, the most effective way to increase the number of cases mediated in Member States would be to incorporate some requirements for parties either to attempt mediation or to learn more about it.

The opportunity for Integrated Mediation as a solution

Considered together, the two studies establish that: 1) very significant amounts of resources (time and money) could be saved if mediation were to increase substantially; and 2) including mandatory elements to bring parties to mediation as part of the litigation process could cause the number of cases mediated to substantially increase. Accordingly, these two studies support continued consideration of what further regulatory support can be provided at the EU level to increase the use of mediation and, correspondingly, access to justice within Member States.

The scope of potential economic savings is tremendous, as the number of judicial cases is impressively large. The European Commission for the Efficiency of Justice (CEPEJ) reports on the numbers of cases each year. The data reported in the following table are part of a comprehensive study conducted by CEPEJ, which ended in

¹ *EU Mediation Law and Practice*, (G. De Palo and M. Trevor, 2012, Oxford Press).

2013 and was based on 2012 data collected from 48 countries. At first sight, the number of incoming and pending cases appears very high, but unfortunately the reality is even worse: those numbers show only the situation of processes in civil and commercial matters and they cannot be exhaustive (no information on pending cases available from 3 countries). The landscape might be even darker, because in countries such as Italy, which already have an enormous number of pending cases, another court, (in Italy, the "Giudice di Pace"), is in charge of small claims (more than 1 million according to the Italian Ministry of Justice report of 2011). Those situations are not taken into account in the CEPEJ study.

Figure 2: Table of Numbers of Judicial Cases in the EU

COUNTRY	POPULATION	PENDING CASES	INCOMING CASES	TOTAL CASES	CASES/POPULATION
Austria	8,451,860	45,414	136,767	182,181	0.021
Belgium	11,161,642	NA	792,762	NA	NA
Bulgaria	7,284,552	100.225*	477.315*	577.540*	0.79
Croatia	4,262,140	304,121	275,739	579,860	0.13
Cyprus	865,900	41,863	35,289	77,152	0.089
Czech Republic	10,509,286	190,855	456,382	647,237	0.061
Denmark	5,602,628	26,290	54,342	80,632	0.014
Estonia	1,286,479	8,965	18,344	27,309	0.021
Finland	5,426,674	11,538	14,011	25,549	0.004
France	65,585,857	1,677,085	1,917,066	3,594,151	0.054
Germany	80,233,100	795,969	1,576,577	2,372,546	0.029
Greece	11,062,508	525,039	672,411	1,197,450	0.1
Hungary	9,908,798	129,673	458,465	588,138	0.059
Ireland	4,591,087	NA	180,892	NA	NA
Italy	59,685,227	3,929,361	1,745,510	5,674,871	0.095
Latvia	2,044,813	31,368	42,337	73,705	0.036
Lithuania	3,003,641	32,105	122,869	154,974	0.051
Luxembourg	525,000	3,471	5,987	9,458	0.018
Malta	421,364	10,464	5,151	10,615	0.037
Netherlands	16,778,025	312.830*	1.286.702*	1.599.532*	0.095
Poland	38,533,000	528,772	1,195,921	1,724,693	0.044
Portugal	10,487,289	364,305	369,178	733,483	0.069
Romania	21,305,097	676,972	1,294,604	1,971,576	0.092
Slovakia	5,410,836	181,517	222,005	403,522	0.074
Slovenia	2,058,821	47,924	47,810	95,734	0.046
Spain	46,006,414	1,366,476	1,927,185	3,293,661	0.071
Sweden	9,555,893	32,793	68,579	101,372	0.01
U.K.	61,881,400	NA	339,174	NA	NA
	TOT. POPULATION	TOT. P. CASES	TOT. I. CASES	TOT. CASES	AVERAGE C./P.
	509,929,331	11,375,395	15,739,374	27,114,769	0.053
(* All non-criminal cases)					

Source: CEPEJ Report on "European judicial systems – Edition 2014"

With these numbers, the cases, the potential for cost and time saving opportunities for mediation are very substantial—in the range of tens of billions of Euros—even with only modest settlement rates. According to the findings of the Rebooting Study, the most effective way to increase mediations would be for mandatory elements to be applied.

Within the modern view of access to justice, such “mandatory elements” could consist of integrating a mediation step in certain judicial procedures, which the parties can easily opt-out of by paying a small fee to the mediator. The authors of this In-Depth Analysis refer to this as “*Integrated Mediation*”. In Integrated Mediation, judicial processes would incorporate into the judicial process an initial meeting with a mediator, which the parties could then “opt-out” of at the time of the meeting. The parties would have the opportunity to mediate, but would not be forced to do so. This approach of integrating a mediation step into the judicial process in appropriate types of cases may help achieve the potential savings that the 2011 Study and the 2013 Rebooting Study indicate are possible.

The following section looks at how mandatory elements in Mediation, such as integrated mediation, have been applied in the EU so far.

5.2. Experience in the EU with Mandatory Elements in Mediation

There is a growing trend toward mandatory elements in mediation in the EU. For example, Italy, as described above in its case study, has a mediation step integrated into the court process for certain civil and commercial disputes.

The UK includes a Mediation Information Assessment Meeting (MIAM) for certain disputes. Representing a step towards introducing integrated mediation in the UK, all potential applicants in relevant family court proceedings are now required to attend a MIAM to consider dispute resolution options. Courts are required to know that non-court dispute resolution has been considered before parties can proceed with an application and a court has the ability to adjourn proceedings if it considers that mediation is more appropriate.¹ Use of the MIAM may even be expanding beyond family matters in the UK. At the CMC 2014 Conference, the Minister of Justice, Lord Faulks, stated, “the Ministry of Justice is also willing to reconsider compulsory mediation information and assessment meetings – or MIAMs – in civil claims.”

Also, the Greek Mediation Law includes a reference in to the possibility of a mediation being initiated through an obligation provided by law. As yet there are no provisions in the Greek law providing for mandatory mediation, although there have apparently been discussions about drafting changes to Greece’s Mediation Law to create mandatory mediation. There are reports that a working group has been formed for the purpose of applying “mandatory mediation” for certain categories of disputes, and that a draft has been submitted to the Ministry of Justice in January 2015, followed by a promising press release.

Finally, EU-level instruments are starting to impose mandatory ADR at the sector level, as is the case with the Universal Services Directive (discussed below in relation to the Alassini decision by the ECJ).

Italy’s Experience with Integrated Mediation – On/Off Switch

Italy presents a special case demonstrating the very significant, and positive, impact of Integrated Mediation. As reported in the Rebooting Study, Italy went from reporting a *de minimis* number of cases to reporting more than 200,000 per annum. This presents a very sharp contrast with the numbers in other Member States.

¹ The MIAM in certain types of family disputes is now a statutory requirement codified in the Child and Families Act 2014, s 10.

That difference in numbers is almost certainly due to Italy's mediation regulatory environment. As stated above, in 2011, Italy put in place an integrated mediation step for initiating certain civil and commercial cases. Before litigating in court, parties must meet with a mediator, at which meeting one or both of the parties may opt-out of mediation, with each party then paying the mediator a modest fee for the mediator's time. The requirement was established through the government-issued Legislative Decree 28 of 2010, which went into effect on March 21, 2011. The number of mediations immediately jumped from likely a few hundred cases per year to over 200,000 cases per year.

In addition to increasing mediations by several orders of magnitude, however, the requirement also triggered strong opposition by lawyer organizations. As mentioned above in the case study for Italy, Legislative Decree 28 was suspended. This was due to a legal challenge that resulted in a Constitutional Court decision in October 2012 invalidating Legislative Decree 28 on the technical basis that the mediation rules had been implemented by a government act that had not been passed as a statute by Parliament. Immediately following the Court decision, virtually all mediations came to a halt in Italy, even those that had been voluntarily initiated. The Italian Parliament responded to this decision as quickly as it could by adopting into law the underlying delegation of authority to the government, with the result that the previous mediation rules came back into effect, with the force of law, on September 20, 2013. The number of mediations in Italy immediately jumped back up to tens of thousands of cases per month.

