Questionnaire No 1: Collection of Statistical Data

A. Evaluation of German courts’ responses and court files ..............................................3
   1. ..........................................................................................................................................3
   2. ..........................................................................................................................................4
   3. ..........................................................................................................................................5
   4. ..........................................................................................................................................6
   5. ..........................................................................................................................................8
   6. ..........................................................................................................................................9
   7. ..........................................................................................................................................10
   8. ..........................................................................................................................................12

B. Evaluation of published German decisions .................................................................12
   1. ..........................................................................................................................................12
   2. ..........................................................................................................................................12
   3. ..........................................................................................................................................12
   4. ..........................................................................................................................................13
   5. ..........................................................................................................................................13
   6. ..........................................................................................................................................13
A. Introduction

The national report is based on the following information: An analysis of information received by means of questionnaires sent to courts, law firms, ministries of justice etc., by means of evaluation of court files, by carrying out personal surveys as well as by an evaluation of all available legal databases.

I. Consignment of Questionnaires

Questionnaires were sent to all 24 Oberlandesgerichte (Higher Regional Courts). The Oberlandesgerichte forwarded the questionnaires to the Landgerichte (Regional Courts) in their respective districts. All in all, we received answers from 13 Oberlandesgerichte (Bamberg, Berlin, Bremen, Celle, Cologne, Düsseldorf, Frankfurt/M., Hamm, Koblenz, Nürnberg, Oldenburg, Saarbrücken, Stuttgart) and from about 20 Landgerichte (Hamburg, Aurich, Berlin, Bremen, Düsseldorf, Erfurt, Gera, Mannheim, Leipzig, Marburg, Meiningen, Mühlenhaus, Oldenburg, Osnabrück, several courts from Saxonia, Saxony-Anhalt, Baden-Wuerttemberg). Further, the Bundesgerichtshof (Federal Supreme Court) delivered a comprehensive report. Occasionally, several judges of one court answered the questionnaires. In total, we received 38 statements from German courts.

Besides courts, the German Federal Ministry of Justice as well as the Ministries of Justice in several States were also contacted and involved in the evaluation process.

Further, approximately 80 international law firms in Germany as well as associations and banks were contacted.

II. Evaluation of Court Files

Besides the inquiry by dispatching questionnaires, the national reporters selected 4 Landgerichte (Munich, Passau, Mannheim and Traunstein) and 1 Oberlandesgericht (Munich) for a comprehensive, factual research. In these courts, the national reporters got access to the files of specific chambers (senates) competent for the recognition of foreign decisions (Articles 38 et seq.) and appellate proceedings. A comprehensive evaluation of the courts’ files was made by Prof. Schlosser and Dr. Vollkommer in the Landgericht München I, Passau and Traunstein and in the Oberlandesgericht München.

III. Personal Interviews

Further, oral interviews were conducted. Professor Hess interviewed judges from the Landgerichte Karlsruhe, Mannheim, Konstanz and Frankfurt and the presiding judges of the Oberlandesgerichte Koblenz and Karlsruhe. Professor Schlosser and Dr. Vollkommer interviewed judges of the Landgerichte Passau, München I and Traunstein and of the Oberlandesgericht München.

Besides, several lawyers working in international law firms were consulted by the German reporters.

In addition, Prof. Hess interviewed the assistants of the German Institute for Youth Welfare Service and Family Law (Deutsches Institut für Jugendhilfe und Familienrecht). The Institute also opened its archive for a comprehensive research of all case law from 2003 – April 2006. All files from this period have been evaluated by the reporters.

IV. Evaluation of Legal Databases

The reporters searched comprehensively all available databases for published case law (Juris, BeckOnline, WestLaw, Legios and specific websites of courts and administration of justice). The results of this research are compiled under B. below.
A. Evaluation of German courts’ responses and court files

