

## **National Report The Netherlands**

### **Questionnaire No 1: Collection of Statistical Data**

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

1. Evaluation of the number of decisions concerning Regulation 44/01/EC proportional to decisions in civil and commercial matters all in all<sup>2</sup>

2. Evaluation of the approximate number of judgments where the courts and tribunals of the Member States concerned retained jurisdiction on the basis of the rules of Regulation 44/2001/EC in 2003/2004 and evaluation of the provisions mostly relied on for that purpose<sup>3</sup>

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

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

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

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

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

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

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

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

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

## **National Report The Netherlands**

### **Questionnaire No 2: Collection of Empirical Data**

#### **1. Survey**

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

#### **2. Questions<sup>1</sup>**

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

Yes, a cross-border law firm (Netherlands-Germany) mentioned some decisions from the 'Verwaltungsgericht'. After some pressure from the side of the lawyer, he received a declaration of enforceability in the Netherlands under Bxl-I Reg. These are mostly small claims and the lawyer did not know of any way to obtain such a declaration. Other lawyers did not come across this situation.

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

Yes, the bailiff in Kerkrade, near the German border, has about one exequatur every week. Another well-known bailiff near the German border now receives more requests, from Germany. In the Brussels I Convention only lawyers had competence to ask for the declaration of enforceability, now bailiffs also have this competence. Another well-known bailiff in Breda receives many requests from Belgium. Most bailiffs in the Netherlands are never asked to request a declaration of enforceability. The law firm mentioned in 2.1) has 180-200 commercial cross-border cases per year. They have one firm in the Netherlands and one in Germany and are specialised in cross-border cases. A law firm in Arnhem receives 10-15 declarations of enforceability a year.

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

Mostly from Germany and Belgium. Followed by Austria, France, Spain, Italy and Great Britain. Actually from all the 15 member states. From the new member states titles are not yet received.

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

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

Bailiffs: much better than the standard forms of the Reg. 1348/2000. Lawyers: very good, although from the start of the regulation there were some problems outside the border region. All the respondents are positive. There is no difference between the courts and the lawyers. The courts are satisfied.

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

Yes, this is possible if the document which instituted the proceedings is produced and this document shows that it was served in due time and in such a way as to enable the defendant to arrange his defence. Lawyers: 99% with certificate. An Amsterdam law firm which also has German lawyers said that it never encountered this problem: certificates from Germany are always received. This is affirmed by other lawyers. The lawyers in the Netherlands asking for the certificate in Germany mention that this takes about two to four weeks. In the Netherlands the certificate is handed out in a few days.

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

Bayliffs: No, in the border region English, German and French are also accepted. Lawyers: the certificate is not translated, leave is always phrased in Dutch. Actually in the Netherlands, judgements in German, English and French are always accepted. On the other hand, the Dutch lawyer always adds a translation of the judgement in the requested language when a declaration of enforceability is asked for in another state. Courts: they accept those languages generally understood in the Netherlands.

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

Not when the languages are understood. This will be different when it is e.g. Italian, Spanish or another language that is not commonly understood in the Netherlands. See above.

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

In general, the decision is fully translated if necessary.

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

Translating the judgement will cost 150-200 Euro, so in small claims cases this is a problem.

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

Lawyers fees; court fees; translation costs

In particular:

- 2.8.1 How is Article 52 implemented?

It is not implemented, so these costs are not due.

- 2.8.2 How are solicitor's charges calculated?

Lawyers or solicitors: charges are free. When documents (Art. 55) are correct and not too much work has to be done one lawyer charges a fee of around 100 Euro (per hour) and an additional fee to verify the name and address of the debtor. Another lawyer charges 200 Euro/hour for commercial parties and 150

## (Questionnaire 2)

Euro/hour for private persons, normally it takes two hour's work; in the case of big companies he charges 400-800 Euro/hour. Another lawyer has a paralegal assistant to fill in the request for the declaration: 70 Euro/hour and the lawyer's fee : 200 Euro/hour, total 500 Euro.

Court fee: 97 Euro.

Bailiffs: charges are free, the costs around 100-150 Euro/hour.

## 2.8.3 Are these costs reimbursable?

Court fee: yes. Lawyers and bailiff's fees: only a part of the costs are reimbursable. The costs are calculated in accordance with the system developed by the Netherlands Bar Association and depends also on the amount of the claim. F.i. for a claim up to 10,000 Euro, 192 Euro of the Lawyers fee is reimbursable. So, in general, the creditor has to pay around 300 Euro himself.

In particular:

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

The court (that means: a court clerk).

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

Yes, it also includes the costs of execution in another member state.

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

No.

2.9 Does the requirement to serve the party against whom enforcement is sought with the declaration of enforceability, which is provided for in Article 42 – or the practice of judicial authorities regarding the dispatch of communications in general – impair the efficiency of enforcement – in particular its surprise effect? Does this virtually obstruct the possibilities of Article 47?<sup>2</sup>

Not in the Netherlands: see Questionnaire 3, No. 4.2: stage B starts at the moment when the judge places his signature on the declaration of enforceability. At this moment the bailiff can take provisional measures automatically. Serving the declaration on the debtor (Art. 42, No. 2) is merely necessary when the creditor wants to start the (forced) execution by the bailiff. Art. 47 does not supplement an additional possibility with regard to Dutch law. Provisional measures are also possible without Art. 47 (see Art. 700 Rv). There are also lawyers who send the declaration by post offering the debtor the possibility still to settle and pay the claim together with the extra costs incurred until that moment. If payment is not made the forced execution by the bailiff will follow (with the extra costs).

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

## (Questionnaire 2)

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

Only one case, on child maintenance allowance, was mentioned. The applicant made reservations because he had to pay the court costs. The representative was of the opinion that minors do not have to pay these costs. Due to Dutch law these costs can not be exempted, and for that reason there was no contradiction with Art. 50.