In effect, the Italian experience provides both a factual and a counterfactual example for the proposition that an Integrated Mediation mechanism—one where mediation is integrated into the litigation process (with the opportunity to opt-out simply and easily)—will likely very significantly increase the number of mediations in a Member State. While not dispositive on the issue of whether Integrated Mediation should be imposed, or otherwise serve as a policy option for the EU, it demonstrates that Integrated Mediation can have a strong effect on establishing a balance between mediation and judicial proceedings.

Romania's Experience with Mandatory Mediation Information Sessions

Despite the positive experience in Italy, obligatory elements regarding mediation may be controversial in some Member States. The experience in Romania suggests that such may be the case with a more conservative, historical approach toward access to justice that focuses on access to courts. Until recently, Romania's Law on Mediation had rules in effect that required parties to attend a mediation information meeting prior to initiating certain kinds of civil cases. The law also contained a provision expressly requiring the court to dismiss a case when the parties have not attended a mediation information meeting.

In holding both of these provisions to violate Romania's Constitution, the Romanian Constitutional Court in Decision No. 266 of May 7, 2014, stated: "*[M]andatory participation in learning about the advantages of mediation is a limited access to justice because it is a filter for the exercise of this constitutional right, and through the application of legal proceedings' inadmissibility, this right is not just restricted, but even prohibited.*" The court supported this ruling by reasoning that the procedure, "*appears undoubtedly as a violation of the right of access to justice, which puts undue burden on litigants, especially since the procedure is limited to a duty to inform, and not an actual attempt to resolve the conflict through mediation, so the parties briefing before the mediator has a formal character.*"

Thus, the Romanian Constitutional Court relied on a finding that the information meeting was a "filter" against the exercise of the constitutional right of access to justice. However, the court was careful to distinguish this from a requirement to actually attempt to resolve the conflict through mediation. So it is not certain how that court would have ruled on an Integrated Mediation process; such a process was neither contained in the Romanian Mediation Law nor before the Court. It is important to note, however, that one of two of the statutory provisions thrown out was one that mandated dismissal of a case, which can have extreme consequences for litigants who were not properly advised. A less draconian penalty might simply be for the court to defer a hearing on the case until the mediation step has been attempted and one or both of the parties have opted out.

EU-Level Experience – The Alassini Case

In a case that demonstrates the modern, liberal view of access to justice, the European Court of Justice examined mandatory out-of-court settlement requirements transposed under force of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002—the Universal Service Directive. Specifically, in the Alassini case¹ the ECJ addressed providers' claims that a suit brought against them could not proceed because of requirements in national legislation (Italy's Electronic Communications Code then in force) that mandated an attempt at out-of-court settlement before commencing a case.

In finding that the Member State law's requirement violated neither the principle of equivalence and effectiveness nor the principal of effective judicial protection, the ECJ laid down a bright line—or safe harbour—for mandatory out-of-court settlement systems. Mandatory systems must:

- Not result in a decision binding on the parties
- Not cause a substantial delay
- Suspend the period for time barring of claims
- Not give rise to cost, or are low cost

The ECJ provided a strong rationale for mandatory mediation:

[T]he imposition of an out-of-court settlement procedure such as that provided for under the national legislation at issue, does not seem – in the light of the detailed rules for the operation of that procedure, referred to in paragraphs 54 to 57 of this judgment – disproportionate in relation to the objectives pursued. In the first place, as the Advocate General stated in point 47 of her Opinion, no less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives. In the second place, it is not evident that any disadvantages caused by the mandatory nature of the out-of-court settlement procedure are disproportionate to those objectives.

By analogy, at least at the EU level, the Alassini ruling provides clear guidance for mandatory elements in mediation requirements, suggesting that Integrated Mediation mechanisms may be established so long as they observe the above four limitations.²

¹ Judgment of the Court (Fourth Chamber) of 18 March 2010, *Rosalba Alassini v Telecom Italia SpA* (C-317/08), *Filomena Califano v Wind SpA* (C-318/08), *Lucia Anna Giorgia Iacono v Telecom Italia SpA* (C-319/08) and *Multiservice Srl v Telecom Italia SpA* (C-320/08)

² It is important to note that the European legislator is aware of the significance of moving away from the model of total voluntariness in mediation at the sectoral level. In this respect, there are two prominent additional examples to consider. First, the pending proposal to review the Insurance Mediation Directive, dated 2012, proposed to rewrite current article 13 to include a requirement that “ensure that all insurance undertakings and insurance intermediaries participate in the procedures for the out-of-court settlement of disputes” where certain conditions are observed.

Clearly, this proposal recognized that in order for there being effective out-of-court settlement of insurance disputes, it is important to oblige one of the parties, namely the party with likely more bargaining power, to participate to the alternative dispute resolution proceeding. This proposal is still pending and, as it will be argued, should be re-written, based on the foregoing analysis of the opt out models-

Another example of proposed EU legislation requiring at least one of the parties to participate in the mediation process comes from consideration for EU regulation of Packaged Retail Investment Products, or PRIIPs. In this contest, a compromise proposal very similar to the one just described would have obligated, “insurance, investment product manufacturers and the persons selling investment products . . . to participate in . . . [ADR] . . . procedures initiated by retail investors concerning the rights and obligations established by this Regulation, subject to certain safeguards in conformity with the principle of effective judicial protection.”

Presumably because of the resistance by the banking and financial industry, this proposal was at the end struck down, so that the current version of it reads as follows: “(28a) Member States should ensure that consumers have access to effective and efficient alternative dispute resolution procedures for the settlement of disputes concerning rights and obligations established under this Directive. Such alternative dispute resolution procedures and the entities offering them shall comply with the quality requirements laid down in Directive 2013/11/EU. [the Consumer ADR Directive]”

Clearly, the new version would be far less effective than the previous one, at least if we accept the rationale of the European Court of Justice in the Alassini case.

6. THE WAY FORWARD

This In-Depth Analysis of the functioning of the mediation regulatory environment in the EU has identified clear, successful functioning on the Mediation Directive's specific structural requirements for mediation regulatory systems among Member States. But its principal objective, identified in Article 1—building a balanced relationship between mediation and judicial procedures—seems much more difficult to achieve. The passage of almost seven years from the adoption of the Mediation Directive, and almost four years since its transposition date, may now provide an opportunity for review and decision making, particularly as the Mediation Directive may be reconsidered in 2016. It may be time to begin planning the next steps, including updating or upgrading the Mediation Directive. As such, this In-Depth Analysis expects to generate discussion that may lead to well-informed recommendations for the next generation of mediation development in the EU context. It concludes by suggesting some options for consideration and discussion and by advising of a new survey to gather data on mediation possible further developments.

6.1 Options for Consideration

Option 1 – A Balanced Relationship Target Number Requirement

Assuming that the regulatory objectives in Article 1 of the Mediation Directive remains to build a “balanced relationship between mediation and judicial procedures,” the two studies – the 2011 Study and the Rebooting Study – appear to suggest that this relationship may be achieved through multiple means. One possibility is through establishment of a specific Balanced Relationship Target Number (BRTN) requirement.¹ Essentially the BRTN would work as a mechanism requiring each Member State to develop a target percentage or number of cases with respect to the total number of civil and commercial cases and report annually on their performance—a sort of key performance indicator (KPI). There would be data collection matters that need to be resolved – source, frequency of collection, quality – that would likely differ for each state. However, some amount of data on court cases does exist, for example, through the World Bank's annual Doing Business Report, or through data compiled by the European Commission for the Efficiency of Justice created within the Council of Europe. More standardized collection of data on actual mediations would need to be developed as well. A BRTN requirement would provide Member States with latitude and flexibility in establishing targets that make sense within their respective systems, and yet also provide a mechanism for tracking performance over time. That level of awareness alone at the Member State level could provide incentive to improve performance year on year.

