

Study JLS/C4/2005/03 concerning the implementation of Regulation 44/2001
Report of the Czech Republic

QUESTIONNAIRE NO.1

The questions cannot be answered due to the short period of time for which the Regulation has applied. It has not been possible to ascertain the matters referred to in questions nos. 1-8 in the time the Regulation has applied in the Czech Republic.

QUESTIONNAIRE NO.2

2.1 Are there conditions of recognition and enforcement of judgments, authentic instruments and court settlements which are beyond those permitted under Regulation 44/01/EC?

This question must be understood in terms of whether national law does not stipulate stricter conditions for the recognition and enforcement of decisions and rights than those set forth in the Regulation. On the grounds of comprehensibility it must be emphasized that national law is in principle applied only when the Regulation explicitly leaves space for, or even demands, their application, or in cases which are not within the scope of the Regulation.

- a) grounds for refusal of recognition consisting in breach of the principle *audiatur et altera pars* (let the other party be heard)

Here Section 64(c) of PILA, in contrast to Article 34(2) of the Regulation, formulates grounds for refusal where the procedure of a foreign authority deprived a person of the possibility to duly participate in proceedings, including, without limitation, when a summons or petition for the instigation of proceedings was not served in person.

- b) the refusal of recognition due to a conflict with a prior decision is formulated in PILA for the situation where the earlier decision was final and recognized (Section 64(b)), whereas Article 34(4) of the Regulation sets forth grounds for refusal where the earlier decision merely meets the conditions necessary for recognition, without actually having to be final and recognized.
- c) Further grounds for the refusal of recognition consist in lack of jurisdiction, formulated in Section 64(a) of PILA so that award proceedings could not be performed if the provisions on the jurisdiction of Czech courts were used to assess the jurisdiction of foreign authorities. This is definitely a stricter condition than those set forth in Article 35(1) of the Regulation.
- d) Finally, PILA stipulates a condition of reciprocity, the lack of which forms grounds for the refusal of recognition.

2.2 – 2.17 Cannot be answered

QUESTIONNAIRE NO.3**1.1 Are there any problems in the judicial practice with the autonomous interpretation of "civil and commercial matters" (Article 1(1)) practised by the European Court of Justice (ECJ)?**

As yet there have been no problems. In one case a court rejected its jurisdiction after reaching the conclusion that an arrears in payment of health insurance of a public insurer is not a civil but a commercial matter, since a public law relationship is involved (see Annex II, case 2 infra).

1.2 Aside from two cases, not at all.

1.3 No known problems.

1.3.1 No known problems.

1.3.2 These problems are not known.

1.4-1.6 No known problems.

1.7 Are the rules of Articles 32-58 of Regulation 44/01/EC compatible with national procedural rules? What is still left to be ruled by the Member States? Do special rules exist or do the general rules have to be used?

a) There is a very brief set of regulations found in PILA (Section 68a-68c, see Annex I).

First and foremost, there exists a rule referring to directly applicable regulations, including without limitation, to the Regulation, whereas domestic regulations are not applied in the law (see Section 68a of PILA).

b) Section 68b sets forth an option for a decision to be made on the recognition of a foreign decision. This is an exception from the current PILA regime, which explicitly bars decisions on the recognition of foreign decisions by a special verdict. Pursuant to PILA, in proprietary matters recognition is not expressed by a special verdict. A foreign decision is recognized by a Czech court and another authority considering it as though it were a decision of a Czech body (Section 65 of PILA). In status matters recognition is then provided for by special laws (Sections 67-68 of PILA). The provisions of Section 68b of PILA therefore allow recognition to be expressed, in the sense of Article 33(2) of the Regulation, by a special verdict of a Czech court, regardless of the nature of the decisive legal relationship.

c) It ceases to be necessary to declare decisions enforceable if such decisions are confirmed as a European right of distraint (Section 68a(1), (2) and Section 68b of PILA)

Since the Regulation is directly applicable there is no conflict with the fact that there is no provision in Czech law analogous to Article 37.1 of the Regulation.

An apparent conflict with Czech law occurs in Article 38(1) of the Regulation. This conflict is merely apparent though, and arises from the translation of the English version of the Regulation. According to this translation, distraint may be sought by any party having a lawful interest in the matter, which fails to correspond not only to the text of the other language versions but above all the Czech regulations on distraint (Section 251 of the Civil Procedure Code), according to which only the entitled party

may seek the enforcement of a decision. That is also not only the sense, but the precise expression of this article of the Regulation in the other language versions.

1.8 Is the meaning of these conventions in relation between the Member States reduced by the application of Regulation 44/01/EC?

It is not clear what is meant by the term “conventions”.

2.1.1 Does the Regulation guarantee, according to its overall objectives, predictability of judicial decisions and legal certainty?

The Regulation, based on experience with the Brussels Convention, guarantees the foresee ability of court decisions and therefore also legal security.

2.1.2 Cannot be assessed.

2.1.3 Is the catalogue of fact-specific grounds of jurisdiction sufficient?

A more extensive catalogue would obscure the matter, and, on the contrary, would narrow the powers of the courts and the material scope of effect of the Regulation as against the current situation, which is based on relatively broad formulative conditions for the jurisdiction of the courts.

2.1.4 In fact, third parties, i.e. parties from non-EU states, are appraised less advantageously than parties from members states.

2.1.5 Cannot be assessed.

2.1.6 Cannot be assessed.

2.2.1 The term “domicile” is translated as “bydliště”, i.e. as used in PILA, and is thus applied. The second question cannot at present be answered.

2.2.2 Cannot be answered, since there is no experience.

2.2.3 Cannot assess, since there is no experience.

2.2.4 Cannot be answered.

2.2.5 Cannot be answered.

2.2.6 No case law.

2.2.7 – 2.2.28 No experience.

3.-4. No experience.

ANNEX I.
SC. 68A – 68C PILA**SUBDIVISION 4****Special provisions on the recognition and enforcement of certain foreign decisions****Section 68a**

The provisions of this subdivision shall apply in proceedings on the recognition and enforcement of foreign decisions, other public instruments and judicial conciliations (hereinafter “decisions”), in which procedure is according to the regulations of the European Community or under an announced international treaty whose ratification has been approved by Parliament and which is binding upon the Czech Republic (hereinafter “international treaty”)¹

Section 68b

If a party requests, pursuant to European Community law or an international treaty, that the recognition of a decision be adjudicated in special proceedings, a court shall rule on such recognition.

Section 68c

(1) A motion for the ordering of enforcement of a decision or distraint pursuant to a special law may also be filed together with a motion for the declaration of enforceability.² In such a case, the court shall render separate, reasoned verdicts on both motions in a single ruling. The ruling must include a rationale even when it concerns only one of such motions.

(2) If a court has proceeded pursuant to subsection 1 above, and if a European Community regulation stipulates a term for filing remedies against decisions on the recognition or declaration of enforceability of foreign decisions which is longer than the term stipulated in the special law² for filing remedies against decisions ordering the enforcement of decisions or distraint, such longer term shall also apply for filing remedies against the decision ordering the enforceability of the decision or distraint.

(3) In the event an appellate court examines the grounds for refusing to recognize a foreign decision when such grounds could not have been examined by the first instance court pursuant to the relevant European Community regulations or an international treaty, then if such grounds indicate that recognition of the foreign decision should be refused, the appellate court shall annul the decision of the first instance court and rule for the rejection of the motion.

(4) The decision rendered in a verdict ordering the enforcement of a decision or distraint may not take legal force earlier than in the verdict declaring such decision enforceable.

