

National Report Italy

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)?

Italian judges generally comply with the autonomous interpretation of article 1.1 practised by the Court of justice and no specific problems have emerged in this respect. For instance recently the Italian Supreme Court (see Cass. May 7, 2003 n°6899 in Riv. dir. int. priv. proc., 2004, 635) had to deal with the issue concerning the definition of civil and commercial matter before examining the other relevant issues pertaining to the scope of article 5.1 and of article 5.3. In that case the claim filed by the former wife against her husband aimed at obtaining a declaration of misrepresentation (simulazione) or the revocation of a contract of transfer of title to land, acting in her quality of alimony creditor, was considered as falling into the scope of application of article 5.1 of the Brussels convention. This solution is consistent with the interpretation given by the Court of justice in Reichert (C-261/90, March 26, 1992), in that it considers that the claim, instead of having a compensatory nature, was rather based on a pre-existent obligation; moreover (and more significantly) according to the Court of Cassation, the fact that the suit had been filed by a third party with regard to the contractual parties was not considered as excluding its contractual character. Eventually the applicability of article 5.1 was stated by the Court in the case concerned as the "obligation in question" - as determined under article 4.3 of the Rome Convention - was represented by the obligation to be performed in the place where the goods should have been delivered. (see also Court of Justice, February 19, 2002, C-256/00, Besix).

In general the Italian Courts seem to follow a restrictive view in interpreting the matters excluded: for instance Tribunale di Roma 13.12.1991 (in Rivista di diritto internazionale privato e processuale 1995, 673) has considered as included in the application of the Convention the action concerning the validity of a settlement even if its object were succession relationships.

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

There is no case law experience on this point, even if in principle there wouldn't be any obstacle if the action is civil or commercial. The action of the public authority is considered in these terms if it is based on a relationship to which the public authorities take part on a position of full participation to the private with exclusion of the exercise of authoritative powers.

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

As far as the interaction with other EC regulations is concerned it is to be noticed that under its article 1.1, Regulation 1348/2000 applies to civil and commercial matters as a whole, without the limitations as of article 1.2 of Regulation 44/2001; as a result the scope of application of Regulation 1348 is definitely wider. Some problems have arisen when it comes to the coordination between Regulation 1348/2000 and Regulation 44/2001 with specific reference to article 27 and article 28 of the latter on lis alibi

pendens (see Tribunal of Milan, order of June 8, 2004, in Riv. dir. int. priv. proc., 2005, 141, which has stated that to the purposes of lis pendens the judge second seized may not check the requisites for the regularity of the service of process which took place within the proceedings first started, as provided by Regulation 1348/2000).

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?

After the entry into force of regulation n° 2201/2003 its rules determine the jurisdiction in matrimonial matters. On the other hand a problem of coordinating article 1.2. a) with article 5.2 of Regulation 44/2001 still remains open. In other words it is still difficult to distinguish which payments fall within the exclusion of article 1.2.a) and which, instead, are governed by article 5.2 the consequence being that the former payments will be ruled by regulation 2201/2003 while the latter will be regulated by regulation 44/2001 (see DE CESARI, Diritto internazionale privato e processuale comunitario, II ed., Torino, 2005, 72).

- 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

Under Italian law avoidance in insolvency proceedings falls under the exclusive competence of the bankruptcy court and accordingly one should apply regulation n° 1346/2000 in any case. The problems of single actions concerning or connected to cases of insolvency cannot be dealt with according to Regulation 44/2001 and will thus be governed by the domestic rules of the Member State whose judge has jurisdiction under Regulation 1346/2000. For example under Italian law (article 24 of Royal Decree 16 March 1942, n. 267 "legge fallimentare") the only exception to the above rule is represented by actions concerning property rights which fall under the jurisdiction of the ordinary civil courts.

- 1.4 Is the application of Article 4 of Regulation 1408/71/EEC practical for the determination of Article 1 (2) lit. c)?

It seems that the list contained in article 4 could help to interpret the meaning of social security provided for by article 1.2.c) by applying a systematic criterium of interpretation in accordance with the need to determine an autonomous notion of social security.

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

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?

The broad interpretation of article 1.2 d) of the Regulation 44/2001 (rectius of article 1.2. § 4 of the Brussels convention) given by the Court of justice in the Max Rich (1991) and Van Uden (1998) - i.e. the "enlarged" exclusion of arbitration from its scope of application - are well known. In my view the mechanisms set forth by the New York convention of 1958 provide a very efficient system of recognition and enforcement of arbitral awards which might be impaired by an extension of the scope of application of the Regulation. In this respect it is noteworthy that according to some national case law (French Cour de cassation, March 23 1994, Rev. arb. 1994, 327, note Ch. JARROSSON) a foreign award which had been invalidated in another country can nevertheless be enforced in a member country of the New York convention, by virtue of the concept of the autonomy of the arbitration. As a matter of facts the invalidation has not been considered as contrary to the limit of ordre public under article V.2 b) of the New York convention. (see RACINE, Réflexions sur l'autonomie de l'arbitrage commercial international, in Revue de l'arbitrage, 2005, 305)

It is rather to be observed that other connected questions still remain quite uncertain as far as the case law of the Court of justice is concerned, namely the applicability of the Regulation to the recognition of a judgment rendered by a domestic court deciding a case in spite of the presence of an arbitration clause, or to the binding effect of a foreign judgment stating on the validity of an arbitration clause. According to some scholars the first problem should be solved applying the Brussels convention in any case and as to the second refusal of recognition should only be based on article 57 of the Brussels and Lugano Conventions (see article 67 of the Regulation 44/2001) which provides that the convention "shall not affect any Conventions to which the Contracting States are or will be Parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments" (see BERAUDO, The Arbitration Exception of the Brussels and Lugano Conventions: Jurisdiction, Recognition and Enforcement of Judgments in Journal of Int. Arbitration, 2001, 13).

Should the Court of justice have the chance of rendering a decision on the above issues it could be of great help in the subject matter.

- 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?

A problem may arise whenever the provisions set forth by articles 5 and 8 of Regulation 1348/2000 concerning the linguistic versions of the writ of summons to be served to the defendant are not respected, as article 8 does not specify the consequences arising from the refusal to receive the relevant document. In such a case one may question whether the provision of article 26.2 of Regulation 44/2001 should apply, that is to say whether the court should stay the proceedings until it is proved that the defendant has had an actual knowledge of the mentioned document.

Although no specific reference to article 26 of Regulation 44/2001 is made, the issue is dealt with by both the Court of justice in the Gotz Leffler v. Berlin Chemie case (C-443/03, November 8, 2005) and the Commission proposal to amend the regulation 1348/2000 of July 11 2005 which provide for the renewal of the service with separate effects for the plaintiff and for the defendant. An indirect consequence could be that the judge is obliged to stay the proceedings until the renewal of the service (see FRIGO, Problemi applicativi della normativa comunitaria in materia di notificazione di atti giudiziari, in Riv.dir.int.priv.proc., 2006, 5).

- 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 rules of Articles 32-58 are compatible with national procedural rules, but there aren't any special rules and it is necessary to adapt the general rules: see point 4.1.1.

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

The bi and multilateral conventions between Member States will maintain their relevance even under Regulation 44/2001 as its article 71 does 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". To this extent article 71 does not alter the situation existing under article 57 of the Brussels convention (see LAVIANI, Coordinamento fra convenzioni internazionali: l'art. 57 della convenzione di Bruxelles del 1968 nelle ipotesi di litispendenza, in Riv.dir.int.priv.proc., 2004, 157).

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?