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

General statistics on the application of the Regulation are not available. Accordingly, the courts responded according to their own statistics and to their experiences. Due to the lack of statistics, some courts could only give rough percentages rather than exact figures. However, these percentages are also of some value since they clearly show that the Regulation (EC) No. 44/01 has been applied rather infrequently during the evaluation period (2003/04). The answers given indicate that the percentage of decisions concerning Regulation (EC) No. 44/01, in comparison to the number of decisions in civil- and commercial matters in total, ranges from 0.2 % (Landgericht in Saxony-Anhalt), 0.5 % (Landgericht Aurich), 0.7 % (Landgericht in Baden-Württemberg), lower than 1 % (Landgerichte Saxonia), 1 % (Landgericht Marburg, Landgericht in Saxony-Anhalt) up to 3 % (Oberlandesgericht Düsseldorf), 4 % (1st Civil Senate of the Bundesgerichtshof) and even 10 % at the Oberlandesgericht Nürnberg. According to the Oberlandesgericht Bamberg, there have been about 20 cases in its district in which the Regulation has been applied since the Regulation came into force. Following the Landgericht Berlin, approximately 80 % of all exequatur decisions are delivered on the basis of the Regulation – respectively the Judgment Convention. However, as the following evaluation of the courts, which could provide exact figures, shows, these percentages differ strongly and have increased from year to year. Further, the figures indicate that there are obviously courts where cases with a connection to the Regulation occur increasingly, which can be illustrated by the Landgericht Traunstein where the percentage of Brussels I cases even amounted to 18.4 % in 2005.

Where exact data could be provided, the inquiries have led to the following figures:

a) Evaluation of the years 2003/2004

At the Landgericht Hamburg, approximately 81 decisions concerning the Judgment Regulation (including the Judgment Convention) have been delivered. This number corresponds to about 0.5 % of all decisions of the Landgericht Hamburg as a court of first instance.

At the Landgericht Erfurt (1st Commercial Chamber) only one interlocutory judgment concerning Articles 5, 23 JR has been given.

According the the Landgericht Karlsruhe, 15-25 proceedings of 180-200 proceedings in the Commercial Chambers concerned the Judgment Regulation which amounts to 10 % per year. In 2004, there were about 12 proceedings according to Articles 38 et seq. in two different Commercial Chambers.

According to the Landgericht Osnabrück, in 2003 cases concerning the Regulation amounted to about 0.32 % while in 2004 this percentage was almost doubled and amounted to 0.61 %.

At the Higher Regional Court Hamm, the percentage of cases concerning the Regulation is rather low: in 2003/2004 there were 37 appellate proceedings, only in 7 thereof the Regulation was applied.

According to the Oberlandesgericht Stuttgart, the Regulation has been applicable in 56 of 6188 proceedings in civil matters (ex family matters).

In 2004, only 9 of 3057 proceedings concerned the Regulation at the Landgericht Bremen.

---

1 The same trend can be stated for 2005 and 2006.
According to the 9th Civil Senate of the Oberlandesgericht of Thuringia, there have been four proceedings concerning the Regulation.

An evaluation of the records of the German Institute for Youth Welfare Service and Family Law brought the following results: in 2003 46 cases concerned the EU, however, thereof the Regulation was applied only in 3 cases; in 2004 there were 98 cases concerning the EU and in 3 cases thereof the Regulation was applied.

b) Evaluation of the years 2005/2006

At two Commercial Chambers of the Landgericht Karlsruhe, there have been about 13 proceedings according to Articles 38 et seq. in two different Commercial Chambers.

Comprehensive inquiries carried out by Prof. Schlosser and Dr. Vollkommer at the Landgericht München I showed the following results for 2005: The Langericht dealt with a total of 16,876 cases, 518 cases were related to the Judgment Regulation (3%). Many of these cases dealt with industrial property (46 cases).

Factual research at the Landgericht Passau showed the following results: In 2005 there was a total of 1,404 cases, 129 of them with a connection to the Judgment Regulation (9.2%). These 129 cases include 79 declarations of enforceability and 50 judgments on the merits.

In 2005, the Landgericht Traunstein handled a total of 3,684 decisions, 609 were connected to the Judgment Regulation, which amounts to a percentage of 16.5%.

The research carried out at the Oberlandesgericht München showed that there were 30 appellate proceedings from February 2005 to October 2006.

According to the Landgericht Mannheim II there were only two proceedings in 2005 (declarations of enforceability).

The Oberlandesgericht Thuringia reported only 2 proceedings which dealt with the Regulation.

According to the 3rd Division for Civil Matters of the Bundesgerichtshof, there was only one judgment which dealt with the Regulation in 2005 – however, it referred to the Regulation only obiter dictum.

With regard to the year 2006, the 7th Division for Civil Matters of the Bundesgerichtshof reported one judgment concerning the Regulation.