¹ e.g. Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, announced under Act No. 141/2001 Coll.

ANNEX II.**Summary characterization of relevant decisions of the Czech Courts under the Regulation**

With the greatest efforts, it was possible to obtain 18 verdicts of the courts of the Czech Republic. These are all the final decisions of the Czech courts rendered as of 30 April 2006. These decisions cite the Regulation, even though some of them, as stated below, are irrelevant from the perspective of the research being made. Of these 10 were irrelevant; partly involving matters which do not fall under the powers of the Regulation (application for recognition of an American verdict), partly involving matters of the powers of Regulation 2201/2001, partly application was rejected because according to the transitional provisions (Article 66(1) of the Regulation) they do not relate to the Regulations due to the time they were made. Of the eight relevant decisions, all related to questions of the powers of the courts, and not to recognition or enforcement. These were the issues involved:

- 1) A suit of an insurer (an insurance company) against a policy holder. In ascertaining the jurisdiction (it was the appellate court), the court correctly applied Article 12(1) of the Regulation and rejected the suit, since it found that at the time the suit was filed the policy holder was not domiciled in the Czech Republic, which it also raised as an objection in the first hearing before the court.
- 2) The Supreme Court of the qualified a claim for the payment of an insurance premium for health insurance asserted by the Slovak General Health Insurance Company as a claim in relation to public law, i.e. in relation to a legal right. It concluded that this is not a matter which falls into the scope of the Regulation, nor into the powers of the Czech courts.
- 3) A decision to order to enforcement based on a decision issued by the commander of a military division against a soldier. The Regional Court concluded that this decision issued to the Slovak Republic was not a court decision since the commander of the military division certainly did not meet the characteristics of a judicial authority, but this rather involved a decision of an administrative military authority. It rejected this application for the enforcement of a decision.
- 4) The court correctly qualified an arrangement in a credit agreement regarding determination of the jurisdiction of the court (prorogation) pursuant to Article 23 of the Regulation. It gave jurisdiction to the court in the locale of the plaintiff's seat.
- 5) The court correctly interpreted Article 2(1) of the Regulation and allowed a suit in the locale of the defendant's domicile (*actor sequitur forum rei*).
- 6) The court correctly interpreted the basic prerequisite for the material powers of the Regulation when it qualified a suit of a Slovak company for the payment of television license fees as a claim arising from a public law relationship, i.e. a matter which does not fall under the powers of the Regulation. It did not therefore proceed according to the Regulation, since the matter did not fall into the powers of the Czech courts on other grounds, and rejected the suit.
- 7) Endorsement of a purchase agreement for a minor seller. The court recognized the jurisdiction of the court according to the site of the real estate which was the subject of the purchase agreement and ignored the domicile of the minor and the seat of its guardian.
- 8) The court correctly concluded that in the matter of a tort it is possible to sue at the court of the locale where the event of damage occurred in the meaning of Article 5(3) of the

Regulation. The Regional Court therefore annulled the verdict of the court of first instance, which rejected the suit because the defendant did not have its domicile in the Czech Republic.

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Report Czech Republic (Třebatický)

Questionnaire No 1: Collection of Statistical Data

The main focus of the statistical evaluation will be on the areas *lis pendens*, jurisdiction and recognition of judgments.¹ Hereby the following inquiries will be carried out:

1. Evaluation of the number of decisions concerning Regulation 44/01/EC proportional to decisions in civil and commercial matters all in all²

no account as far as the recognition of judgments is concerned

2. Evaluation of the approximate number of judgments where the courts and tribunals of the Member States concerned retained jurisdiction on the basis of the rules of Regulation 44/2001/EC in 2003/2004 and evaluation of the provisions mostly relied on for that purpose³

no account

3. Evaluation of the approximate number of applications for a declaration of enforceability on the basis of Regulation 44/2001/EC in 2003/2004

0

4. Evaluation of the approximate number of declarations of enforceability granted on the basis of Regulation 44/2001/EC in 2003/2004

¹ In general the evaluation shall be based on official statistics. However, if no official data bases exist, an approximate number of decisions should be named, that can be asked for at courts.

² Due to the short period of application it can be expected that there are only very few decisions concerning the recognition of judgments. Therefore the evaluation shall be expanded, regarding recognition, on decisions concerning the Judgments related to the Convention of 1968 in 2003/2004.

³ All legal proceedings where the defendant is domiciled in a Member State as well as actions according to Article 22 and 23 Regulation 44/01/EC. It is aimed to evaluate the data of the year 2004 – insofar this data is statistically recorded in the Member States. It has to be admitted that the different methods of organisation and documentation within the EU Member States constitute an element of uncertainty. A separate evaluation of court records is – due to the given time and budget frame –, not possible. The evaluation of data will be carried out at the judicial authorities of the Member States by means of the European Judicial Network (EJN). Supplementary, national reporters should selectively address courts and public authorities, which are according to the reporters' knowledge concerned with the application of the Regulation. If all proceedings concerning declarations of enforceability were concentrated in one senate and had special reference numbers it would be quite easy to determine the number of proceedings by means of the last reference number which has been passed out in the respective year.

0

5. Evaluation of the approximate number of declarations of enforceability which have been refused already in the first instance in 2003/2004, including the principal grounds for refusal; further evaluation of the number or proportion of cases, where a subsequent improvement of the application has been asked for

0

6. Evaluation of the approximate number of revocations of decisions containing a declaration of enforceability after an appeal in 2003/2004, including the principal grounds for revocation

no account

7. Evaluation of the average amount of time required/accrued for obtaining a decision containing a declaration of enforceability

no account

8. Compilation of a list of the provisions of Regulation 44/2001/EC that are most frequently applied by the courts and tribunals in the Member States concerned

Arts. 1,2,5,24,26,33,42,53,59,60,66

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Report Czech Republic (Třebatický)

Questionnaire No 2: Collection of Empirical Data

1. Survey

The second questionnaire covers empirical problems – especially the interfaces between Regulation 44/01/EC and the national laws of procedure. This questionnaire is distributed selectively among groups, who are concerned with the application of Regulation 44/01/EC due to their profession.

2. Questions¹

2.1 Are there conditions of recognition and enforcement of judgments, authentic instruments and court settlements which are beyond those permitted under Regulation 44/01/EC?

No

2.2 Are there local focal points, i. e. do cross border litigations accumulate in border regions?

No sufficient information

2.3 From which State of origin do titles that shall be recognized or executed in your State come from?

Slovakia, Germany, Poland, Austria

2.4 Can the handling of the standard form concerning Article 54 be regarded as satisfactory or do similar problems arise as regarding the standard forms concerning Regulation 1348/2000/EC? (See the respective parts of the Mainstrat-study (p. 93–98), which are attached to the questionnaire. Explanation: group 1 = members of state administration, group 2 = judges and attorneys, group 3 = *hussiers de justice* and other persons providing the service of documents.)

2.5 Do courts make use of the possibility provided for in Article 55 to dispense with the certificate's production?

¹ These questions should be put to lawyers as well as judges. However, regarding some questions mainly lawyers are addressed.

- 2.6 Do any language problems arise regarding recognition and enforcement – especially regarding the handling of the standard form concerning Article 54?

- 2.7 Is the production of translations required (Article 55 (2) Regulation 44/01/EC)?

- 2.7.1 If yes, will the translation of the operative provisions suffice or is it necessary to translate the whole judgment including the grounds for the decision?