The Regulation guarantees a specific degree of certainty, especially thanks to the specification of the scope and rationale of applicability of most rules on jurisdiction through the ECJ. Even though it must be said that in single cases (as the famous rulings "Van Uden-Mietz" on article 31 Reg.) it is somewhat difficult for the practitioners to translate the Court's judgment in clear rules. Still with the exception of Article 5.1, also, predictability and legal certainty have been realized, since a normally well-informed defendant can reasonably foresee before which courts, other than those of the State in which he is domiciled, he may be sued.

- 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?

As far as it can be ascertained, the courts do comply with the aforementioned obligation. The actor sequitur forum rei rule of Article 2 constitutes the basis of any jurisdictional test performed by the Italian national courts, which assert jurisdiction over defendants not domiciled in the State of the forum only in compliance with the issues identified by Article 5.

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

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)).

The catalogue of fact-specific ground of jurisdiction is sufficient. Maybe it can be said that sometime the jurisdiction over defendants not domiciled in the State of the forum is too broad, in the case of Article 5.1 or Article 5.3 (in this context especially because of the relevance of both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those place); but it is common ground that the jurisdictional basis drawn by Articles 5-22 are not too narrow.

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

The scope of the question is misleading. The discrimination does not flow only from Article 4 (2), also from the possibility recognized to plaintiff citizens of the State of the forum or domiciled in that State to invoke the national, though exorbitant, rules of jurisdiction. The discrimination arises from the fact that against defendants not domiciled within the EU jurisdiction can be asserted even upon exorbitant grounds and that the judgments rendered upon those exorbitant grounds of jurisdiction must nonetheless be recognized in the whole European Judicial Area, without any possibility (outside Article 71) for the courts of the requested State to refuse recognition or enforcement. It is also the possibility in itself to assert jurisdiction upon exorbitant grounds, and the mandatory recognition and enforcement of the judgments so issued, which determines the discrimination of third States parties, which are not protected against the exorbitant grounds of jurisdiction as the defendant domiciled in the EU are, although in principle such grounds of jurisdiction are considered unjust.

In Italy, also, the discriminatory effect of Article 4 is not felt as far as the rules of jurisdiction are concerned, since Article 3 (2) of the Law No. 218/1995 has rendered national law identical to the European law of jurisdiction; the discrimination arises though from the mandatory recognition and enforcement of judgments of Member States which have been rendered (and although they have been rendered) upon exorbitant grounds of jurisdiction.

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?

Italian courts apply Article 25 and 26 in a rigorous manner. The examination "ex officio" – in case of a non-defaulting defendant – takes place only in relation to the exclusive grounds of jurisdiction of Article 22. In case of default, courts involve themselves in an examination "ex officio" of the possibility to assert jurisdiction on whichever ground and eventually decline jurisdiction if the plaintiff fails to prove any sufficient basis or even if a choice-of-forum clause is detected in the document of the agreement, although the defaulting defendant obviously did not invoke that clause (the courts also do not demand any declaration of plaintiff that there is no derogation, also because they will not consider sufficient any such declaration).

It must be also stressed that in the case-law of the Supreme Court it has been held that the examination "ex officio" is prevented when the lower judge has asserted jurisdiction and this specific point of the judgment has not been appealed by the defendant, even if an exclusive ground of jurisdiction is involved (see Supreme Court, Plenary Session, November 15th 2001, No. 14306).

- 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 examination of the issue of jurisdiction can be extremely time-consuming. Attorneys' fees, which are awarded pursuant to the so-called "loser pays rule", are the same of those due under the main proceedings: according to this premise, if the case has been tried on the merits, also, there is no extra-fee because of the litigation involving also the examination of the issue of jurisdiction; but if the court declines jurisdiction, attorneys' fees of the same value will be requested.

The attorneys's fees will depend on: number of briefs filed, number of hearings attended, and number of witnesses and/or other evidence examined.

While in some cases the parties can request that a final decision on jurisdiction be rendered separately from, and prior to, the main proceedings, in order to obtain a faster decision on the matter, usually courts decide whether they have jurisdiction over the case brought to their attention only at the end of the main proceedings. This is frequently criticized, considering that the average length of civil proceedings in first instance in Italy is three-four years; anyway it is common for Italian courts to try with the merits every preliminary question of procedure. As a matter of fact, it is not uncommon for a case to be tried (including examination of witnesses and documents, filing of 7-9 briefs, attendance at various hearings) before a judge who, only in its final decision, establishes that he has no jurisdiction and that the parties must bring the case before another judge for a new trial. And the litigation of the jurisdictional issue can go further on in front of the appellate courts. On the other hand, the attitude of the courts is justified by the fact that a separate decision will delay at the very least for 10 months the decision on the merits, and therefore the courts will impose such delay to the parties only if they believe that there is a consistent possibility (which can be assessed on the figure of 70%) of a judgment declining jurisdiction.

It must be stressed anyway that Italian civil procedure includes a sort of pre-emptive appeal to the Supreme Court – the "regolamento di giurisdizione" – through which either of the party can provoke the immediate decision of the Supreme Court on the jurisdictional issue: this pre-emptive appeal, which has to be issued before any judgment on the merits of the court of first instance, will determine an irrevocable decision on jurisdiction within 2 years, without possibility of further appeals; it will bring an amount of costs, but this will be equivalent though to the costs the parties are going to bear, if the jurisdictional issue will be in the future a ground of further appeal in front of the Supreme Court against a judgment of the appellate court.

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?

The application of articles 2 and 59 has not created significant problems in Italian case law as the existence of a domicile in the forum enables the judge to consider the problem solved without having to take account other criteria. According to Italian law (art. 43 of the civil code) domicile is the place where a

person has established the main seat of her/his business and interests as opposed to residence defined by the same article as the place where a person has her/his abode.

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

The criteria provided for by article 60 in order to define the domicile of a company are basically the same as those provided for by article 25 of the Italian law on private international law in order to determine the law applicable to companies. Accordingly this means that Italian judges have been faced with the existence of three different criteria since 1995 and they, at least theoretically, should be used to distinguish between these three alternatives.

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 approach of the Courts to this topic is splitted between the decisions of lower courts and the most recent judgment of the Supreme Court. In the first published cases about the new version of article 5 n. 1 Reg. 44/2001, some Tribunals have stated that the place of delivery must now be determined as the place of final destination, where the goods are materially made available to the addressee, irrespective of the substantive law provisions (*lex causae*) on the place of performance of the obligation (so Tribunale Rovereto 28.1.2004 and Tribunale Brescia 28.12.2004, both in *Int'Lis* 2005, 131).

On the contrary, the Corte di Cassazione, for the first time called to settle the question in the view of Regulation n. 44/2001, has stated that it is the substantive law (*lex causae*) applicable to the contractual relationship according to the conflict of law rules of the forum State the relevant factor for the determination of the place of the delivery of the goods as it was already held for article 5 n. 1 of the Brussel Convention (judgment, at the moment unedited, Cassazione Sezioni Unite 27.9.2006 n. 20887). According to the Supreme Court, in particular, also in the Regulation 44/2001 (as it was already held for the Brussel Convention), CIF or FOB clauses are of no relevance in this context, since they do only regulate the cost and risks questions, but do not interfere with the determination of the place of performance of the obligation. These questions are strongly debated in doctrine (Broggini, *Il forum destinatae solutionis: passato, presente e futuro*, in *Rivista di diritto internazionale privato e processuale* 2000, 15ss., De Cristofaro, *Il foro delle obbligazioni*, Torino 1999, 234ss., Clerici, *Forum solutionis e convenzione di Roma del 19 giugno 1980 al vaglio della giurisprudenza italiana*, in *Rivista di diritto internazionale privato e processuale*, 1997, 873ss., Lupoi, *La competenza in materia contrattuale nella convenzione di Bruxelles del 27 settembre 1968*, in *Rivista trimestrale di diritto e procedura civile*, 1994, 1263ss., Tessitori, *Forum solutionis, convenzione di Bruxelles del 27 settembre 1968 e giurisprudenza italiana*, in *Rivista trimestrale di diritto e procedura civile* 1989, 113ss.).