This option has the benefit that it would be more permissive, in the sense that it allows Member States to determine on their own how they want to implement it, and how they want to achieve target numbers. It would result in comprehensible and quantifiable performance information. It has drawbacks, in addition to lack of standard data, in that it does not offer much guidance in setting targets, allowing Member States to potentially set “low-bar” expectations.

Option 2 – Mandatory Elements in Mediation (Integrated Mediation)

Another, more direct, mechanism that could be implemented is for the Mediation Directive to require Member States to create mandatory elements in mediation in certain kinds of judicial procedures, like those based on

These two examples are very powerful because they prove that if one wants to move into the direction of inserting mandatory elements in mediation, this should be done with great care. Possibly, if the old version of PRIP had been written in a way to allow an easy opt out, the final version would not have looked like the current one, which is clearly very vague. This also suggests that the legislator should review the current version of the insurance mediation directive, article 13, so that it does not get watered down again, just as it happened in the case of PRIP.

If the legislator comes up with the standard, effective formula based on the opt out models, that formula could be inserted in other pieces of sector specific legislation, such as in the case of banking and insurance matters.

¹ The BRTN mechanism, as a potential option, was proposed and described in some detail by several of the authors of this In-Depth Analysis in *EU Mediation Law and Practice*, (G. De Palo and M. Trevor, 2012), Oxford Press, at 8-10.

civil and commercial disputes. Where such procedures integrating a mediation step into the judicial procedure—Integrated Mediation—exist, as in Italy, it is already well established that the number of mediations grows tremendously, by several orders of magnitude.

This option has the benefit of directly addressing a desired outcome of the Mediation Directive, and it is likely to be highly effective in doing so. It has drawbacks as well in that there is not complete unanimity in the legal and professional communities that such forms of Integrated Mediation should be imposed on Member States. The Romania Constitutional Court case cited above exemplifies that there may be doubt, although that case dealt with an imposed Mandatory Information Meeting (an Opt-In, rather than an Opt-out, mechanism). Moreover, it would require specific amendment of the Mediation Directive, which currently allows, but expressly does not require, mandatory mediation and applies directly only to cross-border disputes. In any event, given the strength of the observed experience so far, it is an option that should be ripe for discussion.

6.1.3 Option 3 – Do Nothing

It is always possible, as well, to take no action on the Mediation Directive. The Directive can be said to have had a very good salutary effect in providing guidance on best regulatory practice for mediation systems. As in 2011 and 2013, it may be feasible to continue waiting. Deferring a decision on changing the Mediation Directive minimizes risk of substantial, complex debate. However, in light of the persistent low numbers of actual mediation cases and previous deferrals, over time the call to do something will likely continue to increase.

6.2. NEW SURVEY OF PROFESSIONALS

At this In-Depth Analysis is being written, the authors are conducting an online survey EU-wide among a variety of professionals to follow up on the critical points raised in the Rebooting Study and discussed, to some extent, here. Opened on January 19 following adjustments made after review and comment by more than 20 senior experts around the world, this survey – the 2015 EU Mediation Impact Survey – requests several types of data in three basic sections:

The Estimation Section – Requests estimates of numbers of mediations and the time and costs of mediation of a moderate-sized case (derived using per capita income data reported by the World Bank);

The Opinion Section – Requests opinions on the potential effect of Integrated Mediation in the respondents' respective Member States, what groups might be expected to support it, and whether other mechanisms might have greater impact on the number of mediations;

The Business and Experience Section – Requests information about the respondents' principal profession and degree of experience in mediation.

The goals of this survey will be to refine and update findings from the Rebooting Study, and to present sound data for recommendations regarding policy options for improving Mediation in the EU and, potentially, for updating or upgrading the Mediation Directive. The **Estimation section** will allow the Study-in-Progress to reconfirm or update the 2013 Rebooting Study's findings regarding the lost economic opportunities of Member States with low levels of mediation. The **Opinion section** responses will allow an assessment of whether the Mediation Directive is being followed effectively by Member States and an analysis of whether other policy options exist regarding Integrated Mediation. The **Business and Experience section** will allow for control analysis to check for bias in the results and verify the level of professionalism and experience.

Because the survey is currently in process, this In-Depth Analysis cannot draw any firm conclusions, but the interim data from more than 300 responses, so far, should be of interest to policy makers. The interim data suggest answers to two key queries, outlined below:

"Does a balanced relationship exist?"

The survey asks participants directly whether they think that a *“balanced relationship’ currently exists between mediation and the judiciary in terms of the total number of disputes mediated, compared to the number of disputes litigated, annually.”* Although the survey remains open as of this writing, over 88% of respondents so far have indicated either *“No, it probably does not exist”* or *“No, I strongly believe it does not exist.”* This interim result suggests an opinion among professionals that the Mediation Directive’s goal of a balanced relationship between mediation and the judicial process does not exist in the respondents’ respective Member States. This is preliminary, raw data and it will need to be fully analysed. However, if this opinion and its apparent strength remain after the closing of the survey, it will present a strong case for examining policy updates or upgrade options.

“Would Integrated Mediation increase the number of mediations?”

Another interim observation concerns respondents’ opinions regarding Integrated Mediation, which the survey will help focus on and evaluate. In the survey, Integrated Mediation is explained as a process that must take place before initiating a judicial procedure. In this process, the parties must attend a mediation session and may opt-out during the meeting with no negative consequences (other than the sides each paying the mediator a modest sitting fee to compensate for his or her time). The survey distinguishes this “opt-out” mediation mechanism from those where, in several Member States, parties must attend a “mediation information session” and, based on that meeting, decide if they want to “opt-in” to mediation. The survey asks respondents whether such an “integrated mediation” mechanism in their own country would likely increase the number of mediations.

As applied to Integrated Mediation, the survey seeks to isolate and measure responses to an opt-out mechanism. Although the survey is still in process, interim results indicate an overwhelming majority (currently 77%) of responding professionals indicating their expectation that the number of mediations is “likely” or “very likely” to increase if an Integrated Mediation (opt-out) mechanism is put in place in their Member State. As with the balanced relationship data, this is preliminary data and is subject to additional data coming in and analysis of that data.

As of the date of the submission of this In-Depth Analysis the survey is ongoing, and more than three hundred responses have been received from various professionals, lawyers, judges, mediators, and civil servants from all over the EU. The early indications are, as outlined above, that the next step of development for mediation in the EU will need to effectively increase the reliance on mediation, and that Integrated Mediation is believed to be a very effective tool for this.

7. CONCLUSION

ADR is used world-wide in various forms, and serves as an integral part of the modern concept of access to justice. Disputants increasingly rely on ADR to escape the time, cost, and risk of litigating in court, and as well to have complex disputes addressed by professionals in a particular sector. Its continued growth is not surprising.

The most frequently used types of ADR now are those based on mediation, where the neutral is not expected to make a decision, but rather is engaged to help the parties communicate and come to an agreement. The mediator has several tools to help break down barriers and identify key concerns that may not be obvious to either party, and there are a large number of types of mediation, each tailored to the specifics of the dispute between the parties. Being a mediator is increasingly becoming a popular profession, both for lawyers and non-lawyers, who want to offer their skills at bringing disputing sides together. Mediation service providers are becoming more numerous as public awareness of mediation as a cost and time saving alternative grows.

The European Union, and its Member States, have done a lot of work both to promote mediation as a viable form of access to justice and to create an appropriate mediation-enabling regulatory environment. The discourse on mediation will, and should, continue, as there are still many things to do to bring mediation to the fore and increase awareness and reliance on mediation.

While there has been significant progress in creating a functional environment for mediation, particularly through the Mediation Directive, the outcome sought by the Mediation Directive—establishing a balance between mediations and judicial procedures in Member States—remains elusive. Member States by and large have appropriate regulatory structures in place as required by the Mediation Directive, but the numbers of mediations that actually occur remain a tiny fraction of the enormous caseload faced by Member State judiciaries and cannot realistically be viewed as having attained a balanced relationship with judicial procedures. Something else clearly needs to be done.