- 2.7.2 Do the costs for translations lead to less efficiency?

- 2.8 Which costs result from the recognition of judgments, authentic instruments and court settlements?

In particular:

- 2.8.1 How is Article 52 implemented?

- 2.8.2 How are solicitor's charges calculated?

- 2.8.3 Are these costs reimbursable?

In particular:

- 2.8.3.1 Who calculates and verifies the amount of the reimbursable costs, which have been asserted?

- 2.8.3.2 Is it possible to execute the reimbursable costs without bureaucratic formalities?

- 2.8.3.3 Are there any delays in time due to the fact that the costs have to be calculated or due to the fact that the calculation has to be verified?

- 2.9 Does the requirement to serve the party against whom enforcement is sought with the declaration of enforceability, which is provided for in Article 42 – or the practice of judicial authorities regarding the dispatch of communications in general – impair the

efficiency of enforcement – in particular its surprise effect? Does this virtually obstruct the possibilities of Article 47?²

no account+

2.10 Is there any experience with the granting of legal aid according to Article 50 of the Regulation?

No

2.11 Is there any experience with the declaration of enforceability of authentic instruments (Article 57), court settlements (Article 58) and appealable judgments (Article 37)? (See also Questionnaire No. 3, part 4.).

No

2.12 Do problems arise regarding the references to national procedural laws that are included in Annex I to IV of the Regulation?

No

2.13 Do problems arise regarding the application of the standard forms (certificates) that are included in Annex V and VI of the Regulation?

No

2.14 Do judges have easy access to a version of the printed form concerning Article 54 of the Regulation (Annex V) in their own language, so that a translation of the completed form is dispensable?

Yes

2.15 Are there any possibilities to improve the implementation of the Regulation within the EU? How could guidelines for an improved coordination and cooperation (at a judicial and administrative level) look like?

2.16 How much time does it take usually until the first enforcement measure (at least seizure of assets) is carried out – i. e. not only until the judgment – after an application for a declaration of enforceability has been submitted? How much time does it take usually after a judgment has been given in a Member State to collect all documents which are necessary to pursue the application for a declaration of enforceability in another Member State?

2.17 Is there any experience with actions raising a substantive objection to the judgment claim?³

² Please describe in detail the chronology of all steps that are carried out by the creditor and the court (including its administrative staff). For instance, in Germany the same court clerk is competent to serve the debtor and to notify the creditor. As a consequence of that, the creditor is not informed before the debtor, so that the surprise effect of the first enforcement measure fails. If in your country the court is competent for service: Do similar problems occur? In case your State follows the system according to which the debtor is served by order of the creditor: Does this guarantee the surprise effect?

³ Example: The debtor claims that he has performed in the meantime or has set off his claim against the creditor's claim or has made a compromise including the arrangement to pay by instalments. This is possible according to

No

an explicit provision in the German implementing statute (§ 12). Does a similar rule exist in your legal system? If yes, did this lead to delays in granting declarations of enforceability?

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Questionnaire No. 3: Legal Problem Analysis

1. General Themes

- 1.1 Are there any problems in the judicial practice with the autonomous interpretation of „civil and commercial matters“ (Article 1 (1)) practised by the European Court of Justice (ECJ)?

I have not come across any. It might be somewhat unclear on the first glance, how to deal with the cases of acta iure imperii. The case law of the EJC gives a clear answer to that in a way that these cases are excluded, but not all the judges are despite our effort as lecturers of the Czech Judicial Academy aware of it, because these claims under the Czech law are seen as private law claims. Also the case law is usually not available in Czech, which can often be a problem. Therefore, it would be nice to have the same explicit exclusion of these cases as we can find in Council Regulation 805/2004.

- 1.2 Do public authorities use the Regulation to assert claims against private persons?

I am not aware that this would be the case.

- 1.3 How is the delineation of the scope of application of the Regulation and other instruments concerning the judicial cooperation in civil matters?

We have one problem here: according to our law a legal act of a person below 18 yrs. of age must generally be approved by a court. This concerns only such acts which are objectively beyond the capacity of the person. E.g. the final deal in inheritance cases, contracts of sale of things of higher value or immovables, court settlements, loans, etc. The question was if the jurisdiction in these cases should be given according to Reg. 44/2001 (see par. 9 of the preamble of Reg. 2201/2003) or according to Reg. 2201/2003. There were contradicting court ruling, but my view, which I try to present to my fellow judges is that these are matters falling under Art. 1 par. 2 letter e) of Reg. 2201/2003.

In particular:

- 1.3.1 the delineation to Regulation 2201/03/EC (concerning Article 1 (2) lit. a) Regulation 44/01/EC)? Are there any problems with the assertion of claims concerning maintenance/living costs?

A claim for maintenance between spouses (even former spouses) is completely separate from the divorce proceedings, so there is not problem here.

- 1.3.2 the delineation to Regulation 1348/2000/EC (concerning Article 1 (2) lit. b)), particularly: How does the judicial practice treat the delineation of collective and

single actions? Are there any problems with the delineation of actions concerning cases of insolvency and those that do not?¹

I am sorry, but I do not deal with insolvency cases.

1.4 Is the application of Article 4 of Regulation 1438/71/EC practical for the determination of Article 1 (2) lit. c)?

No.

1.5 Should the scope of application be extended, especially to incorporate arbitration and mediation proceedings?

I do not think so in a case of arbitration proceedings, which are covered by New York Convention. In mediation proceedings yes.

1.6 How do the guarantees for the rights of defence provided by the Regulation work concerning jurisdiction on the one hand and recognition and enforcement on the other hand?

no problem

1.7 Are the rules of Articles 32–58 of Regulation 44/01/EC compatible with national procedural rules? What is still left to be ruled by the Member States? Do special rules exist or do the general rules have to be used?²

The Czech procedural law was always very ready to recognize and enforce foreign judgements without a need for any preliminary procedure. The exequatur procedure is from our point of view a step back, so here we do not have any problem.

1.8 Is the meaning of these conventions in relation between the Member States reduced by the application of Regulation 44/01/EC?

Sorry, what conventions?

2. Provisions of Regulation 44/01/EC dealing with Jurisdiction

2.1 General Issues

2.1.1 Does the Regulation guarantee, according to its overall objectives, predictability of judicial decisions and legal certainty?

Yes.

2.1.2 Do the provisions on jurisdiction deal satisfactorily with the relevant issues, in particular: Do the courts of the Member States comply with the obligation as laid

¹ In some legal systems the avoidance in insolvency proceedings has to be asserted before another court than the court of origin. Before Regulation 44/01/EC and Regulation 1346/2000/EC came into force, the proceeding was treated as one ruled by insolvency law, whose jurisdiction was ascertained by national law. Today it is said that the rules of Regulation 44/01/EC and Regulation 1346/2000/EC concerning the jurisdiction interlock. On the other hand Regulation 1346/2000/EC gives jurisdiction to a court only in the case of opening the insolvency proceedings, not in other cases concerning the law of insolvency. Does this lead to the conclusion that the avoidance of insolvency proceedings is ruled by Regulation 44/01/EC? The same problem arises with actions concerning the liability of a liquidator. Do such problems arise in your country?

² Example: In Germany there is an obligation for the parties of being represented by a solicitor when taking action at the *Landgericht*. An exception is made for the order of enforcement of a foreign judgment by a rule of the national implementation law (§ 4 (2)).

down by the ECJ that exclusively deal with the issues identified by Article 5 constitute a ground of jurisdiction?