The same solution was steadily stated for art. 5 n. 1 of the Brussel Convention (ex multis Cass. 6.6.2002 n. 8224, Cass. 19.6.2000 n. 448, Cass. 23.12.1997 n. 13015, Cass. 25.1.1995 n. 892, Cass. 19.12.1994 n. 10910, and really exceptional were the dissenting precedents: Trib. Milano 29.5.1996, in *Rivista di diritto internazionale privato e processuale*, 1997, 455), but it is in any case surprising that where the question had to be faced in the light of the new version

of article 5 n. 1 in Regulation 44/2001, the Corte di Cassazione has not submitted it to the ECJ (so in the above cited judgment n. 20887/2006).

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

At the moment there is no case law about the application of the notion of "service" in Regulation 44/2001.

- 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?

The Italian case law is very faithful to the jurisprudence of the ECJ on this topic, both under the point of view of the analytical determination of the relevant obligation whose place of performance grounds the jurisdiction (see for example Cassazione 9.6.1995 n. 6499), and under the point of view of the determination of the place of performance according to the relevant substantive law ascertained upon the conflict of law rules of the forum State. It is of course very frequent the reference to the conflict of law rules of the Rome EC Convention 19.6.1980 (into force in Italy since 1984). Where the result is that Italian law is applicable, judges make application of the general principle of the civil code, according to which the obligation of delivery of goods is performed with the handover to the carrier (art. 1510 cod. civ.) and the obligation of payment of a money sum is to be performed at the domicile of the creditor (art. 1182, 2 comma, cod. civ.). Where applicable it is common the reference to the rules of the Vienna Convention 11.4.1980.

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

There is no case law available yet. The literature - in Italy like elsewhere - has in particular focused on the problem if also pure financial contracts can be defined as "contracts for the provision of services".

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

Also for article 5 n. 1 lit. c), there is no case law available yet. According to the literature, the provision aims the scope to "open a European forum", shall the application of the new approach to "forum destinatae solutionis" according to lit. b) bring to the jurisdiction of a third country's Court.

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

The distinction is drawn according to the case-law of the ECJ, that is on the base of the criterion that an obligation freely entered into by the parties is characterized as contractual, whereas the absence of such bond determines a non contractual obligation under article 5 no. 3. It remains uncertain even in front of the Italian courts whether claims upon unjust enrichment or restitution fall within either of the two categories of the claims in contract or of the claims in tort.

It must be stressed that, in the application of the rules of the Brussels Convention although outside its territorial scope (and also in the application of the national rules rendered identical to those of the Brussels Convention by Article 3 (2) Law No. 218/1995), the Italian Supreme Court has held that the *actio pauliana* (which the ECJ said is not a matter of tort) is a matter of contract, so that the (third-party) plaintiff can bring the proceedings in front of the judge for the place of performance of the contract whose avoidance is requested (Supreme Court, Plenary Session, May 7th 2003, No. 6899).

On the other hand, it is obvious that the line between "tort" and "contractual" matters is drawn based on the pleadings and thus on the grounds for, and the type of, relief sought by the plaintiff. According to the Effer-decision of the ECJ, also, the determination of jurisdiction depends on how the action is pleaded by the plaintiff.

- 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?

The ECJ approach, not to accept any annex grounds of jurisdiction other than those laid down in Article 6, does sometimes create some problems, because there is a tendency of the courts to accept in some cases a joinder of claims – in contract and in tort – even in the absence of one of the respective ground of jurisdiction. This tendency is obviously justified by the fact that the consequence of the ECJ not accepting annex grounds for jurisdiction is that there may be cases where, although the parties and the facts are the same, the contractual and the non-contractual sides of the same dispute must be decided by two different judges in two different countries.

On the other hand, there is no evidence in Italy of courts drawing the line between contractual and non-contractual matters in a way other than the one required by national law. Especially because the tortious qualification of the pre-contractual liability through the Tacconi decision of the ECJ is equivalent to the qualification of the pre-contractual liability according to Italian national law, there has not even been the reason for a divergence between law of jurisdiction and national law in drawing the line between contractual and non-contractual matters.

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

The case-law of the Italian courts leans on the case-law of the ECJ. There are also no special features (see also answers No. 2.2.8 and 2.2.9).

- 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?

Italian courts have accepted the principle laid down in the Bier decision of the ECJ, according to which in relation to Article 5 No. 3 the determination of jurisdiction takes place upon relevance of both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places. This option is equivalent to that one which was accepted by Italian courts in the application of the corresponding national rule on jurisdiction in tort matters before the entry into force of the Brussels Convention. The restrictive approach of the Marinari decision of the ECJ has nonetheless influenced the case-law of Italian courts, which have declined the jurisdiction in a case where the relatives of a person deceased in a car-accident claimed damages in Italy, alleging that their psychic pain was suffered (obviously) in the place of their domicile, since the irrelevance of the dommages par ricochet prevents to detect a fair ground of jurisdiction in places other than those where the initial damage occurred (see Supreme Court, Plenary Session, February 11th 2003, No. 2060, although in application of the national rules of jurisdiction, rendered identical to those of the Brussels Convention by Article 3 (2) Law No. 218/1995).

It must be stressed, as a negative consequence of the case-law of the ECJ, that the tortious qualification of the pre-contractual liability by the Tacconi decision of the ECJ has proved excessively favourable to the (allegedly) damaged plaintiff in the practical application of the principle of the relevance of both the place where the damage occurred and the place of the event giving rise to it. In fact, Italian courts have no doubt that, in case of damages deriving from pre-contractual liability, in the place of the domicile or sit of the damaged plaintiff occurred both the damage, since the relevant damages are strictly financial losses, and the event giving rise to it, since the contractual party (often) have notice of the breaking off of the negotiations (see Supreme Court, Plenary Session, July 10th 2003, No. 10896; September 11th 2003, No. 13390; May 3rd 2005, No. 9107). Even if the ECJ should cut off any relevance of the financial losses as a sufficient ground of jurisdiction, the latter opinion – about the place where the conduct giving rise to damage has occurred – allows the (allegedly) damaged plaintiff nearly 100% possibility to sue the defendant in front of the courts of its own domicile or seat. In cases of pre-contractual liability the underlying rationale of the (Brussels Convention and) Brussels Regulation provisions will be entirely nullified by the tortious qualification accepted by the ECJ, while a contractual qualification of the pre-contractual liability would determine the jurisdiction of the place where the loyal conduct of the negotiations should have taken place, which will flow in a much more equilibrated assessment of the jurisdiction.

The principle of the relevance of both the place where the damage occurred and the place of the event giving rise to it has been applied also to cross-border libel and defamation cases, and in this respect the rationale of the Shevill decision has proved workable. In fact, while in a recent decision the Supreme Court has affirmed the Italian jurisdiction in relation to a newspaper defamation, although limited to the damages suffered in Italy, since the relevant newspaper (the German magazine “Stern”) has a broad diffusion in Italy (at least because of the number of German tourists! Supreme Court, Plenary Session, June 21st 2006, No. 14287), in an earlier decision the Supreme Court has declined the Italian jurisdiction because it has been ascertained that the Swiss magazine, where the defamation was alleged to have taken place, did not sell any copy in Italy, so that Italy could not be held place where the damage occurred (Supreme Court, Plenary Session, October 27th 2000, No. 1141: both cases were about the application of the Brussels Convention).