The Rebooting Study demonstrates that the single most effective way to increase the number of mediations that take place, thereby reducing the burden on courts and providing relieve to disputing parties, is for mandatory elements to be in place for mediation in appropriate cases. The Italian case study shows definitively the effect of putting Integrated Mediation into place, stopping it for a period, and then restarting it. The Alassini case establishes clear guidelines for mandatory ADR at the EU level. And finally, the interim results of the current survey of professionals across the EU very strongly suggest that the balance sought by the Mediation Directive does not exist, and that putting Integrated Mediation into place would dramatically raise the reliance on mediation.

In light of this considerable background of study and analysis, the authors believe it is time for comprehensive discussion and consideration of: 1) adopting a Balanced Relationship Target Number (BRTN) requirement, obligating each Member State to establish target figure that is appropriate to that state; and 2) whether and how Integrated Mediation processes should be established in the Mediation Directive as a Member State requirement for appropriate civil and commercial cases.

Session III - Business and consumer's concern

The 2005 Hague Convention on Choice of Court and Brussels I Recast

Gottfried Musger

The entry into force of the Hague Choice of Court Convention will be a major step towards more legal security for European enterprises doing business in Non-EU Member States. Jurisdiction of State courts conferred by choice of court agreements might become a viable alternative to arbitration. However, the success of the Convention will depend on further ratifications by major economic partners of the European Union. The recast of Brussels I eliminated all possible incompatibilities between this regulation and the Convention

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LIST OF ABBREVIATIONS

- Brussels I** Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12/1)
- Brussels Ia** Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L351/1)
- Convention** Hague Convention of 30 June 2005 on Choice of Court Agreements (OJ 2009 L 133/3)
- Report** *Trevor Hartley, Masato Dogauchi*, Explanatory Report on the 2005 Hague Choice of Court Agreements Convention, HCCH Publications 2013.
- New York Convention** Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 (United Nations, *Treaty Series*, vol. 330, p. 3.)
- Rome I** Regulation (EC) no 593/2008 of the European Parliament and of the council of 17 June 2008, on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177/6)
- CJEU** Court of Justice of the European Union

EXECUTIVE SUMMARY

Background

On 30 June 2005, the European Union signed the Hague Choice of Court Convention. This international instrument affects the application of European rules on jurisdiction and enforcement of judgments, in particular the Brussels I Regulation. In 2012, Brussels I was replaced by a “recast” (Brussels Ia) which took into account the possible ratification of the Convention. In particular, the Brussels I rule on choice of court agreements (Article 23) was brought in line with the respective provisions of the Convention (now Article 25 Brussels Ia). On 4 December 2014, the Council adopted the Decision to approve the Convention on behalf of the European Union (2014/887/EU, OJ 2014 L 353/5). Under Article 2 (2) of this Decision, the deposit of the instrument of approval shall take place within one month of 5 June 2015. The Convention shall enter into force for the Union and its Member States on the first day of the month following the expiration of three months after the deposit of the instrument of approval. If a party to a choice of court agreement is domiciled in a Contracting State of the Convention which is not a Member State of the European Union, the rules of the Convention will prevail over the respective rules of Brussels Ia.

Aim

This study intends to clarify the following issues:

- The legal situation of European enterprises doing business with Non Member States of the European Union before the entry into force of the Choice of Court Convention.
- The basic rules of the Hague Choice of Court Convention.
- The recast of Brussels I (Brussels Ia) and its compatibility with the Choice of Court Convention.
- The legal situation of European enterprises doing business with Non Member States of the European Union after the entry into force of Brussels Ia and the Hague Choice of Court Convention.

GENERAL INFORMATION

KEY FINDINGS

- Before the entry into force of the Convention, European enterprises doing business with partners domiciled in third countries had to face a considerable lack of legal security: If an action was brought against them in a Non Member State, the jurisdiction of this State was governed by its domestic law. As there were (and are) no European rules on the recognition and enforcement of judgments issued in Non Member States, this question had to be dealt with according to the domestic law of the Member State where enforcement was sought (including, if applicable, bilateral or multilateral enforcement conventions concluded by that State). Similarly, judgments issued in a Member State would be recognised and enforced (or indeed *not* recognised and enforced) in Non Member States under the domestic law of those States (including, if applicable, bilateral or multilateral enforcement conventions). This lack of legal security was (and is) one of the reasons for the widespread popularity of arbitration agreements in international contracts.
- The Hague Choice of Court Convention has three basic rules: (i) If the parties have chosen a court of a Contracting State, this court must hear the case. (ii) Courts of other Contracting States must decline jurisdiction if an action is brought contrary to the choice of court agreement. (iii) Judgments of the chosen court must be recognised in all other Contracting States. There are some exceptions to these rules, but they have a limited scope.
- Exceptions from the substantive scope of and a disconnection clause in the Convention ensure that the internal law of the European Union (Brussels Ia) remains untouched in cases with no connections to other Contracting States and in areas of exclusive or protective jurisdiction (e.g. immovable property, consumer cases, labour cases).
- Accession to the Convention increases legal security for European businesses. Choice of court agreements will be enforced in all Contracting States. If a court of a Member State is chosen, European enterprises can be sure that there won't be any proceedings in other Contracting States and that the judgment of the chosen court will be recognised and enforced under the Convention. Choice of court agreements might therefore become a viable alternative to arbitration.
- However, the success of the Convention will depend on further accessions. Until now, only Mexico has ratified it. It will have to be seen whether the main economic partners of the EU will join the Convention. As the USA, Canada, Australia, Russia and China have actively participated in the Hague negotiations, there is a good chance that their ratifications will follow within a reasonable time.

1. THE LEGAL SITUATION BEFORE THE ENTRY INTO FORCE OF THE HAGUE CHOICE OF COURT CONVENTION

1.1 International Civil Litigation: Problems and Legal Basis

The increase of international commercial relations necessarily leads to an increase of international civil litigation. In such cases, the parties and their lawyers are confronted with the following questions of Private International Law:

- The courts of which State will have jurisdiction?
- What happens if proceedings are instituted in different States?
- Which substantive law will be applied?
- Will a judgment be recognised and enforced in other States?

Traditionally, the rules governing these questions were to be found contained in the domestic law of each State or in bilateral or multilateral conventions, the latter often concluded in the framework of the Hague Conference on Private International Law. However, the progressing European integration led to new instruments governing especially the relations between EU Member States. Until the Treaty of Amsterdam, these instruments had to be drawn up as International Conventions, i.e. the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention, 1968) and the Convention on the Law Applicable to Contractual Obligations (Rome Convention, 1980).

After the communitarisation of private international law by the Treaty of Amsterdam, these conventions were replaced by regulations: Brussels I and Rome I. They had (and have) a different structure: The conflict rules of Rome I applied (and apply) in all international contract cases irrespectively of the domicile of the parties; any law specified by Rome I is to be applied whether or not it is the law of an EU Member State. In contrast, the jurisdiction rules of Brussels I were (and to a lesser extent still are), with few exceptions, only applicable if the defendant was domiciled in an EU Member State; the rules on recognition and enforcement were (and are) limited to judgments issued in other Member States. So Brussels I was (and still is) more or less restricted to intra-EU cases. In “external” cases, parties and courts had to fall back on national law, including, if applicable, bilateral or multilateral conventions. However, in the context of commercial law, such conventions were rather rare. In particular, there was (and still is) no widely ratified international convention with a comprehensive set of jurisdiction rules for international business contracts.

1.2 Problems in “External” Cases

The lack of international instruments led to a considerable amount of legal insecurity for European enterprises doing business with partners domiciled in third countries.