There are problems in cases of bills of exchange concerning the question if there is a freely assumed obligation from one party towards another and therefore if Art. 5 par. 1 can be used.

2.1.3 Is the catalogue of fact-specific grounds of jurisdiction sufficient?

Yes.

2.1.4 Does Article 4 (2) cause a discrimination in fact of third State parties?

No, on contrary. It takes away the nationality based discrimination.

2.1.5 How are Articles 25 and 26 applied in practice? In particular: How does the examination "ex officio" work? Does such examination include grounds of jurisdiction not mentioned in Article 25? Do the courts examine ex officio if there is a valid choice-of-forum clause derogating the jurisdiction seized with the matter by reviewing the entire document of the agreement or do they demand a declaration of plaintiff that there is no derogation?

Generally, our courts are used to examine their jurisdiction ex officio. I believe that the right practice is to do so only in cases of Art. 22 and if the case pending is not a case of Art. 22, the defendant should be allowed to establish the jurisdiction of a court by means of Art. 24. Only if s/he does not do so, the court must ex officio examine its jurisdiction according to Art. 26/1. This is what we try to explain to our judges and I have not come across any case, where this would be otherwise, though I assume there must be some of them.

As for the choice-of-court agreement, it should be examined only if the defendant brings objections against it. For a plaintiff, in a time of filing a suit, a mere declaration of such agreement is sufficient.

2.1.6 Is the examination of the issue of jurisdiction expensive and time-consuming? Are the same fees for the court and the attorneys to be paid as under the main proceedings? How long does it usually take to obtain a final decision on jurisdiction? Are there any complaints that courts do not decide the issue of jurisdiction separately, but only in connection with the main proceedings? In reverse, are there complaints that a separate decision on jurisdiction results in an unbearable delay of the decision in the main proceedings?

The decision on jurisdiction is a part of the proceedings and courts deliver it only where there is an objection from the defendant. There is an appeal against such decision and the whole thing should not take more than few months (I would say three or four). There is no special cost involved in this deciding. I have not come across any mentioned complaints.

2.2 Questions regarding the various grounds of jurisdiction

2.2.1 How is the reference in Articles 2 and 59 applied? How is the term "domicile" defined? Are there any cases where the courts held that the Defendant had several domiciles?

Domicile in the Czech law is defined as a factual one, i.e. a place, where a person lives with the intention to live there permanently.

This brings along a specific problem. Our procedure allows proceedings against persons, whose domicile is and has ever been unknown. These persons do not have even a fictitious domicile and are represented by a court appointed

representative. The question is, if the Regulation with its stress on the right of defence (Art. 2) allows the use of such a provision of national law. This is still to be answered.

Our courts would admit that a defendant can have several domiciles, but I do not know any court ruling on it.

2.2.2 Does Article 60 with its alternative connecting factors appear feasible?

Yes.

2.2.3 How does Article 5 No. 1 work? In particular: Article 5 No. 1 lit. b) 1st indent leaves open the place of fulfilment if goods are handed over to a carrier under CIF or FOB. Is the place of delivery the place where the goods are handed over to the carrier or is the place of delivery to the addressee at the latter's place? In that respect, are there any difficulties known in court practice or contract drafting?

The place of delivery, if not agreed otherwise, is the handing over to the first carrier. No problem here.

2.2.4 Do courts have difficulties to determine the place where a service was provided or should have been provided?

I do not think so.

2.2.5 Under Article 5 No. 1 lit. a), how is the place of performance determined in light of the jurisprudence of the ECJ?

According to Tessili case (12/76) the obligation, which should have been performed must be determined, the law regulating this obligation must be determined and then a place of performance according to this law.

2.2.6 Under Article 5 No. 1 lit. b), how is the term „provision of services“ defined and how are services localised?

Services have the same meaning as in Art. 49 and following of the Treaty.

2.2.7 How is the scope of Article 5 No. 1 lit. c) determined?

If the letter b) cannot be applied, the letter a) must be applied.

2.2.8 How is the line drawn between Article 5 No. 1 and Article 5 No. 3?

If the damage has anything to do with a contract, it is Art. 5/1, if there is no contract, it is 5/3. However, I can imagine it might be different in some ruling here, because a claim for damages, even arising from a contract, would be generally considered an out-of-contract obligation. So some court might have a wrong approach based on this, but I have not come across it.

2.2.9 Does it provoke any problems that the ECJ does not accept annex grounds of jurisdiction? In particular: Do the courts of the Member States manage to draw a line between contractual and matters of offence in a way other than their own law?

I think they manage.

2.2.10 What falls within the scope of the term „matters relating to tort“ under Article 5 No. 3?

All the matters, where a plaintiffs claims a damages for a breach of a legal or contractual obligation from a defendant.

- 2.2.11 Taking into consideration the case law of the ECJ, how is the jurisdiction determined under Article 5 No. 3, in particular in the case of distance and multistate offences? Is the ratio of the decision of the ECJ in “Shevill” workable?

I would say Shevill works fine.

- 2.2.12 Functioning and practical relevance of Article 6 No. 1 and No. 2 Regulation 44/01/EC: Are there any doubts as to the compatibility of Article 6 No. 1 Regulation 44/01/EC with Article 6 European Convention on Human Rights?

No.

- 2.2.13 How broad is the scope of the grounds of jurisdiction for consumer issues?

It is limited by ECJ ruling in Gruber to purely consumer cases.

- 2.2.14 Determination of defendant’s quality, of a consumer in the sense of Article 15 (1) (in light of the case law of the ECJ).

See Gruber.

- 2.2.15 How is the concept of an activity „directed to one or several Member States“ under Article 15 (1) lit. c) applied in practice? How is the provision construed in case of internet business?

There is no case law yet. I believe that there must be an active directing of the activity. In a case of internet business, if the web page allows ordering of goods from the state where the consumer lives, it is sufficient to establish the required directing. The same would be the case, where there is an advertisement aimed at the state, where consumer lives, possibly in the language of this country. It however, would not be a case of a mere internet presentation, which is explicitly limited to the state of the service provider.

- 2.2.16 Taking into consideration the case law of the ECJ, how is the term of „establishment“ in the sense of Article 15 (2) interpreted?

- 2.2.17 How do the provisions on individual contracts of employment (Articles 18–21) apply and how do they interrelate with the respective choice of law rules (in particular Article 6 Rome Convention)?

I do not know any case, where there would be a choice-of-court or coice-of-law agreement in a labour contract.

- 2.2.18 How is the term „rights in rem“ in the sense of Article 22 construed?

The same as in Gaillard (C-518/99). The problem is in cases, where a plaintiff want a court to decide that a charge on a property no longer exist. It is clear that a charge on a property is a right in rem, however in the light of the Web case it is unclear that this would fall within Art. 22/1, when the plaintiff does no ask for a declaration of a right he already has, but for a declaration of none existence of the charge.

- 2.2.19 Determination of the national practice in respect to the exclusive grounds of jurisdiction under Article 22 No. 2, in particular: In which types of cases is the provision most frequently applied in practice?

I am not aware of any such case.

- 2.2.20 Are there any positive or negative conflicts of competence?