It must be also said that the rationale of the Shevill decision has influenced the Italian law of venue. In fact there has been recently a major shift of the Supreme Court in relation to the venue of the courts in defamation cases through Internet. In order to accept the principle that every place where an access to the net is possible is a place where the damage occurred, the Supreme Court recalled specifically the case-law of the ECJ and, of course, the Shevill decision (Supreme Court, May 8th 2002, No. 6591; further, in relation to defamation through television, Supreme Court, December 1st 2004, No. 22586).

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?

From a practical point of view, Article 6 No. 1 is applied much more often than Article 6 No. 2. In fact, the joinder of defendants in front of the courts of the domicile of any of them is a powerful weapon through which the plaintiff can drive the determination of the most convenient jurisdiction. There are frequent tort actions (about the application of the Brussels Convention) in which the plaintiff sued in Italy a “deep-pockets” foreigner and a defendant domiciled in Italy, whose contribution in the damage was very little, if any.

a) Supreme Court, Plenary Session, April 3rd 2000, No. 86, was about a personal injuries claim of the parents of an Italian boy, who got hurt in a school-trip in England while playing football. The parents sued before the courts of Rome the English National Health Service for medical malpractice and the Italian teacher for not having immediately understood how fierce was the injury suffered by their son. The claim was for joint and several liability and damages, but the role of the teacher was to permit the joinder of the English defendant before Italian courts. In fact, the teacher defaulted, but because of its presence the Supreme Court affirmed the Italian jurisdiction on the whole of the claim.

b) Supreme Court, Plenary Session, June 21st 2006, No. 14287, was about a defamation claim against the German magazine "Stern". A producer of olive-oil sued before Italian courts the German defendant and the Italian person who allegedly passed the wrongful information to the German magazine. The claim was for joint and several liability and damages. Both parties filed their defence, but there is the possibility that the claim against the Italian defendant was to permit the joinder of the German one before the Italian courts (the joinder could have been possible, anyway, on the basis of the Shevill decision of the ECJ: see answer No. 2.2.11).

But, even if we do not consider this possibility of abuse of Article 6 No. 1, it remains that this head of jurisdiction permits to sue a defendant before the courts of a Member State with which he has no contact at all (the same is for No. 2, although in this respect a requisite of predictability of the consequences of the conduct of the third party: e.g. "the stream of commerce" theory, could suitably restrict this possibility of being sued before courts of a State with which the third party defendant has no relevant contact). Even in the case law of the ECJ the problem of a too broad application of Article 6 No. 1 has arisen, and (in the decision *Réunion Européenne*) the ECJ said in obiter that no joinder is legitimate if the claim against the first defendant is a contractual one and the claim against the second defendant is based on tort (in Italian case-law there has not been any judgment which neither accepts nor repudiates the rationale of the said decision of the ECJ).

Most authors hold that the rationale of the sound administration of justice, which underlies Article 6 No. 1, can adequately justify this consequence (see in Italy (Ghirga, *Riflessioni sul significato di giudice naturale nel processo civile*, RDP, 2002, 805 (842 f.), who anyway draws the attention on the fact that, when the sound administration of justice cannot be achieved, Article 6 No. 1 will conflict with the requirements of the natural judge). But – even if now to the provision of the Regulation has been added the specification that the joinder is legitimate "provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings" (specification which was implied in the provision of the Brussels Convention, according to the *Kalfelis* decision of the ECJ) – it is probably the forum of the joinder of defendants in itself, which – since it does not pay attention to the subjective status of every single defendant – conflicts with the due process requirements.

In relation to Article 6 No. 2, it must be stressed that Italian courts consider the forum of the third-party claim not available as long as cases of so called "untrue guarantee" are involved. As such are considered the cases in which the relationship upon which rely the original proceedings is different from that one upon which rely the third party action (e.g.: A claims damages from B as a consequence of a breach of contract; if B alleges that the breach in the contract on his side was due to the breach of another contract between B and C, the connecting factors are deemed to be too loose – "untrue guarantee" – to legitimate the joinder of the third party: Supreme Court, Plenary Session, August 8th 2001, 10891; it must be stressed, though, such limitation of the

applicability of Article 6 No. 2 is probably irreconcilable with the decision Kongress Agentur and Zürich Espana of 2005, and further with the provision of Article 6 No. 2, which refers to “any other third party proceedings”).

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

In relation to consumer issues, there is very few case-law in Italy. Therefore no useful answer can be given to this question and the following ones.

In any case, the scope of the grounds of jurisdiction relating to consumer issues is fairly broad as Italian courts tend to be consumer-prone, at least for jurisdictional matters (e.g. Tribunal of Rome, Decision of September 30, 2002, in Riv. dir. internaz. priv. e proc. 2003, p.181).

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 2.2.13

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?

See 2.2.13

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?

See 2.2.13

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)?

The provisions on individual contracts of employment are applied in order to favour the “weaker party”.

While the problem has never come to the attention of the courts, most of the authors believe that the determination of the notion of “contact of employment” must follow the same criteria both regarding the Brussels Convention and regarding the Rome Convention 1980 (see Mari, *Il diritto processuale civile della Convenzione di Bruxelles. I. Il sistema della competenza*, Padova, 1999, 354 f.; Mosconi, *La giurisdizione in materia di lavoro nel Regolamento (CE) N. 44/2001*, in Riv. dir. internaz. priv. e process., 2003, 11).

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

In Italian case-law the problem of the exact determination of the terms “rights in rem” has never come to the attention of the courts. Especially, courts did not have until now an occasion to determine whether a claim for invalidation or rescission of a contract, whose consequence is a change in the proprietary situation of an immovable, must be considered as a contractual claim (as it has been held by the ECJ in the case Gaillard v. Chekili) or as a claim regarding a “right in rem”.

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?

In Italian case-law the problem of the exact determination of the terms “rights in rem” has never come to the attention of the courts. Especially, courts did not have until now an occasion to determine whether a claim for invalidation or rescission of a contract, whose consequence is a change in the proprietary situation of an immovable, must be considered as a contractual claim (as it has been held by the ECJ in the case Gaillard v. Chekili) or as a claim regarding a “right in rem”.

2.2.20 Are there any positive or negative conflicts of competence?

See the answer to point 2.2.19.

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

The point did not come to the attention of Italian courts. It is nonetheless obvious that the provision in itself complies with the ECJ's decisions on the freedom of establishment. Maybe is the combination of Article 22 (2) and the reference to national rules of private international law for the determination of the seat of the company which does not comply with the case-law of ECJ, because thanks to this reference the exercise of the freedom of establishment may remain without any effect, shall the national rules of private international law provide that the seat of a company depends on where the decisions regarding the life of the company are met and does not depend on whether the company has been registered as a foreign company (the problem is very grave in relation to jurisdiction for the declaration of insolvency, since Italian courts consider that a change of seat of an Italian company to another Member State does not interfere with the Italian jurisdiction for the declaration of insolvency of that company, since according to Italian private international law a change of seat implies necessarily the extinction of the former legal entity and a formation of a new legal entity: see Supreme Court, Plenary Session, January 23rd 2004, No. 1244; July 28th 2004, No. 14348).

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?