- If the European party intended to bring an action, Brussels I would not apply. So the jurisdiction of each Member State would be governed by its internal law. Exorbitant fora – i.e. rules of jurisdiction in favour of the plaintiff – would apply. For instance, jurisdiction could be based on the document instituting the proceedings having been served on the defendant during his temporary presence in the State of the court, or on the presence of property belonging to the defendant within that State.
- On the other hand, the EU party was faced with the possibility of the other party suing in the State of its own principal place of business. Once again, the jurisdiction of this State was governed by its own domestic law. So exorbitant fora of that State could be used against the European defendant as well.
- Based on that, parallel proceedings in two (or even more) States were possible: One party could bring an action for payment, and the other party could sue for damages or for a declaratory judgment on the non existence of the claim of the opposite party. This would lead to unnecessary costs for both sides.

- Except in the case of a bilateral or multilateral enforcement convention, the European enterprise could not be sure that a judgment issued in a Member State would be recognised and enforced in the State of the other party. On the other hand, there was a certain risk that a judgment passed in a Non Member States would be recognised and enforced in one or more Member States.

A choice of court agreement would not have brought legal security.

- If the parties had chosen a court of a Member State, it is true that this agreement would have been binding under Art 23 Brussels I in all Member States of the European Union. However, if the other party brought an action in a court of a Non Member State, this court would have had to determine the validity of the choice of court agreement by applying its own law. So, parallel proceedings were still possible. Moreover, the European party could not be sure that a judgment given by the chosen court would be recognised in the State of the foreign defendant.
- If the parties had designated a court of a Non Member State, it was the law of that State which determined whether this agreement really conferred jurisdiction on that court. Both parties could also try to bring an action in a Member State. As Brussels I was silent on this point, the question whether a court in a Member State was bound by a choice of court agreement designating a court of a Non Member State had to be decided according to the law of that Member State.¹ So it depended on this law whether the other party could sue the European party in the State of its domicile (Art 2 Brussels I) and whether the EU party could use the exorbitant fora of this law to bring an action against the other party.

The only way to avoid these problems of legal insecurity was to exclude the jurisdiction of State courts by agreeing on arbitration. Under the New York Arbitration Convention², arbitration clauses were (and still are) enforced more or less all over the world³. This means that State courts have to dismiss a case brought contrary to an arbitration clause, and that foreign arbitral awards are enforced in the same way as judgments or other enforceable titles.

2. THE HAGUE CHOICE OF COURT CONVENTION

2.1 The Hague Judgments Project

In 1996, the Member States of the Hague Conference on Private International Law decided to start the work on a worldwide jurisdiction and enforcement convention (the "Hague Judgments Project"). The idea was that the outcome should have the form of a "mixed convention" with a "white list" of generally recognised fora applicable in all States Party, a "black list" of fora prohibited because of their exorbitant character. Judgments given by a "white" forum would have to be recognised and enforced in all States Party. Moreover, States Party would have been free to provide for additional fora, being neither on the white nor on the black list, but without an obligation of other Contracting States to enforce their judgments ("grey area"). However, the project proved to be much too ambitious. The key players – EU Member States on one side, the USA on the other – were not able to agree even on minimum contents of the black and the white list. Therefore, after a disappointing Diplomatic Conference in 2001, the Member States of the Hague Conference decided to restart the project limiting it to the only generally accepted "white" forum, i.e. the *designation of a court by the parties of a dispute*. It took another four years until the Hague Choice of Court Convention was finally adopted on 30 June 2005.

¹ CJEU C-387/98, *Coreck Maritime GmbH / Handelsveem BV*.

² Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958); Text: www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

³ List of Contracting States: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

2.2 Scope and Content of the Choice of Court Convention

Scope

The Convention applies in international cases¹ to exclusive choice of court agreements concluded in civil or commercial matters (Art 1 [1]). The Convention is applicable whenever one or more courts of a State Party are exclusively chosen by the parties. It is irrelevant whether the parties are resident in a State Party or not.

In practice, the Convention will predominantly apply in the context of *business contracts*. On one hand, this follows from practical reasons: It is not very likely that parties who have not entered into contractual relations would nevertheless conclude a choice of court agreement. On the other hand, Art 2 (1) excludes labour and consumer contracts from the scope.

Art 2 (2) contains a list of other excluded matters, mostly of an extracontractual character (e.g. family law, wills and successions, insolvency, anti-trust matters, claims for personal injury of natural persons or for damage to tangible property [if not arising from a contractual relationship], rights in rem in immovable property, validity of IP rights other than copyright and related rights entries in public registers). Contractual matters are excluded as to the carriage of passengers and goods and to tenancies of immovable property. IP infringement proceedings are excluded from the scope except where they are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract.

Under Art 21, a Contracting State may declare that it will not apply the Convention to a specific subject matter. This allows for a unilaterally effectuated exclusion from scope where the national law of a State restricts party autonomy in a specific area which otherwise would fall under the Convention. The European Union will avail itself of this provision to make sure that the limitations on choice of court agreements in insurance matters (Art 13, 14 Brussels I; Art 15, 16 Brussels Ia) will not be undermined by the Convention.

Exclusive Choice of Court Agreements

The Convention only applies to exclusive choice of court agreements as defined in Art 3 (a):

(a) "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.

A choice of court agreement which designates the courts of one Contracting State or one or more specific courts is deemed to be exclusive unless the parties have expressly provided otherwise (Art 3 [b]). It follows from this provision that the Convention is applicable whenever one or more courts of a State Party are exclusively chosen by the parties. Therefore it is irrelevant whether the parties are resident in a Contracting State or not.

According to Art 3 [c], a choice of court agreement must be concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference. National law may not impose further formal requirements.

According to Art 22, a Contracting State may declare that its courts will also recognise and enforce judgments given by courts designated in non-exclusive choice of court agreements. However, as the European Union will not make this declaration, this provision will not have any practical impact on European businesses.

¹ For the meaning of the term "international case" cf. the definitions in Art 1 (2) and (3). They are very broad: For the purposes of Chapter II (jurisdiction), a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State. This means that any international link makes the Convention applicable; the only exception being the designation of a foreign court in an otherwise purely national case. For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.

Three Basic Rules

The Convention contains three basic rules which are more or less parallel to those of the New York Arbitration Convention.

- Jurisdiction of the chosen court (Art 5): If the parties have chosen a court of a Contracting State, this court must hear the case.
- No proceedings elsewhere (Art 6): Courts in other Contracting States other than the State of the chosen court must suspend or dismiss proceedings to which an exclusive choice of court agreement applies.
- Recognition and enforcement (Art 8): Judgments issued by the chosen court must be recognised and enforced in all other Contracting States.

The substantive validity of a choice of court agreement is to be determined according to the law of the State of the chosen court; an agreement that is “null and void” under this law does not give rise to the obligations mentioned above. This means that courts in other States than that of the chosen court (dealing either with an action brought contrary to the choice of court agreement, or with the enforcement of a judgment issued by the chosen court) will have to apply foreign law.

There are a few exceptions to the obligations under Art 6 and Art 8. However, these are rather narrow; despite some innovative wording, they do not go beyond what is usual in comparable international instruments.

Under Art 6, a court other than the chosen court may hear the case if

- the agreement is null and void under the law of the State of the chosen court;
- a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
- giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
- for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
- the chosen court has decided not to hear the case.

Recognition and enforcement of a judgment passed by a chosen court may only be refused if one of the grounds of refusal specified in Art 9 applies. Two of them refer to the choice of court agreement as such, parallel to the first two points in the list of Art 6 (choice of court agreement being null and void under the law of the State of the chosen court, lack of capacity), the other grounds are more or less typical for international enforcement conventions (service of documents, public policy, judgment obtained by fraud, inconsistency with other judgments). A special provision (Art 10) deals with the recognition and enforcement of judgments where a judgment was based on a preliminary ruling on a matter excluded from the scope of the Convention. Enforcement of punitive damages may be refused if and to the extent that they „do not compensate a party for actual loss or harm suffered“ (Art 11).

Relationship with Other International Instruments

One of the major practical problems in private international law is the multiplicity of international instruments. In general, every instrument determines its own scope. This may lead to a situation where more than one instrument “want” to be applied in a particular situation. In such cases, it can be rather difficult to identify the correct legal basis.