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

- The case mentioned in 2.11 concerns an authentic instrument. Although the authentic instrument was concluded in 1999 the court did not challenge its competence. The bailiff has never seen an authentic instrument in the last 10 years.
- Lawyer; 1 in 3 years. Other lawyers, none at all.
- Court: no.

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

Yes, see no. 4.1.13. These procedural problems will come to an end because of the new law of 1-5-2006.

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

no

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

Yes.

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

Court: there is a great degree of satisfaction. Special jurisdiction for product liability may be needed.

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

The enforcement measures like provisional seizure can be taken on the same day if necessary. The delivery of the declaration of enforceability can differ from 2 days until 4 weeks. I think two weeks is quite normal. There are lawyers who, before asking for the declaration, make sure there are no longer any uncertainties about the formalities. They ask for copies of the request to serve the document which instituted the proceedings, the forms in the possession of the bailiff according to Reg. 1348/2000 and the bailiff's notification.

In the Netherlands the certificate which is necessary for the declaration of enforceability is delivered in a few days.

## (Questionnaire 2)

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

Bailiffs explain: objections are outside this ambit. For lawyers, objections are also not pertinent because they are the attorney for the creditor. In Dutch law, after a judgement has become executable and there is no longer any remedy, the only way to challenge the judgement is by an enforcement dispute (Art. 438 Rv). One of the requirements is a new factual situation, like payment. The courts have stated that they have not encountered this problem. One lawyer mentions the following problem: A party requires in the Netherlands a declaration of enforceability from a Belgian default judgement. The other party objects against the Belgian judgement and the procedure continues in Belgium. In the Netherlands it is not possible to raise/cancel a declaration of enforceability (for Germany see Art. 27 of the Implementation Act). Practitioners are of the opinion that Art. 46 does not provide a clear solution for this situation. They prefer a court decision postponing the execution (allowed by the exequatur) instead of the court staying its proceedings with the exequatur remaining in force. This is especially important in those cases of default, in which, on appeal, the original judgement is revised.

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<sup>3</sup> Example: The debtor claims that he has performed in the meantime or has set off his claim against the creditor's claim or has made a compromise including the arrangement to pay by instalments. This is possible according to an explicit provision in the German implementing statute (§ 12). Does a similar rule exist in your legal system? If yes, did this lead to delays in granting declarations of enforceability?

## National Report The Netherlands

### 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)?

ECJ Case C-266/01 Pf Tiard SA/Netherlands, 15th May 2003 ECJ, Rep. 2003, p. I-4867, dealt with an action based on a contract between the State and an insurance company, which guaranteed the payment of import duties, imposed by the State on associations of carriers, principal debtors, under Article 6 of the TIR Convention. The ECJ decided that the guarantee contract falls within Art. 1(1) even if it is to safeguard the payment of fiscal duties.

Concerning Reg. 1348/02 EC the Supreme Court decided that a tax claim falls within the scope of Article 1 of the Regulation. No preliminary questions were referred to the ECJ although the A-G decided that it was out of the question that the case was an acte clair: HR 8-4-2005, NJ 2005, 347. Critical: M. Freudenthal and R.H. van Ooik, Betekenis 'burgerlijke en handelszaken' in Europese rechtsmaatregelen, NIPR 2005, p. 381-388. In maritime cases the courts determine the settlement of a general average to be a civil and commercial matter.

In the EEO Regulation and in several other recent regulations the definition of 'civil and commercial' is clarified by the addition of the remark that this phrase does not include administrative matters, which raises the question whether the phrase in Bxl-I does include such matters.

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

No, case law shows that public authorities try to escape its application to ensure the jurisdiction of the national courts: see under no. 1.1: Case C-266/01(Tiard SA/Netherlands); see also ECJ 14-11-2002, Case-271/00, Jur. 2002, p. I-10527 (Steenbergen/Batenburg) NJ 2003, 598 in which recovery from an ex-husband (living abroad) of maintenance paid as social security was determined to be a civil matter.

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

In general there do not seem to be too many problems. In the literature the question has been raised whether autonomous concepts in the Bxl-I Reg can be used in the same way in other European instruments.

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?

Problems are not mentioned. Since the case Van den Boogaard (ECJ 27-1-1997, C-220/95), no problems are mentioned about the topics of maintenance/costs of living and delineation with property settlements. This problem could simply arise in relation to the common law states because there

the term 'rights in property' is unknown. A European instrument ruling on procedural and substantial questions of maintenance is currently being prepared (COM(2005)248/249;(2006) 206).

- 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?<sup>1</sup>

No cases can be cited. See annex.

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

No problems concerning the definition of social security have arisen to date. See above under 1.2.

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

The New York Convention is generally considered to be adequate. Problems are mostly related to cases in which the validity of the arbitration agreement is disputed. If the NY convention is judged not to function properly legal practice is of the opinion that it would be better to adapt that Convention. Less clear is the situation in which during the arbitral procedure the Dutch judge in interlocutory proceedings ('kort geding judge') is resorted to in order to obtain interim measures. In that case the Brussels I-Reg. is applicable. See for these situations the case Van Uden/Deco Line (C-391/95). It should be mentioned that the Dutch judge in interlocutory proceedings may always be resorted to, even if he has no jurisdiction in the procedure on the merits. With regard to mediation the Dutch legislator is reluctant to have the topic regulated in a European instrument as is shown in the standpoint of the Council concerning the proposal for the directive on mediation (COM 2004, 718 def.). More important may be, the fact that mediation in the Netherlands is used especially in family matters.

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

No cases or literature are available. See for the situation where the defendant does not appear in the procedure: par. 2.2.26.

- 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?<sup>2</sup>

<sup>1</sup> 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?

<sup>2</sup> 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)).

Special rules: According to Dutch civil procedure when taking action at the Rechtbank (district court) in cases with a value of over 5000 euro parties must be represented by an advocate. An exception is made for the order of enforcement (exequatur): in cases with a value of over 5000 Euro the applicant may be represented by an advocate or a bailiff. In exequatur cases under 5000 Euro there is no obligation to be represented by a bailiff or an advocate.