An evaluation of the records of the German Institute for Youth Welfare Service and Family Law showed the following results: There were 104 cases concerning the EU in 2005 and the Regulation was applied in 13 cases; until April 2006, the Regulation was applied in 5 of 104 cases concerning the EU.

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

Generally, there are no comprehensive statistics available. However, the answers obtained from the courts clearly show a sparse practice concerning the Judgment Regulation during the evaluation period (2003/04). The Landgericht Osnabrück reported 7 decisions with a connection to the Judgment Regulation in 2003 and 14 decisions in 2004, 20 in 2005. The Landgericht Bremen reported 9 cases in 2004. According to the Landgerichte Mannheim, the chambers deal with 30-50 cases a year (concerning Article 5 (3)). Another Landgericht in

2 The same trend can be stated for 2005 and 2006.
Baden-Wuerttemberg reports 5 cases. At the Landgericht Marburg, there are about 3-4 cases a year (concerning Article 15). A Landgericht in Saxony-Anhalt refers to 6 cases, the Landgerichte of Saxonia counted a total of 40 decisions in 2003/04. According to the Oberlandesgericht Oldenburg, there have been 6 decisions concerning the Regulation in 2004.

At the Landgericht Berlin there have been in 2003/2004 about 180 cases.

No detail figures are available at the Oberlandesgericht Cologne, however, most cases concern Art. 5 (1) and (3). Further, the court had to deal with two cases concerning Art. 11 in 2005, which have led to a reference for a preliminary ruling (BGH, 29.9.2006 – VI ZR 200/05).

According to our research conducted at the Landgericht Passau, there were 50 cases (3.56 % of the total of 1404 decisions) in 2005. In 17 cases the defendant had his domicile in another Member State, in 33 cases the claimant had his domicile abroad. Applied rules: Artt. 5 Nr. 1, 5 Nr. 3, 6 Nr. 1, 23. At the Landgericht München I our research of the case files brought the following results: 345 cases in 2005 (about 2 % from a total of 16.876 decisions). Applied rules: Artt. 5 No. 1, 23, 15, 16.

Our research at the Landgericht Traunstein brought the following result: In 2005 there was a total of 3.684 decisions at the Landgericht. 308 of them had a connection to the Judgment Regulation (8.4 %).

In general, it seems difficult to derive precise information on the basis of these answers. It might well be that the total number of cases, which are related to the jurisdictional grounds of the Judgment Regulation is considerably higher. One reason of this perception is the case law of the ECJ (Owusu v. Jackson) which interpreted the territorial scope of the Judgment Regulation very broadly. According to this judgment, the Regulation is applicable if the defendant is domiciled in a Member State of the European Community. However, in the published case law, several judgments can be found where the applicability of the Regulation has been disregarded by the parties and the courts. However, the results of these judgments are very often in line with the Judgment Regulation, as most of the jurisdictional grounds of the autonomous German procedural law are identical with those of the Regulation.

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

It is impossible to provide a comprehensive overview of all German courts. General statistics are not available. Accordingly, we can only report the practice of those courts, which replied to the questionnaire:

a) Evaluation of the year 2003

With regard to 2003 we received rather diverging figures, which depend obviously on the size and the location of the courts. The highest number of applications for a declaration of enforceability has been reported by the Landgericht Berlin, where 95 applications have been lodged. High numbers can also be found at the Landgericht– Fuerth (40 applications), at the Landgerichte in Saxonia (32 applications), at the Landgerichte belonging to the district of the Oberlandesgericht Düsseldorf (20 applications) and at the Landgericht Hamburg (20 applications). At the Landgerichte belonging to the district of the Oberlandesgericht Bamberg, approximately 17 applications have been lodged, in Saxony-Anhalt on average 12 applications, at the Landgericht Mannheim I 10 applications, at two other Landgerichte in Baden-Wuerttemberg respectively 5 and 14 applications (which amounts to an average at Landgerichte in Baden-Wuerttemberg of approximately 10 applications in 2003), at the Landgericht Gera 10 applications. The courts with the lowest number were the Landgericht
Schoenberg with 7 applications, the Landgericht Erfurt with 2 applications (per chief justice) and Aurich (6 applications) and the Landgericht Marburg with 2 applications.