This problem can be dealt with either by excluding specific substantive matters from the scope of one of the instruments or by so called “disconnection clauses”. Such clauses determine which of two or more conflicting instruments will be applied in a given situation. A typical example is Art 71 (1) Brussels I / Brussels Ia:

This Regulation shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

“Shall not affect” means that Brussels I / Ia will not apply as far as its rules are incompatible with those of a convention on a “particular matter” (e.g. on Nuclear Liability).

The Choice of Court Convention contains a rather elaborated disconnection clause in Art 26. Paragraph 1 gives a general rule of interpretation ("This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention"), paragraphs 2 to 5 deal with the relationship between the Convention and other international treaties. Those provisions follow more or less traditional lines. Paragraph 6 however covers a new question. It determines the relationship between the Convention and rules of a *Regional Economic Integration Organisation*. Though worded in abstract terms, this provision was specifically drafted with a view to Brussels I.

Two options had been discussed. The more innovative would have been a *Federal State analogy*. This would have meant that, for the purpose of the Convention, the European Union would have been treated like a federal State; Brussels I would have had the same legal significance (or non-significance) as internal jurisdiction rules of a federal State, for instance the US.

However, this analogy was not acceptable for some Member States. So the disconnection clause in Art 26 (6) was drafted in a traditional way:

This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention -

- a) *where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;*
- b) *as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.*

By virtue of this provision, the Convention gives way to a regional instrument – in particular to Brussels Ia – if the conditions specified in [a] or [b] are met.

Letter b) above is easy and clear: The rules on recognition and enforcement of the regional system prevail. This means that the European Union rules on recognition and enforcement of judgments – not only those of Brussels Ia, but also the relevant provisions in the Enforcement Title Regulation¹, the Order for Payment Regulation² and the Small Claims Regulation³ – will continue to apply without any restriction.

The disconnection as to jurisdiction is a bit more complicated. Under [a], the Brussels Ia rules have precedence where none of the parties is resident in a State Party of the Convention that is not Member State of the EU. This provision has a remarkable pro-EU-bias: The European jurisdiction rules not only apply in purely "internal" cases of the EU (where both parties are resident in a Member State), but also in "external" cases with no connection to other States Party. However, as most incompatibilities between the Convention and Brussels I have been eliminated by the Brussels I recast (see below 3.2.), this disconnection clause has a rather limited practical impact.

Accession by Regional Economic Integration Organisations

Articles 29 and 30 make provision for a *Regional Economic Integration Organisation* to become a party to the Convention. Whereas Art 29 covers a situation where there is a shared (mixed) external competence of the Organisation and its Member States as to the subject matter of the Convention, Art 30 applies to the Accession of an Organisation that enjoys exclusive external competence. In the latter case, the Organisation has to declare, at the time of signature, acceptance, approval or accession, that it exercises competence over all the matters governed by the Convention and that its Member States will not be parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation. In this case, any reference to a "Contracting State" or "State" equally applies, where appropriate, to the Member States of the Organisation.

¹ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ 2004 L 143/15.

² Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ 2006 L 399/1.

Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ 2007 L 199/1.

The accession of the European Union falls under the second alternative. Therefore only the EU has signed and will approve the Convention, the Member States will be bound by virtue of the accession of the EU. Any reference in the Convention to "Contracting States" has to be read as including the Member States of the EU as well.

In principle, the Convention would have precedence over internal provisions of the EU, in particular over Brussels Ia (Art 216 [2] TFEU). However, as mentioned above, the Convention itself provides that the rules of a Regional Organisation remain untouched in the situations specified in Art 26 (6) of the Convention. So in practice, the Convention prevails only in cases where there is a link to a Contracting State that is not a Member State of the EU.

3. THE CHOICE OF COURT CONVENTION AND THE RECAST OF BRUSSELS I

3.1 Incompatibilities between Brussels I and the Convention

In theory, accession of the European Union to the Convention might have been possible without any changes of the Brussels I system. In this case, the rules of the Regulation would have continued to apply in situations as specified in Art 26 (6) of the Convention; otherwise – i.e. where one of the parties was domiciled in a State Party to the Convention not being a Member State of the EU – the rules of the Convention would have had precedence. However, this might have led to major problems for practitioners (except for real specialists of private international law). There were at least three points where, because of different rules in the Convention and in Brussels I, misapprehensions in the application of the two instruments were possible.

Territorial Scope of the Provision on Choice of Court Agreements

Art 23 Brussels I only applied if one of the parties to the choice of court agreement was domiciled in a Member State. The effects of a choice of court agreement concluded by parties not domiciled in the EU were therefore governed by the national law of the State of the chosen court.¹ On the other hand, Art 26 (6) of the Convention provides that the rules of a Regional Economic Integration Organisation prevail whenever no party resides in a Contracting State that is not a Member State of the Organisation. Choice of court agreements of two parties resident in States that are neither Contracting States of the Convention nor Member States of the Organisation would therefore fall under the rules of the Organisation – which however, under Brussels I, simply did not exist.

Substantive Validity and Form Requirements

Under the Convention, the substantive validity of a choice of court agreement is determined according to the law of the chosen court. The Brussels I provision on choice of court agreements (Art 23) had no similar rule. So it was not clear which law would decide in the case of a dispute on the substantive validity of a choice of court agreement. There was also a difference as to the formal requirements: Under the Convention, a choice of court agreement must be concluded or documented in writing, whereas under Brussels I, there are four possible forms: (i) in writing², (ii) evidenced in writing, (iii) a form according to the practices established between the parties, and (iv), in international trade or commerce, a form according to a usage widely known and observed in similar contracts.

¹ However, Brussels I provided that courts of other Member States had no jurisdiction unless the chosen court had decided not to hear the case (Art 23 [3]).

² Both instruments have an additional rule for choice of court agreements concluded by electronic means. Though the wording is different, they have basically the same content: The agreement is valid if the electronic means provide a durable record thereof.

Choice of Court Agreements and *lis pendens*

Under Art 6 (1) of the Convention, any court seised contrary to a choice of court agreement has to decline jurisdiction. If it erroneously fails to do so, the chosen court is nevertheless obliged to hear the case. The *lis pendens* rule in Art 27 Brussels I led to a different result: In the case of parallel proceedings on the same cause of action, the court second seised had to stay its proceedings; when the jurisdiction of the court first seised was established, the court second seised had to decline jurisdiction. This was even the case if the court second seised was designated in a choice of court agreement¹. So the *lis pendens* rule of Brussels I prevailed over a choice of court agreement.

3.2 The Elimination of those Incompatibilities

Territorial Scope of the Provision on Choice of Court Agreements

The Brussels Ia rule on choice of court agreements is now applicable “regardless” of the domicile of the parties (Art 25 [1]). So there is no need any longer to fall back on national law if a choice of court agreement designating a court of a Member State was concluded by parties resident neither in a Member State of the European Union nor in another Contracting State of the Convention.²

Substantive Validity and Form Requirements

Under Art 25 (1) Brussels Ia, a choice of court agreement is binding “unless it is null and void null as to its substantive validity” under the law of the Member State of the chosen court. This takes up the language of Art 5, Art 6 and Art 9 of the Convention. So from a practical point of view, it is irrelevant whether a choice of court agreement the substantive validity of which is challenged falls under the Convention or under Brussels Ia.

In contrast, the form requirements are still different. However, this will not cause any problems: Both instruments accept agreements concluded “in writing”; the meaning of “documented in writing” (Convention) and “evidenced in writing” (Brussels Ia) should not be too different. If a court of a Member State is designated in one of the two *other* forms foreseen under Art 25 Brussels Ia (but not under the Convention), only Brussels Ia would apply. So both the chosen court and all other courts in the European Union would be bound by the choice of court agreement. However, it would be possible that a court of another Contracting State would hear the case; and a judgment issued by the chosen court would not be recognised and enforced under the Convention.