Article 5 no. 3 sets forth the rules on jurisdiction with reference to the infringement of a patent. Article 22 n. 4 sets forth the rules on jurisdiction with reference to litigation concerning the validity/nullity of a patent. With reference to the way of Italian courts to deal with the argument of patent invalidity in infringement proceedings, should the invalidity of a patent be claimed in an action other than the infringement one, or in an action under a foreign jurisdiction, the Italian court competent for the action concerning the infringement of the patent can decide to suspend said action under article 295 of the Italian Code of Civil Procedure as long as the invalidity argument is considered to be preliminary with reference to the decision concerning the infringement of the patent. This solution is now mandatory, since the ECJ (decision of July 13th, 2006, GAT) has held that Article 16 (4) of the Brussels Convention is to be interpreted as meaning that the rule of exclusive jurisdiction laid down therein concerns all proceedings relating to the registration or validity of a patent, irrespective of whether the issue is raised by way of an action or a plea in objection.

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

No objection has been ever raised in relation to those grounds of jurisdiction.

- 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?

The debtor-obligor may rely on the oppositional remedies provided for by national law (Vollstreckungsabwehrklage according to Article 615 of the code of civil procedure).

In relation to the provisions of the Brussels Convention, some courts held in obiter dictum that the defence alleging that the claim has changed since the judgment could be raised already within the appeal against the declaration of enforcement according to the Convention provisions. In view of the much more simplified structure of the appeal proceedings against the declaration of enforcement, most of the Authors hold now that there is no room for a defence alleging that the claim has changed since the judgment within the appeal against the declaration of enforcement according to the Brussels Regulation.

- 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?

Since the "Castelletti" judgment, Italian Court implement very faithfully the jurisprudence of the ECJ, without making use of national rules on the validity of choice of forum clauses. For instance the Italian law would require for clauses in standard form contracts that they are explicitly and separately approved by written reference (art. 1341-1342 cod. civ.), but the Corte di Cassazione has often stated that this requisite is not necessary where the clause is subject to the application of the Brussel Convention (Cassazione 11.6.2001 n. 7854, Cassazione 11.7.1997n. 6238, Cassazione 26.4.1995 n. 4625). Moreover the Corte di Cassazione, in the decision 17.1.2005 n. 731, has stated that the formal requirements of article 17 of the Brussel Convention are relevant also for the interpretation of the requisite of "agreements to be proved with written statements", provided as formal requirement by article 4 of the Italian Private International Law (Legge n. 518/1995), which applies to the validity of choice of forum clauses outside the scope of the European Convention and Regulation.

- 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*?

There is no specific case law available on this problem and the literature is splitted: for the application of the *lex causae* see Gaja, *La deroga alla giurisdizione italiana*, Milano 1971, 271; for the application of the *lex fori* Attardi, in *Commentario al cod. proc. civ. diretto da Allorio*, I, 1, Torino 1973, 29.

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

Choice-of-forum clauses in standard form contracts are subject to judicial control, but, as already said at point 2.25.1, the jurisprudence does not apply the formal requisites of the Italian law as provided in articles 1341-1342 cod. civ.

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

Italian courts apply a high standard with respect to the notion of "usages" of international trade set forth in Article 23 (1) lit.c). For example, the mere presence of a clause in standard form contracts is usually not sufficient to qualify the clause as a "usage" absent evidence that there is a well-established practice in that regard (e.g. Corte di Cassazione, 29.1.2002 n. 1150, Cassazione 11.6.2001 n. 7854).

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

There is no case law available on this point. The Italian law on conflict of jurisdictions provides specific requirements of validity of choice of forum clauses, making use of the freedom guaranteed by article 23 of Regulation n. 44/2001.

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

There is no case available. It is noteworthy that Italy with reference to art. 19, no. 2, Reg. 1348/2000 has first notified that Italian judges cannot give judgments if the conditions provided for by art. 19, no. 2 are not fulfilled and subsequently declared that Italy did not intend to make declarations under par. 2 and 4 of article 19.

2.2.27 Effect and functioning of Article 31

There is no case law available, but there is no special problems applying the Italian national law that allows exercise of jurisdiction only if the measure can be enforced in Italy (see point 2.2.27). Legal writers assume that the provision is too broad where it allows the application of national exorbitant grounds of jurisdiction existing in the laws of other Member States (especially if used for satisfactory measures, as payment orders), and this even with the limits imposed by the rulings of the EJC in the cases "Van Uden-Mietz".

In particular:

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?

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

The term of provisional measure includes every temporary measure intended to safeguards rights the recognition of which is sought or will be sought in a main proceedings or more simply intended to anticipate temporarily the decision on the merit. They may include sequestrations (articles 670 and 671 Italian civil proc. code) or satisfactory measures (article 700 Italian civil proc. code) or interim payment orders granted by the Court of the main proceedings (artt. 186 bis, 423 Italian civil procedure code). The requisites for granting such measures are very strict if the measure has satisfactory nature: a part from special cases, it is necessary for the creditor to demonstrate that his rights are exposed to a real immediate and irreparable prejudice. In this sense legal writers commonly exclude from the category of "provisional measures" stricto sensu (so called misure "cautelari") the temporary measures that can be granted without the demonstration of a specific prejudice: they are temporary but not properly "cautelari". The distinction is in any case not relevant for the application of article 31 Reg. 44 because this kind of satisfactory measures can be granted only during the proceedings on the merit (as it in the above mentioned cases of article 186 bis and 423 civil proc. code), and so they are necessarily conditioned by the fact that the Italian Court has jurisdiction on the merit according to the ordinary rules.

There is no case law available on the term of "provisional measure" according to the rulings of the ECJ ("Van Uden" and "Mietz"). As to the requisite that repayment of the granted amount is guaranteed to the debtor in case the claimant loses on the merit, legal writers assume that, in general, it is not sufficient the existence of a substantive claim for re-payment and the claimant must be asked to give guarantee of reimburse at least if the measure doesn't impose to the claimant the beginning of the main proceedings within a short time limit (see Consolo, "Van Uden e Mietz: un'evitabile Babele", in *Int'lis* 2001, 73, 84, Merlin, "Le misure provvisorie e cautelari nello spazio giudiziario europeo", in *Rivista di diritto processuale* 2002, 759, 795-796).

2.2.27.2 Territorial connection with the State where the measure was rendered⁵

Territorial connection is normally guaranteed by the strict general rule that allows the exercise of jurisdiction, in cases where the Italian Courts have no jurisdiction on the merit, only if the provisional measure can be enforced in Italy (art. 10 Legge 218/1995). Where the measure is an interim payment, and Italian courts have no jurisdiction on the merit, it

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?

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?

is discussed if the assets of the debtor on which enforcement can take place must be precisely mentioned in the order (so assuming the requisite is imposed by the ECJ rulings "Van Uden" and "Mietz", Merlin, op. cit., 790; in the opposite sense Consolo, op. cit., 81, who assumes that the existence of assets within the national territory is necessary only for retaining jurisdiction). There is no experience concerning cases where the provisional measure imposes or interdicts an action to the opponent.

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

There is no particular problem because the Italian law is very clear in allowing the exercise of jurisdiction only if the measure can be enforced in Italy (article 10 Legge 218/1995).

2.2.27.4 Relation between interim protective measures and main proceedings

Until a very recent reform, it was a rule that any provisional measure granted before the beginning of the main proceedings would lose its efficacy if the action was not started within a very short delay.

With the Act 14.5.2005 n. 80 it has been reformed the article 669 octies civil proc. code. In the new version it is confirmed the general rule that, if the measure is granted "ante causam", the main proceedings must be started within 60 days (1 comma). But the opposite rule is provided (6 comma) if the provisional measure has satisfactory nature and is directed to anticipate the effects of the judgment on the merit. In this case there is no special term for starting the proceedings on the merit but simply every part may start it. As a result the general rule about the necessity to promote the proceedings on the merit can now be considered applicable only to sequestrations.