There is a problem, which arose after GATT case. It is clear now, that a court has no jurisdiction to deal with matters, in which a court of a different state has exclusive jurisdiction, even though they were raised as a part of defendant's defence. In our procedure, if this is the case, the court should request the defendant to obtain a ruling on the particular matter from a court, which has jurisdiction and then take this ruling into account when deciding its case. However, what if the defendant does not do so? In cases of patents and ownership of immovable property it is not so difficult, because there is always a register, where one can look up, who is a formal holder of such right. But for example there can be a case, where a person domiciled in Germany sues according to Art. 2 a person domiciled in Czech Rep. before a Czech court for a sum of money as an unjust enrichment obtain by the Czech person by using a house of the German without any legal bases, located in Germany. The Czech person objects that the sum should be much lower, because they had a tenancy agreement, validity of which is refused by the German person. Now, the validity of the contract should be judged by a German court, so the Czech court will ask the defendant to go to Germany and obtain a ruling on validity of the agreement. But if s/he does not do so and if the Czech court cannot decide this matter itself, there is a big problem.

- 2.2.21 To what extent does the provision comply with the ECJ's decisions on the freedom of establishment (Centros/Überseering)?

- 2.2.22 How do you draw the line between Article 5 No. 3 and Article 22 No. 4 in respect to litigation on patents? How do the national courts deal in infringement proceedings with the argument of patent invalidity?

See 2.2.20. Either there is a decision on the validity from a court, which has exclusive jurisdiction or one looks in a register.

- 2.2.23 Are any of the exclusive grounds of jurisdiction in the catalogue of Article 22 too broad or too narrow?

Cases of tenancy seems to cover according to ECJ case law a wider range than one would expect.

- 2.2.24 What is the relation between the respective national remedies against enforcement and the freedom of judgments (Articles 22 No. 5, 32)? In particular: What remedy does the obligor rely on if he argues that the claim has changed since the judgment or the title to enforce rendered outside courts does not base on a respective payment on the claim?

There is an appeal against an execution order and also a possible appeal to a Supreme Court.

- 2.2.25 Questions relating to the applicability of Article 23

In particular:

2.2.25.1 Implementation in practice of the decisions of the ECJ by the courts of the Member States?

No problem. The only question is, if the parties can enter in a choice-of-courts agreement, which is in favour of courts of more or even all the member states.

2.2.25.2 Except for the issue of formal requirements, are conclusion and validity of choice-of-forum agreements determined according to the *lex causae* or the *lex fori*?

According to the ECJ case law.

2.2.25.3 Are choice-of-forum clauses in standard form contracts subjected to judicial control?

No.

2.2.25.4 National practice in determining „usages“ of international trade or commerce in the sense of Article 23 (1) lit. c)?³

Not known to me.

2.2.25.5 Applicability of Article 23 *vis-à-vis* third states?

Have not seen.

2.2.26 How does Article 26 function, in particular in comparison with Article 19 of Regulation 1348/2000/EC?

See 2.1.5. I would say it works well.

2.2.27 Effect and functioning of Article 31

In particular:

2.2.27.1 Term of „provisional measures“. According to the practice of the courts of your Member State, do measures resulting in the provisional fulfilment of the claim fall within the ambit of “provisional measures”?⁴

³ The problematic point lies with written confirmations of orders that are issued by the provider of the non-cash contribution with reference to general conditions that encompass a clause-stipulating jurisdiction. According to the opinion of the ECJ (“Segoura”) this was not possible without written confirmation by the client. This was the reason for the implementation of today’s Article 23 (1) c) in the adapting negotiations with Denmark, Ireland and the United Kingdom. According to the leading decision of the ECJ (“Mainschiffahrtsgenossenschaft”), the meaning of “commercial customs” used by Article 23 (1) c) is a matter of fact that has to be finally decided upon by national courts. Did the courts of your State express their opinion regarding this point – in particular with regard to confirmations of orders to which general conditions are attached? Are there any complaints from representatives of the economy who claim that there are no workable and reliable possibilities anymore to achieve choice of forum agreement for certain kinds of business?

⁴ According to the rulings of the ECJ (“van Uden”, “Mietz”) a provisional measure according to Article 31 can only be assumed when the repayment of the granted amount is guaranteed to the claimant for the case of the claimant being defeated in the proceedings of the main action. Are there any opinions of the judicial practice or legal writers concerning the meaning of “guaranteed”? Does it only mean the existence of a substantive claim for a payment or does it mean the obligation of the claimant to grant sufficient securities?

No.

2.2.27.2 Territorial connection with the State where the measure was rendered⁵

No.

2.2.27.3 Problems in applying autonomous provisions on jurisdiction in cross-border transactions

No.

2.2.27.4 Relation between interim protective measures and main proceedings

There does not have to be one. But if the provisional measure is seeks before the main proceedings start, the court can limit the duration of the measure till the time when the main proceedings is finished and order the plaintiff to start the proceedings in a certain time period.

2.2.27.5 Enforcement of provisional measures under national law⁶

They should be inforced using the enforcement means of the mational law.

2.2.28 Is there any case law relying on Article 24 Brussels I Convention (jurisdiction by appearance)?

No.

3. *Lis Pendens* and Similar Proceedings

3.1 How does Article 27 work concerning the principle of *lis pendens*, particularly in the light of the case law of the ECJ and the courts of the Member States?

I have not come across any case yet.

3.2 Does the principle of *lis pendens* ("first seized") cause an incentive to "race to the court room" in the judicial practice?

Do not think so.

3.3 Are there any frictions between Civil Law- and Common Law-systems caused by the different procedural cultures?

⁵ In the judgments quoted above, the ECJ has set up the requirement that a provisional measure issued by a court that has no jurisdiction on the proceedings of the main action must have a territorial connection to the State of the forum. The question is, whether this criterion is also capable in cases, where the provisional measure shall impose or interdict an action to the opponent, e. g. not to distribute goods, which have been produced by infringements of the legal protection of industrial property. Are there any experiences concerning such cases in your State?

⁶ The provisional measures provided by the national legal systems are very different. The rules regarding the enforcement in the Member States are not applicable regarding provisional measures unknown to the national law. The problem has become a practical one in connection with the freezing order (Mareva Injunction) of the English law. This instrument prohibits the opponent from disposing over his assets. Infringements cause penalties because of contempt of court – even for third persons (e. g. banks running the account) that take part in these infringements. British courts add a clause to the world wide freezing order that persons who are not subject to the court's jurisdiction are only covered, when this special order is declared enforceable abroad. What are the results of such a declaration of enforceability? Is there a possibility of enforcement in your State, when an English freezing order has been declared enforceable? To the national reporter of the UK: Do English courts demand to impose "contempt of court"-penalties on foreign banks because of account dispositions in the State of question after the declaration of enforcement of the freezing order?

- 3.4 How does Article 28 work with actions that have close connections to each other? Would a positive differentiation by hard criteria be useful?

- 3.5 Within the Articles 27 to 30, how is it determined whether pending actions concern the same claim between the parties, particularly taking into consideration the case law of the ECJ?

Same as in Tatry case.

- 3.6 Do practical problems arise regarding the application of Articles 27 to 30 with actions of several parties? If yes, please indicate which problems arise in your State.

no

- 3.7 Is there a loss of efficiency because of the tactics of taking negative actions for a declaratory judgment at courts without jurisdiction ("torpedos")? Please give a short description of these tactics.

- 3.8 Or could the client with an action taken quickly for a declaratory judgment turn away an oppressive action of a claimant in a foreign country (for example in a country with extremely high costs)?

Not in the Czech Republic. The basic prerequisite of a successful declaratory claim is under our procedural law "urgent legal interest". Our case law has stated that such an urgent legal interest is not given in a situation where there can be a claim for fulfillment (i.e. usually payment), because in such a case the declaratory judgement does not have a preventive function of declaring the rights of participants and this way preventing any further claims between them. This prerequisite would not be probably met in such a case.