Choice of Court Agreements and *lis pendens*

The most striking innovation of the recast is the reversing of the *lis pendens* rule in cases of choice of court agreements. Art 31 (2) and (3) of Brussels Ia provide as follows:

(2) Without prejudice to Article 26³, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

¹ CJEU C-116/02, *Gasser/MISAT*, n° 49.

² Moreover, Art 23 (3) Brussels I had become redundant.

³ Under Art 26 Brussels Ia, a court becomes competent if the defendant enters an appearance without contesting jurisdiction. The reference to this provision is a consequence of party autonomy: Even if the parties had designated a specific court, they can afterwards agree to submit their dispute to another court. Entering an appearance without contesting jurisdiction is one possible way to accept the jurisdiction of a court not designated in a previous choice of court agreement.

(3) Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

Under this rule, it is the chosen court which decides on the validity of the choice of court agreement, not the court first seised. This strengthens the concept of party autonomy: A breach of a choice of court agreement is not any longer rewarded by the precedence of the court first seised.

Example: *A contract between A and B contains a choice of court agreement designating the commercial court of Vienna. Contrary to this agreement, A sues in the commercial court of Budapest for a declaratory judgment that he does not owe anything to B. Three days later, B sues for payment in the designated court in Vienna. Under the old rule (Art 27 Brussels I), the Vienna court – being the court second seised – had to stay its proceedings. The Budapest court would then decide about its own competence. If this court – even erroneously – accepted its jurisdiction, the Vienna court had to dismiss the case. Under the new rule (Art 31 Brussels Ia), it is the Budapest court which has to stay its proceedings until the Vienna court has decided on the validity of the choice of court agreement. The Budapest court could only hear the case if the Vienna court dismissed the case (e.g. because the choice of court agreement was null and void under Austrian law).*

Art 31 Brussels Ia deals with parallel proceedings pending in courts of two or more Member States. Where the parties had designated a court of a Contracting State that is not a Member State of the EU, Art 6 of the Convention basically leads to the same result if, despite the choice of court agreement, an action is brought in a court of a Member State: This court has to suspend or dismiss proceedings unless one of the exceptions specified in Art 6 (a) – (e) applies. Whereas Art 6 (e) is parallel to Art 31 (2), Art 6 (a) – (d) provide for a slightly broader margin of appreciation for the Member State court not to enforce the choice of court agreement.

Example: *Suppose Canada is a State Party to the Convention. A contract between the German company A and the Canadian company B contains a choice of court agreement designating the commercial court of Toronto. Contrary to this agreement, A sues in the regional court of Munich for a declaratory judgment that it does not owe anything to B¹. Three days later, B sues for payment in the designated court in Toronto. Before the entry into force of the Convention, the German court would have applied German law to decide how to deal with the proceedings, and the Canadian court would have applied Canadian law. Parallel proceedings would have been possible. Under the Convention, the Canadian court has to hear the case unless the choice of court agreement is null and void according to Canadian law (Art 4 of the Convention). The German court could only hear the case if one of the exceptions of Art 6 of the Convention applied. It is irrelevant whether the Canadian or the German court was seised first.*

The Convention does not deal with choice of court agreements designating courts of Non Contracting States. Under Brussels I, the CJEU held that the question whether such agreements excluded the jurisdiction of courts of Member States was to be decided according to the national law of the Member State whose court was seised contrary to the choice of court agreement.² So if a German and a USA company had concluded a choice of

¹ As the defendant is not domiciled in a Member State, the jurisdiction of the Munich court could be based on German law (cf Art 6 Brussels Ia).

² CJEU C-387/98, *Coreck Maritime GmbH / Handelsveem BV*.

court agreement designating a court in the USA, it was to be decided according to German law whether the US company could sue the German company in a German court. This could lead to parallel proceedings. As there was no rule on *lis pendens* situations involving a Non Member State in Brussels I, the time at which the courts had been seised was irrelevant for the decision of the German court. Contrary to that, Brussels Ia contains a rule on parallel proceedings in third States (Art 33). Under this provision, it seems that a court of a Member State the jurisdiction of which is based on Art 4, 7, 8 or 9 Brussels Ia could only stay its proceedings or dismiss the case if the court of the Non Member States was first seised. As there is no exception for choice of court agreements designating a court of a third State, it is an open question whether the above-mentioned CJEU judgment would still apply. Under Art 33 Brussels Ia, it could be argued that a court of a Member State could take into account a choice of court agreement designating a court of a third State *only if* this court had been seised first. However, this problem could only arise in very exceptional cases.

Example: Suppose Canada is not a State Party to the Convention. A contract between the German company A, which has a branch in Canada, and the USA Company B contains a choice of court agreement designating the commercial court of Toronto. Contrary to this agreement, A sues in the regional court of Munich for a declaratory judgment that it does not owe anything to B. Three days later, B sues for payment in the designated court in Toronto. Under Brussels I, the German court would have applied German law to decide whether the choice of court agreement had any impact on its jurisdiction. The same would be true under Brussels Ia: As the defendant is a Canadian company, the jurisdiction of the German court could not be based on Art 4, 7, 8 or 9 Brussels Ia (those provisions being only applicable where the defendant is domiciled in a EU Member State). Therefore, Art 33 would not apply, and the question mentioned above would not arise.

However, suppose that B (the USA company) sues for payment in Munich, and three days later, A (the German company with a branch in Canada) sues for a declaratory judgment in Toronto. Under Brussels I, the legal situation would have been the same as described above: The Munich court would have applied German law to decide whether the choice of court agreement had any impact on its jurisdiction. Under Brussels Ia, the situation might be different: As the jurisdiction of the Munich court is based on Art 4 Brussels Ia (domicile of the defendant), Art 33 Brussels Ia applies. Under this provision, it seems that the Munich court could only stay its proceedings or dismiss the case if the Toronto court was first seised. If not, the Munich court would have to exercise its jurisdiction despite the choice of court agreement.

However, it has to be stressed that this only applies to choice of court agreements designating a court of a State not Party to the Convention. Where a court of a State Party was chosen, Art 6 of the Convention would apply and thereby exclude the *lis pendens* rule of Art 33 Brussels Ia.¹

3.3 Other New Provisions

According to the new Art 25 (5) Brussels Ia, an „agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the agreement conferring jurisdiction cannot be contested solely

¹ Except perhaps in a situation where Brussels Ia would have precedence under Art 26 (6). However, this would only apply where no party is resident in a State Party to the Convention that is not a Member State of the EU. In this case, it would be rather unlikely that the parties would nevertheless designate a court of such State Party.

on the ground that the contract is not valid.” This provision is parallel to Art 3 (d) of the Convention.

3.4 The Obligation not to Hear the Case

Under Art 6 of the Convention, the obligation not to hear the case applies *unless* one of five conditions is met. The fifth one – the chosen court has decided not to hear the case – is not problematic, as it is mirrored by Art 31 (2) Brussels Ia. But could a court in Member State A make use of the exceptions (a) to (d) to exercise jurisdiction if the parties had chosen a court of Member State B? Certainly not if, according to Art 26 (6) of the Convention, the provisions of Brussels Ia prevail over those of the Convention. Then Art 25 (1) and Art 33 Brussels Ia apply, and the court of Member State A could only exercise jurisdiction if the choice of court agreement is null and void under the law of State B or if the chosen court had decided not to hear the case. But what if Art 26 (6) does not apply because one of the parties is resident in a State Party to the Convention that is not a Member State of the European Union? In this case, it could be argued that the court of Member State A could apply one of the exceptions in Art 6 of the Convention and (for instance) hear the case despite of the choice of court agreement because “giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised” (Art 6 [c]).

However, this argument would give too much weight to the exceptions in Art 6. If one of them is met, only the prohibition *against* hearing the case is lifted. This does not mean that a court other than the chosen court has jurisdiction or is obliged to exercise jurisdiction.¹ So there is no real conflict between the Convention and Brussels Ia: Not being obliged to dismiss the case under Art 6 of the Convention is in no way incompatible with the duty to decline jurisdiction under Brussels Ia.