Without prejudice to the provisions in Art. 55 para. 1 Bxl-I Reg. the court may request the applicant to complete the documents (Art. 2 para. 3 Implementation Act).

If the amount of money is in a currency other than the Euro, conversion into the Euro will take place against the rate of the day. The debtor will be ordered to pay the costs of the exequatur procedure.

With regard to an appeal as mentioned in Article 43 there are different provisions for the debtor and for the applicant: the debtor has to appeal before the court that took the decision. The applicant who does not agree with the court's decision has to appeal before the court of appeal. In accordance with Article 44 in both cases a second appeal (cassation) is to be lodged before the Supreme Court (Hoge Raad). With regard to Art. 43(3) problems have arisen in the Netherlands since the appeal has to be handled in accordance to the provisions for a contradictory procedure which starts with a 'dagvaarding' (writ of summons) and the person is called the plaintiff, while the Regulation uses the word applicant who, under Dutch procedural law, is the person who starts a 'verzoekschriftprocedure' (petition procedure). There are often mistakes as to the way the procedure on appeal has to commence. This procedure has been changed by law (1-5-2006): the appeal procedure now starts with a 'verzoekschrift'.

In all Dutch non-EU cases an appeal has to be lodged within three months, therefore art. 43(5) deviates from Dutch law. The authority mentioned in Art. 57(4) is the notary who drew up the authentic instrument.

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

Yes. The Netherlands has bilateral enforcement agreements with Belgium, Germany, Italy, the UK and Austria. These agreements remain in force as far as they regulate topics that are not covered by the Bxl-I Reg, like inheritance cases. Other conventions with jurisdiction clauses like the CMR Convention and the Benelux Trade Mark Act (1st January 1971) are not limited by the Regulation. The courts mention that the provisions of the CMR and the Reg. are not completely in conformity with each other. This may lead to uncertainty about which court was the first court seized.

## 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?

Private International lawyers held a meeting concerning the tension between flexibility and legal security in international jurisdiction, especially concerning the Bxl-I Reg. The overall view is, that legal security is predominant, although there are some provisions that might lead to insecurity, because parties can abuse these rules (f.i. Article 27). Furthermore the idea exists that the enlargement of the EU will result in less confidence regarding courts in the new states and that the provisions should be more rigid and clearer.

- 2.1.2 Do the provisions on jurisdiction call tensionstorily 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?

In general Article 5 is properly applied. However, there are situations in which it is not possible to locate the place where the obligation has to be performed. In that case it would be favourable to have a 'forum actus', in relation to Article 31. The courts mention a problem with Art. 5 No. 3 in the case of product liability in which different courts in the EU could have competence. They suggest a special provision for product liability.

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

Among practitioners the idea exists that Article 5 should be restricted, in any case not broadened. Article 5 provides the possibility of forum shopping and may therefore be an infringement of legal certainty.

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

In general Art. 4 raises problems of discrimination against third State parties. However, the Netherlands in its domestic law no longer has any exorbitant forum rules. Since the 1st of January 2002 the Dutch Law of civil procedure contains provisions on international jurisdiction (Art. 1-14 Rv) comparable to those of Bxl-I reg. These provisions are applicable when no convention or regulation is applicable. The peculiarity of these provisions is that they are for a major part a copy of the provisions of the Brussels I-Reg. The only forum which might be used in an exorbitant way is the forum necessitatis (Article 9 b and c Rv), which is based on Art. 6 ECHR.

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?

As for Art. 25: after the written pleadings in which one party concludes that the Dutch judge has no jurisdiction based on forum choice because of Article 22 (immovable property), the oral hearing takes place. During this oral hearing the judge declares whether or not he is competent. The same holds true for a claim concerning the execution of mortgaged immovable property in Belgium by a Dutch mortgage bank. As for Art. 26: the court examines the validity of the choice-of-forum clause. The court determines in particular whether these clauses are communicated to the other party. If this is not completely certain the court is not competent. Even if there is a valid choice-of-forum clause the 'kort geding judge' may be competent to order provisional measures, in case there is a sufficient relationship with the Netherlands (art. 31). Next the court examines whether the document has been properly served, even if the defendants did appear in the proceedings. Interesting in this case is that the court has decided that there was no valid argument to consider the 'dagvaarding' to be invalid because it was not in compliance with the Article 8 of Reg. 1348/2000. The defendant declared that the German translation was not the same as the original Dutch document. So the court decided that the defendant understood the Dutch document perfectly well and decided that the (summary) procedure should continue. In another case the court ex officio declared itself not to be competent (Art. 26) with regard to defendants who did not appear in court.

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?

A defence as to jurisdiction is heard as a 'procedural issue' (Art. 208-209 Rv). The legislator realised that such a procedural issue can be expensive and time-consuming. Therefore the new law on civil procedure from 2001 gives the option to introduce one statement of defence, including procedural and substantive defences at the same time. A delay has to be avoided by deciding the procedural defence before the other defences. In questions of jurisdiction an appeal and cassation are permitted, but not concerning other procedural issues. In the procedural issue the court restricts its decision to the question of jurisdiction. After the interlocutory judgement the procedure on the merits can go ahead. However, the procedure can be time-consuming if there is a defence concerning *lis pendens*: the court will have to stay the proceedings and wait until the other court has decided on its competence. If the judge in interlocutory proceedings ('voorzieningen judge', kort geding) is involved (Art. 31), the procedure is different: the court will decide at the same time on its competence and on the merits.

## 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 term 'domicile' is defined in accordance with Dutch law. Art. 10 C.C. considers the domicile of a natural person to be the place where that person is habitually living according to social norms and does not mean the actual place of residence. A defendant who claims his domicile has moved to France although he still has a house in the Netherlands and is returning to the Netherlands during the year has to prove that he has changed his domicile (centre of social and economic life) to France. This has to be done primarily in the legal prescribed way of informing the city councils. The place of domicile has to be taken into account at the moment when the document is served. Art. 1:14 Civil Code defines domicile with respect to a legal person as being the place of its statutory seat. In one case Art. 60 was not mentioned, but it was not contradicted either.