- 3.9 Are there any cases of actions concerning the infringement of a patent that were delayed by the objection of nullity of the patent?⁷

- 3.10 In the case of a European patent: Can a consistent action of infringement be asserted in your country when the objection is raised that several elements of this European patent are infringed by a consistent strategy of marketing?

⁷ In Germany the judgment of an action concerning the nullity of a patent does not ascertain the nullity of the patent, but furthermore abolishes it. In such cases only the special court for patents has jurisdiction. The objection of the nullity of the patent cannot be raised in an action concerning the infringement of the patent. So the action of infringement must be suspended until a decision is made in the action concerning the nullity of the patent, when such an objection is raised. How far is the court that is concerned with the action of infringement of the patent able to decide whether the announced action concerning the nullity of the patent in the foreign country is serious?

4. The Recognition and Enforcement of Judgments, Authentic Instruments and Court Settlements According to Regulation 44/01/EC

4.1 Questions regarding the free movement of judgments

4.1.1 How does the procedure regarding the recognition and enforcement of judgments, authentic instruments and court settlements work?

4.1.2 Are the establishment of additional standard forms, e. g. for applications for a declaration of enforceability, desirable?

4.1.3 Did the term “judgment” in Article 32 lead to difficulties in your State?

4.1.4 Please describe the status of the accessibility of courts by electronic means.

4.1.5 Are the reasons for objection that are laid down in Articles 34 and 35 appropriate? Is there a possibility to decrease the number of reasons for objection or is it – on the contrary – necessary to increase this number?

4.1.6 What is the criteria regarding the requirement of clarity and definiteness of foreign titles have to comply with according to Article 38?

4.1.7 How often is the reservation of public policy (Article 34 No. 1) referred to and with which result?

4.1.8 Did the non-recognition of judgments given in your State (in particular due to incompatibility with the public policy in the respective Member State) lead to amendments of laws?

4.1.9 What kind of interrelation exists between the rule of public policy and the general objection of abuse of the process of the court?

4.1.10 How does Article 49 work with regard to the enforcement of foreign decisions, which are aimed at the payment of an administrative fine to the creditor and what is the practical significance of this provision?

4.1.11 Is there any practical experience or is there a theoretical discussion among legal writers regarding the enforcement of titles which are aimed at the specific

performance of an obligation or which are framed as a prohibitory injunction by means of penalties for contempt of court?

4.1.12 Does the inadmissibility of “anti-suit injunctions” which has been stated by the ECJ have any consequences for the efficiency of legal protection?

4.1.13 How does the practical implementation of appeals work in your State (costs, duration, mandatory representation by lawyers)?

4.2 Provisional Measures according to Article 47

4.2.1 How does Article 47 work?

4.2.2 Do law enforcement authorities consider – within the scope of Article 47 – the reasons to refuse recognition that are laid down in Articles 34 and 35?

4.2.3 If yes, on the basis of which factual criteria?

4.2.4 Does the judge who is competent for declarations of enforceability have competence for provisional measures (Article 47) as well?

4.3 Cross-border Enforcement of Court Settlements and Notarial Deeds

4.3.1 How do Articles 57 and 58 work?

In particular:

4.3.1.1 Is there any experience regarding the interpretation of the term “authentic instrument” in Article 57?

4.3.1.2 Is there any experience regarding the interpretation of the term “settlement approved by a court” in Article 58? Did the wrong English version (“court approved” instead of “*conclus devant le juge*”) lead to difficulties?

4.3.1.3 Are the standardised forms sufficient?

4.3.1.4 To which extent are Articles 34 and 35 applied?

4.3.2 Please describe the practical significance of Article 57 and Article 58

4.3.2.1 Did the situation occur that declarations of enforceability against the debtor have been applied for in several States at the same time?

4.3.2.2 For creditors` lawyers: Was it possible to achieve a higher efficiency of legal protection by means of this?

4.3.2.3 For debtors` lawyers: Did oppressive situations arise out of this? Did this lead in particular to the result that excessive enforcement measures have been carried out?

4.3.3 Specific problems regarding court settlements, enforceable instruments and provisionally enforceable judgments

4.3.3.1 Are there any known cases, where a court of a higher instance has reversed a foreign judgment after enforcement measures had been carried out? How can enforcement measures be set-aside in such a situation?

4.3.3.2 Are there – from the debtor's point of view – any problems with documents that are not valued?⁸

5. Proposals for Improvements

Do you see, based on your experience with Regulation 44/01/EC, any necessity to improve the regulation, in particular regarding the rules on jurisdiction, *lis pendens*, provisional measures and recognition and enforcement? If yes, please make proposals.

⁸ In some States, as for instance in Germany, notarial deeds are only enforceable if the debtor has submitted to enforcement explicitly. The submission is abstract. The debtor can submit to enforcement for a sum that he does not owe at all or does not owe to the stated amount. If the creditor pursues the enforcement nevertheless, the debtor is entitled to claim restitution of the unjust enrichment – if necessary in a separate legal proceeding. Therefore, there is a risk that the enforcement is carried out first for a much higher amount than the debtor has to pay (especially regarding interests). In Germany there exists – regarding cases without a foreign element – a very differentiated system of provisions of security and provisional stay of execution or limitations in its contents (only seizure of assets), which ensures a balance between the interests of both sides – the creditor as well as the debtor. Does the problem of titles that are not valued exist also in other States? Are cases known, where an excessive enforcement has taken place and the debtor was unable to obtain judicial remedy in time?

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Report Czech Republic (Třebatický)

Questionnaire No. 3: Legal Problem Analysis

1. General Themes

- 1.1 Are there any problems in the judicial practice with the autonomous interpretation of „civil and commercial matters“ (Article 1 (1)) practised by the European Court of Justice (ECJ)?

No

- 1.2 Do public authorities use the Regulation to assert claims against private persons?

No account

- 1.3 How is the delineation of the scope of application of the Regulation and other instruments concerning the judicial cooperation in civil matters?

no specific problems experienced

In particular:

- 1.3.1 the delineation to Regulation 2201/03/EC (concerning Article 1 (2) lit. a) Regulation 44/01/EC)? Are there any problems with the assertion of claims concerning maintenance/living costs?

- 1.3.2 the delineation to Regulation 1348/2000/EC (concerning Article 1 (2) lit. b)), particularly: How does the judicial practice treat the delineation of collective and single actions? Are there any problems with the delineation of actions concerning cases of insolvency and those that do not?¹

¹ In some legal systems the avoidance in insolvency proceedings has to be asserted before another court than the court of origin. Before Regulation 44/01/EC and Regulation 1346/2000/EC came into force, the proceeding was treated as one ruled by insolvency law, whose jurisdiction was ascertained by national law. Today it is said that the rules of Regulation 44/01/EC and Regulation 1346/2000/EC concerning the jurisdiction interlock. On the other hand Regulation 1346/2000/EC gives jurisdiction to a court only in the case of opening the insolvency proceedings, not in other cases concerning the law of insolvency. Does this lead to the conclusion that the avoidance of insolvency proceedings is ruled by Regulation 44/01/EC? The same problem arises with actions concerning the liability of a liquidator. Do such problems arise in your country?

- 1.4 Is the application of Article 4 of Regulation 1438/71/EC practical for the determination of Article 1 (2) lit. c)?

no practical experience

- 1.5 Should the scope of application be extended, especially to incorporate arbitration and mediation proceedings?