As a consequence legal writers would now assume that Italian provisional measures that anticipate the decision on the merit must be charged, if rendered in application of the exceptional forum of article 31 Reg., by the guarantee of reimbursement as imposed by the ECJ in the rulings "Van Uden-Mietz".

2.2.27.5 Enforcement of provisional measures under national law⁶

The means of enforcement are the same provided for judgments on the merit. See at point 4.1.10-4.1.11 for the inexistence of specific performance for injunctions to do, not to do or to abstain. There is small experience about the English freezing orders, but it results that the Corte di Appello di Milano has occasionally granted the declaration of enforceability to such a freezing order without discussing the problem

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?

of the means of its practical execution (App. Milano 27.12.2005, unedited).

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

Yes, concerning art. 18 Brussel Convention (today art. 24 Reg. 44/2001), the Italian Corte di Cassazione has often stated that the so called jurisdiction by appearance cannot be realized if the defendant has clearly contested the jurisdiction and that even though at the same time he has developed other defenses on the merit. Necessary it is only that the further defenses (on the merit or not) are at least implicitly alleged only as subsequent and the jurisdiction is contested at a priority level (Cassazione 22.5.1998 n. 5145, Cassazione 28.3.1990 n. 2500, Cassazione 13.1.1989 n. 103, Cassazione 21.5.1986 n. 3376, in Rivista di diritto internazionale privato e processuale, 1987, 821, Cassazione 17.6.1986 n. 4036, in Rivista di diritto internazionale privato e processuale, 1987, 559, Cassazione 19.5.1984 n. 3107, Cassazione 19.5.1984 n. 3107, in Rivista di diritto internazionale privato e processuale, 1984, 758). The principle has been applied even in the case where the defendant had conditionally proposed a counterclaim (of course for the case the Italian judge should retain its jurisdiction: Cassazione 16.1.1985 n. 96, in Rivista di diritto internazionale privato e processuale, 1985, 170). On the contrary it was held that jurisdiction by appearance is founded where the defendant himself had sued in Italy an action for negative declaration and then contested the jurisdiction as to the adversary counterclaim (Cassazione 2.2.1991 n. 999, in Rivista di diritto internazionale privato e processuale, 1992, 327) or had developed its defenses on the merit on a full equivalent level and in these cases even if there was a choice-of-forum clause (Cassazione 22.11.1984 n. 5985, in Rivista di diritto internazionale privato e processuale, 1985, 844).

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?

The edited cases raising issues in relation to art. 27 of Regulation 44/2001 and before to art. 21 of the Brussel Convention are not numerous. In any way the Italian Courts show to apply the large term of *lis pendens* given by the ECJ without any particular reluctance. This is probably due also to the fact that according to Italian law the relationship between disputes involving different causes of actions but so strictly connected to involve the risk of conflicting decisions are subject to a rule very similar to *lis pendens* (prevailing the proceedings first started and being mandatory the migration of the second proceedings in front of the judge first seized: so called "continenza di cause", art. 39, 2 comma, it. civil proc. code).

As far as concerns the application of art. 27 Reg./art. 21 Convention, in the case ruled by Corte di Cassazione 15.10.1992 n. 11262 (in Foro italiano, 1994, I, 1545) *lis pendens* has been affirmed in relation to disputes arising from the same contract and involving mutual actions of annulment for breach of the contractual obligations (in the same terms, Cassazione 10.4.2002 n. 5127, in Foro italiano 2003, I, 1841); in the case ruled by Corte di Cassazione 25.5.1999 n. 293 (in Rivista di diritto internazionale privato e processuale 1999, 625) *lis pendens* has been affirmed in relation to disputes arising from the same contract where a party claimed for payment of the delivered goods and the other party complained breach of the contract and claimed for its annulment and damages; in the case ruled by Corte di Cassazione 28.4.1993 n. 4992 (in Foro italiano 1994) *lis pendens* has been affirmed to disputes where a party claimed the payment of a maintenance obligation and the other party sought negative

(Questionnaire 3)

declaratory relief of the same obligation; in the case ruled by Tribunale di Milano 8.6.2004 (in *Rivista di diritto internazionale privato e processuale* 2005,141) *lis pendens* has been affirmed in relation to disputes involving mutual actions for the payment of credits arising out of the same contract, for which it was also claimed the set-off of the credits. In all these cases the court first seized was the foreign court.

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

Of course, practitioners are aware of the effect of *lis pendens* rules in Regulation 44/2001 and of the need to issue proceedings first in their client's chosen forum even if only to the purpose to frustrate the opponent's choice of jurisdiction. But the race must keep in count that, in order to consider the proceedings formally pending in the Italian law, the application must be first served to the opponent and cannot be accepted by the court office before the service has been regularly done (art. 39, 3 comma, Italian civil procedure code). For this reason there is no practical possibility for the Italian lawyers to take advantage of the new rule in art. 30, nr. 1, Reg. 44/2001. In a recent case the Corte di Cassazione (8.2.2002 n. 5127, in *Rivista di diritto internazionale privato e processuale* 2002, 708) has ruled that if the foreign court has already declared that the proceedings in its country has been first started, even if the judgment is not conclusive, the Italian court cannot discuss any more about the issue and is bound by the foreign judgment. This solution must be criticised because as a result it recognises to the foreign decision more effects than it is admitted for the Italian decisions (as a general rule, in Italian procedural law, judgments on procedural issues have not binding effect out of the proceedings in which they have been rendered) and because the binding effect of the foreign decision is provided in article 27 Reg. for the decision on the jurisdiction issue but not on the priority issue. Also it has been ruled that the Italian court cannot determine its jurisdiction when the foreign court is first seized, even if the party invokes a choice of court agreement in favour of the Italian forum (Tribunale di Milano 8.6.2004 in *Rivista di diritto internazionale privato e processuale* 2005, 141).

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

Yes. At a practical level Italian lawyers complain that under the English system the proceedings is considered formally started with the issue of a claim form which contains only a very concise statement of the nature of the claim, while under civil law rules the claim form must since the beginning contain a complete exposition of all elements of the dispute. This difference is considered unfair in favouring the English lawyers in the "race to the Court".

- 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?

There is no case law available at the moment.

- 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?

According to the general principles of Italian law *lis pendens* could be affirmed only if claims are the same in all their formal elements - parties, "causa petendi" and "petitum" -. But the courts have since many years applied the wider and substantial concept of "sameness" as dealt by the ECJ: see point 3.1.

- 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.

There is no case law available at the moment.

- 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.

The possibility that actions for negative declaratory judgment causes a loss of efficiency has been actually increased by the ECJ case law about the concept of "same cause of action" as expressed in The Tatry (case C-406/92). In fact as a rule of principle the Italian courts wouldn't apply *lis pendens* considering the action for a negative declaratory judgment different, as object, from the mutual action for positive declaratory judgment and condemnation.

Normally these actions are issued using the forum of article 5 (3), even if in the recent case law the Corte di Cassazione (19.12.2003 n. 19550) ruled that actions for declaration of non infringement must be brought before the domicile court of the injured party as provided under article 2, justifying it by the fact that judges sitting in the court where the infringement occurred ("the judge of the market") are more suitable to settle the conflict in a case of infringement liability but these reasons do not apply when a case of mere declaration of non infringement is conducted. In the same sense, concerning in general actions for negative declaratory judgment, see Corte di Appello of Milan 2.3.2004, in *Diritto industriale* 2004, 431.

In any case, in the field where torpedos have been more often used, that is in disputes about infringement of intellectual property, recent reforms have made it less convenient to seize the Italian Courts. The Legislative Decree 27.6.2003 n. 168 has set up Specialist Sections for IP Litigation ("istituzione di sezioni specializzate in materia di proprietà industriale ed intellettuale presso i tribunali e le corti di appello"), which are competent for all disputes concerning the validity or the infringement of IP. The existence of specialist Sections should have the effect of reducing the length of the proceedings. Moreover it is provided the possibility that the dispute is decided by way of a summary judgment, which is considered admissible also for the actions for negative declaratory judgment.