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

The wide range of domiciles under Art. 60 has not been disputed until now.

2.2.3 How does Article 5 No. 1 work? In particular: Article 5 No. 1 lit. b) 1<sup>st</sup> 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?

Rb Middelburg NIPR 2004, 379 concerns CIF/FOB. Court: although Art. 5 No. 1 lit. b) is much clearer than before, with regard to FOB/CIF it is still very unclear how the place of delivery should be defined.

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

There do not seem to be too many problems in the case of a contract for services. Sometimes a contract contains several obligations of (almost) equal importance and the obligations are or have to be performed at different places. In such a case it has to be decided, firstly, which one is the principal obligation. There may also be problems in defining the contract, if the contract is partly for sale, partly for service. F.i. ordering a suit to be made by a tailor in London who also sells the textile, and to be delivered in Paris. Of course there is no problem concerning a choice of court clause or when the service was already provided. In practice the competence of the court is mostly based on defective delivery or defective service; competence based on the Tessili criteria is used only once in a while and is clearly evaded by the courts.

- 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?

After having qualified the contract as a sales contract, the courts follow the Tessili criteria (mostly using CISG).

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

The provision of services includes activities for industrial property, commercial activities, trade and the "professions" ('vrije beroepen'). Probably also transport contracts and agency contracts might fall within the definition. When the contract is a mixed one it might be a provision of services as Kropholler advocates in 'Europaeisches Zivilprozessrecht'. If the place of performance is not contractually laid down the same route is followed as under 2.2.5.

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

In some of the literature lit. c) is considered to be superfluous (P. Vlas. looseleaf commentary on the law of Civil proceedings). However, one might consider that the reference in c) to a) means that the ECJ decision De Bloos/Bouyer (14/76) decides the jurisdiction if a) or b) does not create jurisdiction. If, e.g., in the case of a dispute as regards payment the place of performance of the sales contract or the contract of service is outside the EU, Art.5 No 1 lit c) means that (according to the Tessili/Bloos criteria) the court of the place of payment has jurisdiction if that court is located within the EU. No cases are available.

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

In general Art. 5 (1) refers to matters relating to contracts but also to obligations that are a substitute for the non-performance of contractual obligations, f.i. the obligation to compensate a breach of contract (ECJ De Bloos/Bouyer, case 14/76). Art. 5 (3) refers to matters relating to tort. In the case of 'concursum actionum', in which misbehaviour can be qualified as a breach of contract and as a tort, Dutch law allows the claimant to choose between an action in contract and an action in tort, f.e., if a transporter is being sued because his truck with freight has been stolen by his driver/employee, Dutch law allows the claim to be based on Art. 5 (1) or on Art. 5 (3). In a recent case (based on the EEC Convention of 1968): HR 3-5-2002, NJ 2005/39 Spectra/Ziegler, ann. P.Vlas, the Hoge Raad decided that if one claim is based on Art. 5 (1) and another on Art. 5 (3) and both refer to the same court, that court is competent to decide both claims. However, if the court can only base its competence on Art. 5 (1) it in principle has no competence in relation to a collateral claim in tort. The same holds true if the court is competent according to Art. 5 (3), where it is not automatically competent to hear a collateral claim on the contractual obligation.

There is no 'jurisdictional accession'. This also means that following the Reunion case the claims are not closely connected in the sense of Art. 6 (1).

- 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?

Literature demonstrates uncertainty concerning disrupted negotiations. In such cases the locus delicti might not always be the most workable connecting factor. Better would be the law of the domicile of the laedens. In HR 21st September 2001, NJ 2002, 254 (Bus/Chemconserve, ann. T. de Boer) the Hoge Raad decided that the site of the unlawful act is the place where the notice of the disruption of the negotiation is received ('Handlungsort'). In this case the Supreme Court acknowledged that this might lead to uncertainty, if the negotiations are accidentally disrupted in the Netherlands. It might also result in the forum actoris. Although A-G Strikwerda advised that preliminary questions on this matter should be referred to the ECJ, the Supreme Court did not follow his conclusion.

In the lit.: Veenstra, NTBR 2003, p. 138-142. suggests that it would be better in these cases to refer to Art. 2. L.Strikwerda in his conclusion in NJ 2002, 254 is of the opinion that caretaking (negotiorum gestio) and unjust enrichment should fall outside Art. 5 (1) and (3), and can only be tried in the courts meant in art. 2. Rb Arnhem NIPR 2004, 370 decided however that a claim based on unjust enrichment according to Peters/ZNAV (case 34/82) should be based on Art. 5 (1).

The Rb Utrecht (NJF 2004/73) considered a claim for a declaratory judgement not to be liable in tort to be a claim which falls under Art. 5 (3); however another court decided the opposite (Rb. Zwolle-Lelystad, NIPR 2005, 367).

In another case the Rb Utrecht decided that whether or not there has been an abuse of Art. 5 (3) depends on the existence of a sufficient connection between the claim and the court: sometimes it is difficult to draw the line. In the case mentioned the court refers to Art. 2.

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

Art. 5 (3): after the ECJ 17th September 2002, Tacconi/Wagner, case C-334/00, claims concerning disrupted negotiations, in which the parties did not voluntarily start a contractual relationship with each other, come under Art. 5 (3). The literature shows that Art. 5 (1) may be invoked if there is a 'letter of intent' in which parties voluntarily declare their willingness to negotiate, (P. Vlas, Looseleaf Commentary Rv). Claims concerning product liability between a third party and the manufacturer, who is not the seller, fall under Art. 5 (3) too, as has been decided for cross-border breaches of the press code; cross-border infringement procedures on intellectual property; and professional medical errors; see also 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?

In the only case concerning cross-border breaches of the press code the jurisdiction was clear, also in relation to the "Shevill" provisions. The libel offences against the Dutch plaintiffs took place in the Netherlands (VznGr Almelo, NIPR 2005, 52). Some lawyers in the Netherlands are of the opinion that the Shevill decision means that Art. 6 (1) can be deleted.