I should think so

- 1.6 How do the guarantees for the rights of defence provided by the Regulation work concerning jurisdiction on the one hand and recognition and enforcement on the other hand?

- 1.7 Are the rules of Articles 32–58 of Regulation 44/01/EC compatible with national procedural rules? What is still left to be ruled by the Member States? Do special rules exist or do the general rules have to be used?²

no practical experience as far as recognition is concerned

- 1.8 Is the meaning of these conventions in relation between the Member States reduced by the application of Regulation 44/01/EC?

2. Provisions of Regulation 44/01/EC dealing with Jurisdiction

2.1 General Issues

- 2.1.1 Does the Regulation guarantee, according to its overall objectives, predictability of judicial decisions and legal certainty?

Yes

- 2.1.2 Do the provisions on jurisdiction deal satisfactorily with the relevant issues, in particular: Do the courts of the Member States comply with the obligation as laid down by the ECJ that exclusively deal with the issues identified by Article 5 constitute a ground of jurisdiction?

no information available

- 2.1.3 Is the catalogue of fact-specific grounds of jurisdiction sufficient?

Some problems are faced in determining the jurisdiction in cases where the claim is based on obligations arising from securities, more specifically from bills of exchange or promissory notes and especially those which have been endorsed. Though it is possible to derive the competence of the court under Art. 5/1/a of the Regulation as far as the relationship between the drawer (issuer) of the bill and its first owner is concerned, it may be problematic to do the same in cases where the promissory note has been endorsed and there is no contractual relationship between the new owner and the debtor (e.g. the drawer).

² Example: In Germany there is an obligation for the parties of being represented by a solicitor when taking action at the *Landgericht*. An exception is made for the order of enforcement of a foreign judgment by a rule of the national implementation law (§ 4 (2)).

2.1.4 Does Article 4 (2) cause a discrimination in fact of third State parties?

no practical experience

2.1.5 How are Articles 25 and 26 applied in practice? In particular: How does the examination “ex officio” work? Does such examination include grounds of jurisdiction not mentioned in Article 25? Do the courts examine ex officio if there is a valid choice-of-forum clause derogating the jurisdiction seized with the matter by reviewing the entire document of the agreement or do they demand a declaration of plaintiff that there is no derogation?

The application of Art. 26 is rather problematic mostly due to its incorrect translation. In Czech version of Art. 26/1 the obligation of the court to declare it has no competence is linked to the physical absence of the defendant in the court room.

2.1.6 Is the examination of the issue of jurisdiction expensive and time-consuming? Are the same fees for the court and the attorneys to be paid as under the main proceedings? How long does it usually take to obtain a final decision on jurisdiction? Are there any complaints that courts do not decide the issue of jurisdiction separately, but only in connection with the main proceedings? In reverse, are there complaints that a separate decision on jurisdiction results in an unbearable delay of the decision in the main proceedings?

no specific problems experienced

2.2 Questions regarding the various grounds of jurisdiction

2.2.1 How is the reference in Articles 2 and 59 applied? How is the term “domicile” defined? Are there any cases where the courts held that the Defendant had several domiciles?

no specific problems experienced

2.2.2 Does Article 60 with its alternative connecting factors appear feasible?

Yes

2.2.3 How does Article 5 No. 1 work? In particular: Article 5 No. 1 lit. b) 1st indent leaves open the place of fulfilment if goods are handed over to a carrier under CIF or FOB. Is the place of delivery the place where the goods are handed over to the carrier or is the place of delivery to the addressee at the latter's place? In that respect, are there any difficulties known in court practice or contract drafting?

see 2.1.3

2.2.4 Do courts have difficulties to determine the place where a service was provided or should have been provided?

no practical experience

2.2.5 Under Article 5 No. 1 lit. a), how is the place of performance determined in light of the jurisprudence of the ECJ?

2.2.6 Under Article 5 No. 1 lit. b), how is the term „provision of services“ defined and how are services localised?

2.2.7 How is the scope of Article 5 No. 1 lit. c) determined?

2.2.8 How is the line drawn between Article 5 No. 1 and Article 5 No. 3?

2.2.9 Does it provoke any problems that the ECJ does not accept annex grounds of jurisdiction? In particular: Do the courts of the Member States manage to draw a line between contractual and matters of offence in a way other than their own law?

no specific experience

2.2.10 What falls within the scope of the term „matters relating to tort“ under Article 5 No. 3?

2.2.11 Taking into consideration the case law of the ECJ, how is the jurisdiction determined under Article 5 No. 3, in particular in the case of distance and multistate offences? Is the ratio of the decision of the ECJ in “Shevill” workable?

2.2.12 Functioning and practical relevance of Article 6 No. 1 and No. 2 Regulation 44/01/EC: Are there any doubts as to the compatibility of Article 6 No. 1 Regulation 44/01/EC with Article 6 European Convention on Human Rights?

no practical experience

2.2.13 How broad is the scope of the grounds of jurisdiction for consumer issues?

no practical experience

2.2.14 Determination of defendant’s quality, of a consumer in the sense of Article 15 (1) (in light of the case law of the ECJ).

no practical experience

2.2.15 How is the concept of an activity „directed to one or several Member States“ under Article 15 (1) lit. c) applied in practice? How is the provision construed in case of internet business?

2.2.16 Taking into consideration the case law of the ECJ, how is the term of „establishment“ in the sense of Article 15 (2) interpreted?

2.2.17 How do the provisions on individual contracts of employment (Articles 18–21) apply and how do they interrelate with the respective choice of law rules (in particular Article 6 Rome Convention)?

2.2.18 How is the term „rights in rem” in the sense of Article 22 construed?

satisfactorily

2.2.19 Determination of the national practice in respect to the exclusive grounds of jurisdiction under Article 22 No. 2, in particular: In which types of cases is the provision most frequently applied in practice?

no practical experience

2.2.20 Are there any positive or negative conflicts of competence?

no other practical experience than under Reg. 1346/2000

2.2.21 To what extent does the provision comply with the ECJ's decisions on the freedom of establishment (Centros/Überseering)?

2.2.22 How do you draw the line between Article 5 No. 3 and Article 22 No. 4 in respect to litigation on patents? How do the national courts deal in infringement proceedings with the argument of patent invalidity?

no practical experience

2.2.23 Are any of the exclusive grounds of jurisdiction in the catalogue of Article 22 too broad or too narrow?

2.2.24 What is the relation between the respective national remedies against enforcement and the freedom of judgments (Articles 22 No. 5, 32)? In particular: What remedy does the obligor rely on if he argues that the claim has changed since the judgment or the title to enforce rendered outside courts does not base on a respective payment on the claim?

2.2.25 Questions relating to the applicability of Article 23

no practical experience so far

In particular:

2.2.25.1 Implementation in practice of the decisions of the ECJ by the courts of the Member States?

2.2.25.2 Except for the issue of formal requirements, are conclusion and validity of choice-of-forum agreements determined according to the *lex causae* or the *lex fori*?