Example: *A contract between the German company A and the French Company B contains a choice of court agreement designating the commercial court of Vienna. Contrary to this agreement, A sues in the regional court of Munich for a declaratory judgment that it does not owe anything to B. According to Art 26 (6) of the Convention, the rules of Brussels Ia have precedence over those of the Convention. Under these rules it is clear that the Munich court has to dismiss the case, even if “giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised” in the sense of Art 6 (c) of the Convention.*

But suppose that B is a Canadian company and Canada is a State Party to the Convention. Nevertheless, the parties chose the commercial court of Vienna. Contrary to this agreement, A sues in the regional court of Munich for a declaratory judgment that it does not owe anything to B. As the conditions of Art 26 (6) of the Convention are not met, Art 6 of the Convention applies without any restriction. In principle, the Munich court would have to suspend the proceedings or dismiss the case, which is parallel to its obligation under Brussels Ia. But what if the court comes to the conclusion that “giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised”? Under Art 6 (c) of the Convention, the Munich court would not be barred to hear the case. However, as a court of another Member State had been chosen, the Munich court would still be bound by Brussels Ia. As this Regulation has no provision similar to Art 6 (c) of the Convention, the Munich court would therefore have to decline jurisdiction.

¹ Cf. Report, paragraph 146:

4. THE LEGAL SITUATION AFTER THE ENTRY INTO FORCE OF THE HAGUE CHOICE OF COURT CONVENTION

4.1 Entry into Force

According to Art 31 (1), the Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession. As the European Union will be the second Contracting Party to join the Convention, entry into force of the Convention will depend on the deposit of the document of approval as specified in the Council Decision 2014/887/EU. As under Article 2 (2) of this decision, the deposit shall take place within one month of 5 June 2015, the Convention should enter into force either on 1 October or 1 November 2015.

The Convention will apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court (Art 16 [1]); it will not apply to proceedings instituted before its entry into force for the State of the court seised (Art 16 [1]). This provision has rather unexpected consequences for recognition and enforcement: If a choice of court agreement was concluded after the entry into force of the Convention in the State of the chosen court, a judgment issued by this court will be recognized and enforced in other Contracting States even if the Convention had entered into force in those States long after the date of the judgment.

4.2 Consequences for International Litigation

Importance of Further Ratifications

The practical consequences of the entering into force of the Convention depend on further ratifications. At present, the only other Party is Mexico. So the entry into force of the Convention will not lead to its application in the relations with major business partners of the European Union (e.g. Canada, China, Korea, Russia, Turkey, USA). This does not make life easier for businesses and lawyers: Until the entering into force of the Convention, the only question was whether Brussels I/Ia was applicable or not. If not, national law had to be applied. Now, the possible applicability of the Convention must also be taken into account.

However, a considerable number of major EU business partners – in particular the US, Russia, China, Korea and Australia - have played a very active role in the negotiations leading to the Convention, and there might be a good chance that their ratifications will follow. But the political probability of such developments is beyond the scope of this study.

Increase of Legal Security

If some key players follow the example of the European Union, the Convention will provide a much higher level of legal security for European enterprises. As far as their business relations within the European Union are concerned, nothing changes. Because of the disconnection clause in Art 26 (6) of the Convention, the rules of Brussels Ia continue to apply, and the Convention has no practical impact. The same is true in the case of contracts with partners resident in Non States Party to the Convention: If the parties designated a court of a Member State, Brussels Ia would apply, but the European party could not be sure that the judgment of this court would be recognised and enforced in the State of the other party; and it would even be possible that a court of that State accepted jurisdiction despite the choice of court agreement. In this context, arbitration remains the only way to have legal security: If the parties enter in an arbitration agreement, the New York Convention applies. Any court of a Contracting State of this Convention would be obliged not to hear the case, and the award issued by the arbitral tribunal would be enforced in all Contracting States.

However, if European enterprises enter into contracts with partners resident in other Contracting States of the Convention, they have an additional option to plan for the case of a contractual dispute. Instead of opting for arbitration, they can designate a court of a Contracting State of the Convention. In this case, the parties can be sure that, with very limited exceptions,

- the chosen court will hear the case.
- courts of other Contracting States will decline jurisdiction, and

- judgments of the chosen court will be recognised and enforced in all Contracting States

This legal framework is parallel to that of the New York Convention. Choice of court agreements may therefore prove to be a viable alternative to arbitration. There is no doubt that this competition of systems is in the best interest of all economic players. States might wish to make proceedings in their courts even more attractive, e.g. by reducing court fees or introducing new rules for fast track procedures. On the other hand, the arbitral community¹, being faced with the possibility that businesses could opt for choice of court agreements instead of choosing arbitration, might be induced to improve the quality of arbitration proceedings and to lessen their costs. Moreover, if choice of court agreements are really accepted as an alternative to arbitration, the ongoing privatisation of justice in international business relations, which is a consequence of the worldwide success of the New York Convention, could be brought to a halt.

However, it is obvious that the advantages of choice of court agreements depend on the economic strength of the parties. In the case of a contract between a European and a foreign company – the latter being domiciled in a Contracting State of the Convention that is not a Member State of the EU –, the European party will clearly benefit from the Convention if a court of the Member State of this party is chosen. In this case, the European company can sue at home and is protected from being sued abroad; the decision of the chosen court will be enforced at the place of the other party. If, however, the European company has to enter into a choice of court agreement designating a court in the State of the other party, it goes the other way round. The company loses possible fora which might exist under its national law², and a decision of the foreign court will be enforced in all Member States of the European Union. But this is not specific to the Choice of Court Convention: The concept of party autonomy generally favours economic players who are in a position to get their own objectives accepted by the other party. This is the reason why Brussels I/la limits party autonomy where contracts are concluded between businesses and (typically) weaker parties (consumers, employees, policy holders). As such contracts are excluded from the scope of the Convention – by virtue of an express provision concerning consumer and labour contracts (Art 2 [1]) and of a declaration of the EU under Art 21 concerning insurance contracts – these restrictions of the EU system are not affected by the entry into force of the Convention.

Multiplicity of International Instruments

The mere existence of the Convention will contribute to the multiplicity of international instruments in the area of private international law. There will certainly be situations where both the Convention and other treaties or instruments of regional integration organisations seem to be applicable. In such cases, it will be important to make a precise assessment of the scope of the (seemingly) conflicting instruments and of the respective disconnection clauses. Legal advice in drafting international contracts will therefore be far from superfluous. But once again this is not a specific problem of the Convention: One cannot expect to have simple legal solutions for complex business transactions. The increase of legal security for contracts with choice of court agreements definitely outweighs the possible problems caused by conflicts between different private international law instruments.

5. CONCLUSION

The entering into force of the Hague Choice of Court Convention will be a major step towards more legal security for European enterprises doing business in Non Member States. Jurisdiction of State courts conferred by choice of court agreements might become a viable alternative to arbitration. However, the success of the Convention will depend on further ratifications by major economic partners of the European Union. As long as this is not the case, the practical impact of its entering into force will be marginal at best.

¹ Lawyers acting as arbitrators or as representatives in arbitration proceedings.

² If the defendant is not domiciled in Member State, the jurisdiction of each Member State is, in general, determined by the law of that Member State (Art 6 Brussels Ia).

Biography

Dr. Gottfried Musger is Judge at the Supreme Court of Justice of Austria. Having started his judicial career in 1995, Gottfried Musger has been a judge at the Supreme Court of Justice in Vienna since 2006. His main areas of work are intellectual property and unfair competition law. Prior to his appointment as a judge, he had worked as a research assistant at the Universities of Graz and Saarbrücken. From 1997 to 2005 he was a delegate of the Austrian government to working groups of the European Union on questions of international civil procedure and to the Hague Conference on Private International Law.

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