- 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?

In the Netherlands Art. 6 (1) of the Regulation is mostly used in intellectual property cases. In these cases there is always some degree of connection between the claims. In the case Primus/Roche the Netherlands' Hoge Raad referred preliminary questions to the ECJ (case C-539/03, conclusion A-G P. Leger, 8th December 2005). In this case two American private plaintiffs started an infringement procedure in the Netherlands against several Roche branches in different European countries. The plaintiffs argued that access to the court, guaranteed in Art. 6 ECHR, would be impossible if they had to adhere to the courts in the place of business of each branche since they did not have the money to start procedures against the big Roche company in different European countries. The case law shows that the domicile requirement restricts the jurisdiction. If jurisdiction is based f.i. on Art. 5 (3), and not on the domicile of the defendant, then Art. 6 (1) is not applicable. Relating to Art. 6 (2) the HR 20th September 2002, NJ 2005/40 (an.t. P. Vlas) decided on the 'unless' clause (Convention 1968). The Supreme Court considered that there might be an abuse of right if the procedure on the merits started with no other purpose than to confer jurisdiction on a Dutch court in relation to the warranty claim in order to remove it from the jurisdiction of Art. 2.

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

Case law is limited: Art. 15(a) does not award jurisdiction in the case of a sale of immovable property; Art. 15(c): regarding the buying of immovable property the Dutch court has jurisdiction because the plaintiff pursued his commercial activities in the Netherlands and these activities fall within the scope of such activities; the plaintiffs had accounts at the Commerzbank. According to the court the contract is not a professional activity as required. There is also no activity by the bank which is exercised in the Netherlands: the contract between the parties already existed. In another case: in deciding whether the other party is a consumer or a commercial party, somebody who is earning a little money by dog training is doing this as a consumer, because in his working life he was a butcher (Rb Assen, NIPR 2004, 371). The conclusion seems to be that the interpretation of Article 15 is a restricted one and is possibly not very satisfactory.

- 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 under 2.2.13. Literature shows that after Gruber (ECJ 20-1-2005, case C-464/01) the definition of 'consumer' in national law may be even more restricted compared to the definition until now.

- 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?

In the case mentioned in 2.2.13 the bank did not exploit activities in the Netherlands, and a phone call was not considered to be such an activity. VznGr Den Haag NIPR 2005, 168: necessary for the offering of furniture on a website in the Benelux (Ben. Trade Mark Act) if the website is unmistakable by word and its content pursues its activities in the Benelux. One of the factors is the accessibility of the website in the Benelux. This factor is not enough: there must be other indications: the language of the website and the character of the domain name; a(.com. or .nl, .be or .lux.).

- 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?

No case law exists. P. Vlas in his commentary on the Brussels I-Reg. considers that the conclusion of A-G Darman in the case C-89/92 (Shearson Lehmann/TVB) should be followed.

- 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 few cases found follow the same rules. F.i. in a case in which Belgian employees were orally dismissed by their Dutch employer. In a 'kort geding' procedure an employee claimed the continued payment of wages. Then, at the same court, the employer commenced a procedure to terminate the employment contract (Art. 20, 2). Both procedures were heard at the same time. The employee raised as a defence that the court had no jurisdiction in the second procedure because a Belgian court was the proper forum. The Dutch court was of the opinion that the claims were connected (Art. 28 no. 3). Needless to say the court was of the opinion that the employee had misused his rights.

In HR 31st January 2003, NJ 2005/337 (Weber/Ogden Services) the Court of Justice dealt with preliminary questions (case C-37/00) taken to account. In Kantonrechter Amsterdam, JAR 2005/275, the Dutch court followed the Weber case to determine its competence: the employer was an international consultancy company with its principal place of business in London. The employee worked in different European countries of which the latest was the Netherlands. Moreover, the court took into consideration the kind of company and the kind of activities, as well as the fact that the employer did engage the employee in England and that there was a choice for English law. In this case the employee did not fulfil his activities for most of the time in the Netherlands. Only one reference was made to Art. 6 Rome Convention.

At the moment there is still a problem with German and Belgian employees working in the Netherlands and living just across the border in Germany and Belgium. According to Dutch labour law, a Dutch employer who wants to terminate a labour contract, as a rule has to file a suit for rescission (German law does not know this way of terminating a labour contract). Dutch courts dealing with labour conflicts are skilled in determining the compensation due to the employee in the case of rescission, taking into account the social and fiscal benefits related to this kind of compensation. In cross-border cases Bxl-I Reg. directs the employer towards a German or Belgian court, which for both parties is mostly more expensive and in such matters is a less experienced court.

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

Art. 22 (1) has to be interpreted in a restricted sense. The actual claim has to be connected to a right in rem and not to a right in personam. A claim concerning the transfer of a title does not therefore fall within the scope of Art. 22 (1): (VzngRb Breda, NIPR 2004, 266). In this case jurisdiction was based on Article 15 (c). On appeal, this judgement was confirmed. VzngRb Maastricht (NIPR 2005, 62) decided that the claim against the husband to transfer a title in immovable property to the wife is a right in rem. Rb Haarlem NIPR 2005, 60 considered the division of joint property in relation to the ownership of immovable property to be a right in personam. Although such a division may lead to the obligation to cooperate in transferring the title of the holiday home in Greece, it does not turn it into a right in rem. A mortgage right is a right in rem. The case law concerning holiday homes abroad is still unclear, especially if the

plaintiff and the defendant are both living in the Netherlands. In the case of a French holiday home the Dutch court declared the French court to be exclusively competent based on Art. 22 (1). Probably the plaintiffs could have based their claim on Article 15, 1c referring to timesharing. Now they had to resort to a French court (VzngRb Haarlem NIPR 2003, 291, ann. T.M. Bos, JBPr 2003, 77). See also U. Drobnig, Security rights in movables, and Transfer of property in: Towards a European Civil Code, Ars Aequi Libri, Nijmegen, 2004, p. 725-757 and E. M. Kieninger, Securities in Movable Property in European Private Law, 2004.