2.2.25.3 Are choice-of-forum clauses in standard form contracts subjected to judicial control?

2.2.25.4 National practice in determining „usages“ of international trade or commerce in the sense of Article 23 (1) lit. c)?³

2.2.25.5 Applicability of Article 23 *vis-à-vis* third states?

2.2.26 How does Article 26 function, in particular in comparison with Article 19 of Regulation 1348/2000/EC?

2.2.27 Effect and functioning of Article 31

no practical experience so far

In particular:

2.2.27.1 Term of „provisional measures“. According to the practice of the courts of your Member State, do measures resulting in the provisional fulfilment of the claim fall within the ambit of “provisional measures”?⁴

2.2.27.2 Territorial connection with the State where the measure was rendered⁵

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³ The problematic point lies with written confirmations of orders that are issued by the provider of the non-cash contribution with reference to general conditions that encompass a clause-stipulating jurisdiction. According to the opinion of the ECJ (“Segoura”) this was not possible without written confirmation by the client. This was the reason for the implementation of today’s Article 23 (1) c) in the adapting negotiations with Denmark, Ireland and the United Kingdom. According to the leading decision of the ECJ (“Mainschiffahrtsgenossenschaft”), the meaning of “commercial customs” used by Article 23 (1) c) is a matter of fact that has to be finally decided upon by national courts. Did the courts of your State express their opinion regarding this point – in particular with regard to confirmations of orders to which general conditions are attached? Are there any complaints from representatives of the economy who claim that there are no workable and reliable possibilities anymore to achieve choice of forum agreement for certain kinds of business?

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⁵ In the judgments quoted above, the ECJ has set up the requirement that a provisional measure issued by a court that has no jurisdiction on the proceedings of the main action must have a territorial connection to the State of the forum. The question is, whether this criterion is also capable in cases, where the provisional measure shall impose or interdict an action to the opponent, e. g. not to distribute goods, which have been produced by infringements of the legal protection of industrial property. Are there any experiences concerning such cases in your State?

2.2.27.5 Enforcement of provisional measures under national law⁶

2.2.28 Is there any case law relying on Article 24 Brussels I Convention (jurisdiction by appearance)?

no information available

3. *Lis Pendens* and Similar Proceedings

3.1 How does Article 27 work concerning the principle of *lis pendens*, particularly in the light of the case law of the ECJ and the courts of the Member States?

3.2 Does the principle of *lis pendens* (“first seized”) cause an incentive to “race to the court room” in the judicial practice?

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- 3.8 Or could the client with an action taken quickly for a declaratory judgment turn away an oppressive action of a claimant in a foreign country (for example in a country with extremely high costs)?

- 3.9 Are there any cases of actions concerning the infringement of a patent that were delayed by the objection of nullity of the patent?⁷

no information available

- 3.10 In the case of a European patent: Can a consistent action of infringement be asserted in your country when the objection is raised that several elements of this European patent are infringed by a consistent strategy of marketing?

4. The Recognition and Enforcement of Judgments, Authentic Instruments and Court Settlements According to Regulation 44/01/EC

- 4.1 Questions regarding the free movement of judgments

- 4.1.1 How does the procedure regarding the recognition and enforcement of judgments, authentic instruments and court settlements work?

no specific problems experienced so far

- 4.1.2 Are the establishment of additional standard forms, e. g. for applications for a declaration of enforceability, desirable?

No

- 4.1.3 Did the term "judgment" in Article 32 lead to difficulties in your State?

- 4.1.4 Please describe the status of the accessibility of courts by electronic means.

- 4.1.5 Are the reasons for objection that are laid down in Articles 34 and 35 appropriate? Is there a possibility to decrease the number of reasons for objection or is it – on the contrary – necessary to increase this number?

no practical experience

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⁷ In Germany the judgment of an action concerning the nullity of a patent does not ascertain the nullity of the patent, but furthermore abolishes it. In such cases only the special court for patents has jurisdiction. The objection of the nullity of the patent cannot be raised in an action concerning the infringement of the patent. So the action of infringement must be suspended until a decision is made in the action concerning the nullity of the patent, when such an objection is raised. How far is the court that is concerned with the action of infringement of the patent able to decide whether the announced action concerning the nullity of the patent in the foreign country is serious?

- 4.1.7 How often is the reservation of public policy (Article 34 No. 1) referred to and with which result?

- 4.1.8 Did the non-recognition of judgments given in your State (in particular due to incompatibility with the public policy in the respective Member State) lead to amendments of laws?

- 4.1.9 What kind of interrelation exists between the rule of public policy and the general objection of abuse of the process of the court?

- 4.1.10 How does Article 49 work with regard to the enforcement of foreign decisions, which are aimed at the payment of an administrative fine to the creditor and what is the practical significance of this provision?

- 4.1.11 Is there any practical experience or is there a theoretical discussion among legal writers regarding the enforcement of titles which are aimed at the specific performance of an obligation or which are framed as a prohibitory injunction by means of penalties for contempt of court?

- 4.1.12 Does the inadmissibility of “anti-suit injunctions” which has been stated by the ECJ have any consequences for the efficiency of legal protection?

- 4.1.13 How does the practical implementation of appeals work in your State (costs, duration, mandatory representation by lawyers)?

4.2 Provisional Measures according to Article 47

- 4.2.1 How does Article 47 work?

- 4.2.2 Do law enforcement authorities consider – within the scope of Article 47 – the reasons to refuse recognition that are laid down in Articles 34 and 35?

- 4.2.3 If yes, on the basis of which factual criteria?

- 4.2.4 Does the judge who is competent for declarations of enforceability have competence for provisional measures (Article 47) as well?

4.3 Cross-border Enforcement of Court Settlements and Notarial Deeds

4.3.1 How do Articles 57 and 58 work?

In particular:

4.3.1.1 Is there any experience regarding the interpretation of the term “authentic instrument” in Article 57?

4.3.1.2 Is there any experience regarding the interpretation of the term “settlement approved by a court” in Article 58? Did the wrong English version (“court approved” instead of “*conclus devant le juge*”) lead to difficulties?

4.3.1.3 Are the standardised forms sufficient?

4.3.1.4 To which extent are Articles 34 and 35 applied?

4.3.2 Please describe the practical significance of Article 57 and Article 58

4.3.2.1 Did the situation occur that declarations of enforceability against the debtor have been applied for in several States at the same time?

4.3.2.2 For creditors` lawyers: Was it possible to achieve a higher efficiency of legal protection by means of this?

4.3.2.3 For debtors` lawyers: Did oppressive situations arise out of this? Did this lead in particular to the result that excessive enforcement measures have been carried out?

4.3.3 Specific problems regarding court settlements, enforceable instruments and provisionally enforceable judgments

4.3.3.1 Are there any known cases, where a court of a higher instance has reversed a foreign judgment after enforcement measures had been carried out? How can enforcement measures be set-aside in such a situation?

4.3.3.2 Are there – from the debtor's point of view – any problems with documents that are not valued?⁸

5. Proposals for Improvements

Do you see, based on your experience with Regulation 44/01/EC, any necessity to improve the regulation, in particular regarding the rules on jurisdiction, *lis pendens*, provisional measures and recognition and enforcement? If yes, please make proposals.

⁸ In some States, as for instance in Germany, notarial deeds are only enforceable if the debtor has submitted to enforcement explicitly. The submission is abstract. The debtor can submit to enforcement for a sum that he does not owe at all or does not owe to the stated amount. If the creditor pursues the enforcement nevertheless, the debtor is entitled to claim restitution of the unjust enrichment – if necessary in a separate legal proceeding. Therefore, there is a risk that the enforcement is carried out first for a much higher amount than the debtor has to pay (especially regarding interests). In Germany there exists – regarding cases without a foreign element – a very differentiated system of provisions of security and provisional stay of execution or limitations in its contents (only seizure of assets), which ensures a balance between the interests of both sides – the creditor as well as the debtor. Does the problem of titles that are not valued exist also in other States? Are cases known, where an excessive enforcement has taken place and the debtor was unable to obtain judicial remedy in time?