- 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)?

The best way under Italian procedural law in case where a client is sued with an action for negative declaratory judgment is to seize immediately the Corte di Cassazione with a "regolamento di giurisdizione" (art. 37 Italian civil proc. code), by which it is possible to have a final declaration on the jurisdiction within a reasonable time (about one-two years), without any further possibility of appeal (the importance of this procedural remedy in this field has been strongly underlined by Consolo, "La Italian Torpedo non fa naufragare per la seconda volta la petroliera Erika etc.", in *Int'lis* 2003, 97). Also the "regolamento di giurisdizione" can and must be proposed at a preliminary stadium of the proceedings so that it avoids that the judge of first instance can carry on the examination on the merit. See about that at point 2.1.6.

- 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

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?

The objection of the nullity of the patent is very often raised in actions concerning the infringement, but this cannot be considered as an unfair practice.

- 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?

There is no case law available at the moment.

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?

In general the procedure for recognition and enforcement works efficiently, thank to the wideness of the concept of enforceable "decision" in art. 32 Reg., the narrowness of the grounds for refusal and the exclusion of any review in the first stage of the proceedings.

The procedure shows to be much more simple and rapid in comparison with the recognition procedure provided by the Italian Private International Law (L. 31.5.1995 n. 218), which imposes, for enforcement, the necessity to start a common ordinary procedure to ascertain the requisites for recognition (art. 67).

In particular, in the first stage of the procedure (art. 41 Reg.) the court verifies its territorial competence, the authenticity of the decision, the inherence of the case to the civil of commercial matter and the regularity of the certificate referred to in art. 54 Reg. The applicant is normally requested to produce a translation of the foreign decision, which is considered necessary in the practice in order to permit the court to verify that it is inehereent to civil and commercial matter. It results that a translation is not requested only if the decision is written in English and is brief and easy to understand.

Examining the cases treated by the Court of Appeal of Milan it has resulted that:

- in the year 2003 have been deposited 42 applications - None was rejected - 1 was renounced.

- in the year 2004 have been deposited 43 applications - None was rejected - 3 were renounced.

In the 20% of the cases the Court requested additional documentation.

The time necessary for obtaining the exequatur was in average 20-30 days.

A big part of the application concerns default judgments and payment injunctions.

Examining the cases treated by the Court of Appeal of Bolzano it resulted that:

- in the year 2003 have been deposited 31 applications - None was rejected or renounced.

- in the year 2004 have been deposited 44 applications - 1 was rejected.

In the 15% of the cases the Court requested additional documentation (concerning cases of default judgments from Austria where the decision was rendered without grounds and it was for this reason not possible to verify if it concerns a civil or commercial matter).

The time necessary for obtaining the exequatur was in average 7-20 days.

Some problems arise on the following points:

- there is some uncertainty in Italy about the rules governing the exequatur procedure. The Italian legislator has never issued an implementation Statute (neither for the Convention nor for the Regulation). For this reason the question about the identification of the applicable rules has been object of interpretation in the case law. In particular, the procedural rules about the payment injunctions (ex parte procedure: art. 633ss. civil proc. code) should apply (Corte di Cassazione 16.7.1994 n. 6704, in *Rivista di diritto internazionale privato e processuale* 1995, 274, Corte di Appello Genova 14.7.1990 in *Rivista di diritto internazionale privato e processuale*, 1992, 134) in any case where the Regulation's provisions refer to the national procedural law. As result it is clear that the decision on the application (art. 42 Reg.) has the form of a decree, which is communicated to the applicant with a simple notice of the court's clerk, and that before rejecting the application the court can invite the applicant to produce the failing documents (art. 640 civil proc. code). But other aspects remain uncertain: for example if the applicant must necessarily serve the declaration of enforceability in the time of 60 days (as provided for the payment injunction in art. 644 civil proc. code) under sanction of inefficacy of the decree.

- practitioners complain that some of the concepts in the Regulation text are too general and sometimes expressed in different meanings in the single language versions. One of the focused point are, for instance, the rules about the stay of the proceedings in art. 37 and 46 Reg.

- the topic question, in the view of the practitioners, is however the fact that the Regulation doesn't permit to start the enforcement during the time for appeal and until the such appeal is determined. They mean it should be provided the possibility for the court to allow enforcement provisionally at least under provision of security. The requirement to serve the debtor, as provided in art. 42, can often impair the surprise effect and give him occasion to hide his assets. Also in some small districts it can be even possible that the debtor is informed of the procedure at the same moment when the application is submitted to the court.

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

Yes, the practitioners have showed to appreciate the introduction of a standard form for the application for a declaration of enforceability.

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

No, even if there is small documentation about the case law. In any case in the known case law it results that the Italian courts grant the declaration of enforceability without objections to summary decisions, as it is for the German payment injunctions, so called *Manhbescheid*, even dispensing the party from producing the certificate of art. 54 Reg. (Court of Appeal of Trieste 9.11.2002, in *Rivista di diritto internazionale privato e processuale* 2003, 532), or for protective measures (even if in this field there are sometimes misinterpretations: for example the Tribunale of Venezia has stated that in case of provisional measures the judge is not inhibited to review the decision on the merit: Trib. Venezia 28.8.2003 in *Rivista di diritto internazionale privato e processuale* 2004, 688). The Italian Corte di Cassazione has recently admitted the recognition of a judgment of the English Court of Appeal even if the condemnation to reimburse of the procedural expenses was not directly quantified in the judgment itself (being intended to be quantified by the taxing

master). The recognition has been held admissible considering the English decision as a form of "condanna generica" provided by art. 278 of the Italian civil proc. code (Cass. 7.8.2002 m. 11921, in International Lis 2003, 132). As related at point 3.2. recognition is granted also to judgments rendered on mere procedural issues.

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

The accessibility of the courts by electronic means is assured only in the biggest districts like Milan, and in any case it only lawyers have access to it and only in order to control the status of the proceedings. The deposit of applications and documents must still be done personally at the court office. For instance the Court of Appeal of Milan has rejected an application coming from Polen, which was simply sent to the court by post instead of being formally deposited at the office: App. Milano 1.3.2005, in Giurisprudenza di merito 2005, 2354.

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?

It is commonly assumed that the reasons for refusal in articles 34-35 is appropriate. It is not expressed the exigence to decrease them, especially keeping in count that the enlargement of the number of the Member States can give occasion to face decisions rendered in proceedings with a very different degree of garanties

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?

The criterion are the same followed for the enforceability of national titles. In particular it is required that the contents of the obligation is clearly expressed in the text of the decision, and, if it a money judgment, that at least contains the objective criterion by which the national judge can come, with a simple matematical calculation, to a quantification of the sum. As pointed at 4.1.3 also decisions containing a condemnation without any indication of the amount of the debt are recognised but not for purposes of enforcement.

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

The reservation of public policy was very often referred to by the defendants, but there is no known case where it results that the objection had success concerning european decisions. As a principle the Corte di Cassazione (3.3.1999 n. 1769) has stated that the clause of public policy in the Convention doesn't involve only the contents of the decision on the merit but also the procedural rules followed in the foreign proceedings. It is in particular necessary that the decision was rendered with respect of the most important rules of the due process of law as guaranteed by art. 111 of the Italian Constitution: see point 4.1.9.

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?

No.

- 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?