- 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?

Most cases on Art. 22 (2) concern the identity of the defending party.

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

Dutch PIL uses only the statutory seat as point of reference, which creates, as the case may be, positive or negative conflicts of competence. Few cases are known. In the case of a negative conflict the Dutch courts, if resorted to, will accept jurisdiction.

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

Centros complies with our private international law, there are no problems.

- 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?

HR 19-12-2003, RvdW 2004, 10 (Primus/Roche, see nr. 2.2.12) decided that it was not necessary to apply Art. 22 no. 4 ex officio. The conclusion might be that the Supreme Court is of the opinion that Art 22 no. 4 (16 no. 4) does not stand in the way of jurisdiction by the Dutch courts. It should be noted that the Supreme Court in its preliminary questions to the ECJ did not take Art. 22 No. 4 into consideration. There are no recent cases which refer to both Art. 5 (3) and Art. 22 (4). See for the way Dutch courts (actually only 's-Gravenhage, because this court has exclusive competence in i.p.-cases based on Art. 80 Rijksoctrooiwet 'Patents Act' 1995) handle infringement procedures under intellectual property law, no. 2.2.12.

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

The problem with Art. 22 is that real rights are determined in accordance with national substantive property law. Because substantive property law is of a mandatory nature it will be very difficult to reach a univocal interpretation in the EU. In the Netherlands 'rights in rem' constitute a 'closed' system.

- 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 obligor has different options: 1) if an appeal is still possible one has to lodge the appeal. In the Netherlands one can execute a decision as soon as the

decision is provisionally enforceable. 2) If an appeal is no longer possible one can request a court order preventing enforcement (Art. 438 Rv). There are stringent criteria to submit such a request and it can not be used as a distinct appeal. The court can order the enforcement to cease if the judgement is based on incorrect facts or a judicial mistake or if there is an abuse of execution on the side of the executor. Anyway the court is not competent to review the decision as to its substance. All the judgements mentioned in Art. 32, whatever they may be called, fall within the definition of an executorial title.

#### 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?

The courts are strict in deciding whether there is a valid choice-of-forum clause: especially whether it is in writing and whether consensus has been reached, see ECJ 20-2-1997, case C-106/95. A draft of a choice-of-forum clause is not accepted. Rb Rotterdam SES 2006/56: a choice-of-forum clause is also exclusive where not only the court(s) of one country is (are) located but also courts in different countries (see case Meeth/Glacetal ECJ 9-11-1978). A choice of forum clause is considered to be valid even if the forum is outside the EU.

##### 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*?

Dutch PIL determines that choice-of-forum agreements are ruled by the *lex causae*.

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

Yes, the court always examines whether the other party has gained knowledge of the choice-of-forum clause in good time and whether he receives the clause in writing. If it is part of a bill of lading f.i. 'port of discharge' it is considered to be in accordance to Article 23. Such choice-of-forum clauses will be valid if there is a long-lasting commercial relationship between the parties and these standard form contracts are usually accepted in the particular kind of international trade or commerce and the party did not protest against the standard form.

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

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<sup>3</sup> 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

See also under 2.2.25.3. Rb Arnhem 26-10-2005, NIPR 2006, 51: In accordance to ECJ 20-2-1997 (C-106/95) it is a matter of usage whether contracting parties in a particular branch of the international trade or commerce when concluding a special kind of contract generally follow a special kind of conduct. The court accepted that the parties know of this usage when they have previously contracted with each other or with other persons working in the same branch, or when it is shown that in this branch a special kind of conduct in concluding the contract is usually and regularly used, so that it is the normal practice within that branch. A standard form contract containing the choice-of-forum is not sufficient. In some maritime cases the plaintiff has to prove that there is indeed a certain usage which is regularly observed in the contract of carriage. Lawyers are of the opinion that Art. 23, s. 1 lit. b and c are unworkable. Especially lit. c gives no clear definition of the usage which the parties are or ought to have been aware of. And what does 'particular trade or commerce' (in Dutch 'betrokken handelsbranche') mean. In international commerce cases it is considered to be not very useful.

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

In 2001 the Netherlands introduced a new Code of civil procedure. Art. 1 -14 Rv gives general rules of jurisdiction, which are in line with the Bxl-I and Bxl-II regulations. Art. 8 Rv contains the provision on the choice of forum, it is a copy of Art. 23; the agreement has to be proven by writing. Art. 1-14 Rv will only apply if no convention or regulation applies. Art. 8 Rv prevents discrepancies.

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

If a foreign defendant does not appear the court will ex officio check its competence. Especially if there is an informal checklist of the requirements for serving documents. The Utrecht court has indicated that it has to check its competence 3-4 times a month because the defendant does not appear. Non-appearance by the defendant mostly occurs when Art. 5 is applied.

#### 2.2.27 Effect and functioning of Article 31

In particular:

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

The Dutch 'kort geding' is the most important provisional measure where the Dutch court has competence. In case the claim is a money

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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?

<sup>4</sup> 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?

claim, we follow the Van Uden case law. The guarantee which the claimant has to grant is a bank security (by a well known bank).

A second provisional measure is the "voorlopig getuigenverhoor", by which a pretrial hearing of a witness is ordered. This provisional measure will be given before the start of proceedings on the merits and is only allowed under special conditions (see ECJ Case C 104/03, StPaul Diary/Unibel).

#### 2.2.27.2 Territorial connection with the State where the measure was rendered<sup>5</sup>

Yes, and the assets should be sufficiently described. The claimant's declaration that there are some assets is not enough to accept a sufficient territorial connection. As soon as the measure has to take effect in another country the court will declare itself incompetent. There is a provision which determines that a declaration of entitlement can not be pursued in a 'kort geding' because it is a definite provision. The definition of kort geding still means that only provisional measures can be ordered.

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

The Netherlands is known for its cross-border injunctions in intellectual property cases (Art. 6, No. 1). These injunctions are requested in 'kort geding'. Since a couple of years the Hague court now follows the 'spider in the web' competence. The Dutch court, if it has competence, does not feel restricted in granting cross-border injunctions. However, in light of the preliminary questions in the GAT Luk-case, and especially in view of the conclusion of A-G Geelhoed, the court for the time being adjourns its decision if its injunction has a cross-border effect.

#### 2.2.27.4 Relation between interim protective measures and main proceedings

There is no real relationship between protective measures and the proceedings on the merits. There is no obligation to start the merits proceedings once a protective measure is granted. In the Netherlands 95% of 'kort geding' cases are not followed by a procedure on the merits. On the other hand if the court is of the opinion that the claim is too complicated for the 'kort geding', the 'voorzieningenrechter' can refer the case to the procedure on the merits.

#### 2.2.27.5 Enforcement of provisional measures under national law<sup>6</sup>

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<sup>5</sup> 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?

<sup>6</sup> 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

As shown in 2.2.27.3 the Dutch 'kort geding' judge does not grant cross-border injunctions if there is no territorial connection with the Netherlands in monetary claims. In intellectual property cases the 'kort geding' judge also orders cross-border injunctions, but in such cases the competence is usually also based on Art. 6 (1). Maybe in these I.P. cases cross-border injunctions will be possible in the near future in the EU due to Directive 2004/48/EG, OJ L 157/45. Lit: M. Freudenthal, *De Nederlandse rechter en grensoverschrijdende verboden in intellectuele-eigendomszaken*, JBPr 2006, p. 5-12.

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

Rb. Rotterdam 29-1-2003, NIPR 2003, 296: in a motion to add a third party, the defendant stated that the court was not competent. The court decided that, due to Art. 24, when one of the parties has not provided arguments against jurisdiction, the court has jurisdiction. VznGr Zwolle, 15-9-2003, NIPR 2004, 59: one of the parties said the court should have declared itself *ex officio* incompetent. The court declared itself competent because no arguments against its jurisdiction were raised and the parties did appear in the procedure. The courts, furthermore, do not make a distinction between the mere raising of arguments against jurisdiction and substantial arguments. Raising only substantial arguments does not interfere with the court's competence.

### 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?

There are few cases. The court examines whether the procedures involve the same cause of action and concern the same parties. There is a tendency to interpret strictly the concept of 'the same cause': in some cases the courts have decided that there was a connection between the procedures and the courts stayed the procedure (Art. 28). However, one lawyer mentioned the opposite: the court decided to hear the case although the claims did not involve the same cause of action.

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

Lawyers are of the opinion that Art. 27 is used in a race to the courthouse, referred to as the Italian or Belgian torpedo. Actually they are of the opinion that it is rather often misused. The ECJ case law makes this possible according to Gubisch/Palumbo and Taty. As a result a party which may be liable can start a procedure to reverse a judgement or a negative declaratory procedure in a "slow" court and even the choice-of-forum can be frustrated.

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

See under 1.3.1 and 4.1.7.

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?

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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?

See under 3.1. There is a great deal of uncertainty about the dual concept of "same cause of action" and "between the same parties". Some writers expressed the idea that Art. 27 and Art. 28 should be combined. There is a clear difference in flexibility between the strict rule of Art. 27 and the discretionary power of the court under Art. 28. Some solutions are given: to bring the kind of Gubisch and Tetry-like cases within the reach of Art. 28; or to add an anti-abuse rule to Art. 27, f.i. the second court seized should have a discretionary power to hear the case, assuming that that court is competent and it is clear that the first court has been seized abusively or there will be an unacceptable delay in the procedure. The advantage of such a solution is that the hard and fast rules will become more flexible, the disadvantage is obvious too: more flexible rules are a source of uncertainty. In a maritime case, SES 2006/58: Rb Arnhem's competence was based on the Rhine Navigation Act (Rijnvaartakte) and in this case the court of Antwerp was also competent. The procedures were closely connected because they both had to decide who was liable for the collision. In this case the Dutch court decided not to decline competence even if the Belgian court was competent too, because in the Dutch procedure decisions on other claims had already been taken. The Dutch court also decided not to stay the proceedings, because it could base its competence on the Rhine Navigation Act and therefore it considered itself to be pre-eminently competent to decide who had caused the collision.

- 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?

See under 3.1. The court has to decide this in the defence on jurisdiction and is heard in a 'procedural issue' (Art. 208-209 Rv).

- 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.

Problems are signalled when there are several parties, and it is not quite clear who is legally "the other party".

- 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.

See under 3.2.

- 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)?

Judicial practitioners are of the opinion that 'torpedo' tactics like everlasting proceedings and extremely high costs are regularly followed. However, extremely high costs are not considered to be a first priority.

- 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?<sup>7</sup>

<sup>7</sup> 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?

Yes, quite often the infringement procedure is delayed by an objection that there is no infringement since there is no valid patent. Then the court has to decide whether the validity of the patent is concerned and whether it has competence under Art. 22-4.

- 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?

Yes, see under 2.2.12

#### **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?

See also No. 1.7. According to the Dutch Act implementing Regulation 44/01/EC (Uitvoeringswet EG-executie-Vo) leave for enforcement has to be requested in the Dutch language. If the court ('voorzieningenrechter') grants the enforceability, this is done through a simple rubber-stamp leave, placed on the authenticated copy of the judgement. The courts do order the defendant to pay the costs of the request.

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

No, in the Netherlands the request is quite simple. Lawyers who more often apply for a declaration of enforcement have an electronic form. Practice does not mention any problems.

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

There is one case on this issue: VznGr Rotterdam, SES 2003/126, concerning Londens Beperkingsverdrag 1976 (Convention on the limitation of liability). The Swedish court's jurisdiction in a limitation procedure fell within the scope of Art. 1 Brussels I-Reg. and was a decision according to Art. 32. However, in this special case the decision could not be recognised because there was no contentious procedure. The defendants were not heard, and they could not challenge the competence of the Swedish judge. However, in general, practitioners do not mention any problems.