The abuse of process isn't considered a true operative objection and the theoretical discussion about it is very recent. It is only admitted that the most important rules about the due process of law (especially, independence and impartiality of the judgment respect of the essential rights of defense), as guaranteed by art. 111 of the Italian Constitution, involved in the clause of public policy: so Corte di Cassazione 3.3.1999 n. 1769, in *Rivista di diritto internazionale privato e processuale*, 2000, 122 (the violation of public policy was excluded referring to the rule of the French law that sanctions with extinction of the appeal the appellant who doesn't demonstrate to have given execution to the appealed judgment, but in principle the objection was considered admissible under art. 27 n. 1 of the Convention). In any case not every violation of the constitutional guarantees is considered as a violation of public policy: for instance, the lack of grounds in the foreign decision (pronounced in default) is not violation of public policy, even if the rule is covered by guarantee in art. 111 Constitution: so Corte di Appello di Milano 8.2.2006, unedited, and before Corte di Cassazione 18.5.1991 n. 5451.

- 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?

There is no practical experience about the enforcement of decisions aimed to the payment of an administrative fine. It is however commonly admitted that they can be enforced in Italy even if this kind of compulsory sanctions are unknown to the Italian law. In fact it must be remembered that the Italian law admits enforcement for obligations to do or not to do only if its object can be performed by a third party (art. 612 Italian civil proc. code). There are in substance no means for specific enforcement of obligations which can be performed only by the debtor (such as penalties or fines).

- 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?

The point is strongly discussed, since also for the national judgments the law doesn't provide any means of specific performance (see 4.1.10). In any case it is commonly said that penalties of contempt of court are not apt to have effect in Italy because they don't correspond to any existing instrument and in any case they would probably be considered contrary to the Italian public policy (which doesn't admit criminal sanctions for the inexecution of civil obligations).

- 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?

No. Anti-suit injunctions are unknown to Italian law and it never happened that such an injunction was presented for recognition.

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

The appeal follows the ordinary rules, even if normally after one hearing it is submitted to decision. The duration of appeal is normally appreciated in about 2 years. The representation by lawyers is mandatory. The costs depend on the

value of the matter in the single case, even if it results that they range normally about 1.000/4.000 Euro.

4.2 Provisional Measures according to Article 47

4.2.1 How does Article 47 work?

There is small case law available. It results that art. 47 is not frequently used even if lawyers very often ask in the application for exequatur to be authorized to enforcement of protective measures and the Courts pronounce the authorization without any additional review of the foreign decision. Although it is uncertain if the possibility to enforce protective measures after the declaration of enforceability as provided in art. 47, 2 comma, requires that the enforcement Court has expressly authorized the measures. In some cases it has been held that the express authorization is not necessary because it derives directly from the declaration of enforceability: Corte di Cassazione 16.11.1987 n. 8380, in *Giustizia civile* 1988, I, 705, Corte di Appello Bologna 24.6.1993 in *Rivista di diritto internazionale privato e processuale* 1994, 385. In an edited case the Corte di Appello di Palermo 22.6.2001, in *Rivista di diritto internazionale privato e processuale* 2002, 165, has held that the protective measure enforced on the basis of the declaration of enforceability is subject to the national procedural rules, and so it can be revoked for new circumstances of fact (in that case it was a transaction between the parties).

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?

When the authorization is asked to the Court of exequatur, it is automatically pronounced in the declaration of enforceability without any additional review. When protective measures are asked before the declaration of enforceability (as provided in art. 47, 1 comma), the competence follows the ordinary rules (and so competent is the Tribunale of first instance) and the applicant is not requested to demonstrate a specific periculum in mora (see Tribunale di Torino 13.3.1992, in *Rivista di diritto internazionale privato e processuale* 1994, 150, and Tribunale di Udine 28.2.1997 in *Nuova giurisprudenza civile commentata* 1998, I, 300, that granted a sequestration before the exequatur of a German payment injunction - Mahnbescheid). The case law available doesn't allow to establish if the Court of first instance would consider the reasons laid down in articles 34 and 35 in order to refuse the measure.

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

See point 4.2.2.

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

Yes, but only if the provisional measures are asked together with the declaration of enforceability. Otherwise the competence follows the common rules, and it is competent the court of first instance (Tribunale) of the domicile of the debtor or of the place of enforcement.

4.3 Cross-border Enforcement of Court Settlements and Notarial Deeds

4.3.1 How do Articles 57 and 58 work?

There is no case law available at the moment. From interviews to judges of the Court of Appeal of Milan it results that authentic notarial instruments (often

concerning bank loan contracts) are commonly declared enforceable without any particular problem.

In particular:

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

See point 4.3.1

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?

See point 4.3.1.

4.3.1.3 Are the standardised forms sufficient?

It is supposed yes: see point 4.3.1.

4.3.1.4 To which extent are Articles 34 and 35 applied?

See point 4.3.1.

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

See point 4.3.1.

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?

See point 4.3.1.

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

See point 4.3.1.

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?

See point 4.3.1.

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

See point 4.3.1.

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?

Considering the question in general (and not only in relation with the issues concerning authentic instruments), in case where the foreign judgment has been reversed by a court of higher instance, the foreign title is considered as automatically extinguished without any necessity of recognition of the decision of anulment of the court of higher

instance, and the execution must be stopped (see Corte di Appello di Milano 22.10.1993, in *Rivista di diritto internazionale privato e processuale*, 1993, 987). In case the decision has already been enforced, there is no particular means to set aside the enforcement measures and as a rule the debtor has to exercise a common action for *condicio indebiti* (and if he wants to found the *condicio indebiti* on the annulment decision, it is supposed that the decision has all the requisites for being recognised; otherwise he will have to demonstrate again the inexistence of the enforced obligation).

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

See point 4.3.1.

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.

Proposal in general:

In order to promote the knowledge of the EC Regulations in civil procedural matters it would be useful to collect them all in a EC "Procedural Code".

Proposals on the rules on jurisdiction:

- it could be appropriate to provide that actions for negative declaratory judgments (including actions to declare that a certain behaviour is not infringement of rights) can be sued only in the forum of the defendant's domicile;
- it could help to give an express autonomous definition of "domicile" as it is provided for the seat in article 60 Reg.;
- it is opportune to re-think about the extraordinary forum of article 31 with the purpose to limit its application and to clarify the text of the provision. In particular, it would be appropriate to provide that provisional measures can be asked to the judge who hasn't jurisdiction on the merit only if they are to be enforced in the State and that in any case this forum is not applicable to provisional orders for payment of money.

Proposals on *lis pendens*:

- it could be opportune to provide expressly in article 27 that *lis pendens* must be declared *ex officio* also in case of default;
- it seems opportune to provide in art. 30 that the act introducing the proceedings must, for these purposes, fully identify the claim sued.

Proposals on *exequatur*:

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?

- it seems opportune to reform art. 34 n. 2 providing expressly a minimum term (for instance 15 days) for considering that the defendant had a "sufficient time" to arrange for his defense;
- to provide a maximum term (for instance 6 months) for the decision on the appeal to the exequatur;
- to provide in art. 47, 2 comma, that, if requested, the judge must expressly authorize provisional measures and specify their contents;
- also it would be opportune to provide in art. 40 that the member States must allow, even if not provided by the national law, the simple election of domicile.

Proposals from the practitioners:

- to introduce the possibility that the decision is declared enforceable at the beginning of the proceedings of appeal in case the Court can estimate that there are serious reasons to do so;
- to introduce special rules on jurisdiction for actions concerning "company" litigation and Internet litigation;
- to state expressly that the costs of translation must be reimbursed by the party against whom the exequatur is obtained;
- to state that the jurisdiction issue must be decided by the judge at a preliminary stadium of the proceedings.