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

The assessability of the courts by electronic means is still very poorly developed. There are some experiments with regard to undefended money claims.

- 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 works satisfactorily, especially Art. 34 No. 2 results in much fewer defences, in comparison to Art. 27 Brussels I Convention 1968. Sometimes a violation of Art. 34 No. 2 (the serving of the document) is raised.

- 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?

Because the court of the state of origin declares, by means of Form V, the decision to be enforceable the court which made the declaration of enforceability will not challenge this declaration and accepts the definitive nature of the foreign title.

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

No case law on public policy could be found. However, I was informed about one case in which the defendant declared the procedure in Belgium to be contrary to the fundamental principles of Art. 6 ECHR, but the Dutch court did not agree with the defendant. Sometimes public policy is used as a defence, but is never followed. There is also an interesting decision by the England and Wales Court of Appeal, Civil Division of 29th May 2002, Maronier v. Larmer, which refused leave for enforcement because there had not been a fair hearing in the Netherlands according to Art. 6 ECHR. In this case nothing had occurred in the Dutch procedure for 12 years, and the defendant was not summoned again when proceedings were recommenced. Special mention is made by the English court concerning the very strange procedural rules in the Netherlands, especially the possibility for the Dutch court to order a judgement by default in the absence of the defendant. The difference between English procedural law and Dutch law is clear: Under English law the oral hearing is predominant, while in the Netherlands the procedure is predominantly in writing. The defendant did originally raise a defence, so the default judgement was not given 'in his absence'.

- 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?

Sometimes the abuse of a fair trial is raised as a defence. There is no case law that has sustained this kind of defence.

- 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?

In the literature it is said that penalties should be interpreted autonomously in such a way that the character of the penalty to bring pressure on enforcement is more important than the question of who will receive the penalty. Therefore, if the penalty has to be paid to the State, such payment should fall outside the scope of the Regulation. The opinion is that this kind of obligation should not be seen 'als oeffentliche Strafe, sondern als Mittel der Willensbeugung'

- 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?

See 4.1.10

- 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

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

At the moment the internal rules for the application of a remedy (opposition, appeal) are not very transparent and may lead to various errors (see under 1.7). The reason for this lies with the Dutch legislator itself: Annex III is not in accordance with the Dutch Implementation Act, Art. 4. In this article only the 'voorzieningenrechter' of the courts are competent to hear the appeal under Art. 43. On the other hand, Annex III mentions the defendant, the court and, for the applicant, the Court of Appeal.

Rb Arnhem, NJF 2005, 334 decided on this question: the regulation and Annex III have supremacy over the Implementation Act. Although the Dutch legislator promised to change the Implementation Act, until now this has not occurred. Another problem is the start of the procedure because it is dealt with in accordance with the contradictory procedure. The consequence is that the procedure has to start with a writ of summons ('dagvaarding') although the request for a declaration of enforceability has to start with a request. In practice this could lead to mistakes. Therefore the Supreme Court decided that Art. 69 Rv (which allows the court to order a conversion of the opening instrument from a writ of summons to a request or v.v.) is applicable so courts can proceed to the request procedure although it was not commenced by means of a 'dagvaarding'.

#### 4.2 Provisional Measures according to Article 47

- 4.2.1 How does Article 47 work?

In the Netherlands Art. 47 is not really important (see Questionnaire 2, no. 2.9). A distinction in three stages is of importance:

A) 47 No. 1: From the date of the decision in the first country, the bailiff in the Netherlands can take provisional or protective measures, like attachment, if on the request of the creditor the court so orders. A declaration of enforceability is not needed, provided the judgement is subject to recognition according to the Regulation. At this stage a request for the court to take provisional measures is obligatory.

B) Art. 47 No. 2 and 3 are applicable during the time when an appeal is possible: from the moment the declaration of enforceability is given, it entitles the bailiff automatically to take conservatory measures without a request to the court. F.i. if the creditor in Germany requests conservatory measures, for instance the handing over of property in the Netherlands, at this stage he can ask the bailiff in the Netherlands to issue a conservatory attachment on the property for the purpose of surrender. As long as the declaration of enforceability is not irrevocable, only conservatory measures can be taken.

C) From the moment the declaration of enforceability becomes final the conservatory measure will automatically become an executorial measure. After serving the judgement, executorial measures can be executed immediately by the bailiff.

- 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?

The bailiff, as the enforcement authority, can take provisional measures. Because there is a foreign title he does not verify the possible reasons for refusing recognition. The court, on the other hand, always verifies whether the regulation is applicable, especially whether it concerns a civil or commercial matter (Art. 1). Sometimes the court refuses the declaration of enforceability for this reason.

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

See 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?

See 4.2.1.

4.3 Cross-border Enforcement of Court Settlements and Notarial Deeds

4.3.1 How do Articles 57 and 58 work?

In particular:

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

Dutch notaries have no problems in interpreting this term, since for them the term is clear. The definition of the term “authentic instrument” is laid down in various legal acts.

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?

The term is construed according to internal law.

4.3.1.3 Are the standardised forms sufficient?

Unknown (the Dutch organisation of notaries has no information available).

4.3.1.4 To which extent are Articles 34 and 35 applied?

Only in one case was the convention applicable: the declaration of enforceability can simply be denied when recognition is contrary to public policy.

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

Very restricted references; in international cases court settlements and notarial deeds seem to be seldomly used.

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?

Unknown (the Dutch notarial organisation has no information available).

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

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

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

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

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

## 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.

A remark can be made (I did not find a question on this): Often courts do not decide on their competence at all. If plaintiff and defendant do not object to the competence of the Dutch court, the court does not *ex officio* state its competence nor does the judgement contain any consideration as to its competence.

Literature suggests that a *perpetuatio fori* rule should be introduced, allowing the parties after the decision at first instance to appeal on the merits in the court which hears appeals from the court that decided at first instance.

Remarks are further made when answering the questions.

<sup>8</sup> 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?