b) Evaluation of the year 2004

The evaluation of the numbers received for 2004 shows a clear increase of applications. Again, the highest number of applications was lodged at the Landgericht Berlin (95 applications), the Landgericht Hamburg (61), the Landgericht Nürnberg-Fuerth (55), Landgerichte in Saxonia (33), Landgerichte within the district of the Oberlandesgericht Düsseldorf (20). At the Landgericht Mannheim I, 15 applications were lodged, while in two other Landgerichte in Baden-Wuerttemberg respectively 5 and 18 applications were filed (this amounts to an average at Landgerichte in Baden-Wuerttemberg of 13 applications), at the Landgericht Karlsruhe (11th Civil Division) about 25 proceedings, at the Landgerichte within the district of the Oberlandesgericht Bamberg 17 applications, in Saxony-Anhalt on average 12 applications, at the Landgericht Gera 10, at the Landgericht Schoenberg and the Landgericht Aurich respectively 6 applications, at the Landgericht Erfurt 4 (per chief justice) and only 2 applications at the Landgericht Marburg.

The numbers provided by one court, the Landgericht Bremen, facilitate a more detailed analysis for the year 2004: In total 3057 proceedings in civil matters were filed at this court. In 9 proceedings thereof the Judgment Regulation was applicable and all of these 9 proceedings concerned applications for a declaration of enforceability.

c) Evaluation of the year 2005

With regard to 2005, we received concrete numbers only from one Landgericht in Baden-Wuerttemberg, where 22 applications were filed and from the Landgericht Karlsruhe (11th Civil Division), which had about 25 proceedings.

However, the evaluation of the court files at the Landgerichte Passau and Traunstein by the reporters facilitated a detailed analysis: At the Landgericht Passau 79 applications for declarations of enforceability were filed in 2005 (of 1404 proceedings in civil matters, and thereof 129 proceedings concerning Brussels I). The highest number of applications for a declaration of enforceability could be found in Traunstein, where 301 declarations of enforceability were issued in 2005 (of 3648 proceedings in civil matters, thereof 680 proceedings concerning Brussels I).

Further, a judge from the Landgericht München I interviewed by Dr. Vollkommer reported that there were about 180 applications for declarations of enforceability a year.

4.

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

In general, it can be summarised that the evaluation of the available data shows that almost all applications for declarations of enforceability have been successful.

a) Evaluation of the year 2003

At the Landgericht Berlin approximately 90 applications (of ca. 95) were successful, within the district of the Oberlandesgericht Nürnberg virtually all applications were granted, thus about 40. At two other Landgerichte in Baden-Wuerttemberg approximately 5 and 12 respectively, which amounts to an average at Landgerichte Baden-Wuerttemberg of about 8.3 declared grants of enforceability (of 10 applications, which indicates that most applications are successful). In Saxony-Anhalt, all applications have been successful, thus approximately 12 declarations of enforceability have been granted. The same can be said for the district of the Oberlandesgericht Düsseldorf, where all – and therefore about 20 - applications have led to a declaration of enforceability. All applications (32.5) were also successful in Saxonia, at the Landgericht Gera (10 of 10) and at the Landgericht Marburg (2
of 2 applications). At the Landgericht Aurich, 5 of 6 applications were successful. In Hamburg 18 of 20 applications were granted. At the Landgericht Schoeneberg 4 of 7 applications were successful and at the Oberlandesgericht Berlin 2 declarations were issued.

With regard to the Oberlandesgericht Cologne, the number of granted declarations of enforceability can only be inferred by means of the appeals lodged at the Oberlandesgericht. In 2003, there have been 20 appeals, thereof 14 on the basis of the Judgment Regulation, 5 on the basis of the Hague Maintenance Convention 1973 and 1 on the basis of the Lugano Convention.

**b) Evaluation of the year 2004**

At the Landgericht Berlin, approximately 90 applications (of about 95) were successful, within the district of the Oberlandesgericht Nürnberg virtually all applications were granted, thus about 40. At the 11th Civil Division of the Landgericht Karlsruhe about 25 declarations were granted and at two other Landgerichte in Baden-Wuerttemberg 5 and 16 respectively, which amounts to an average at Landgerichte in Baden-Wuerttemberg about 10 granted applications in 2004 of (thus on average most applications were successful). In Saxon-Anhalt all applications were successful, thus approximately 12. The same can be said for the district of the Oberlandesgericht Düsseldorf, where all – and therefore about 20 applications were granted. All applications (in average 32.5) were also successful in Saxonia, at the Landgericht Gera (10 of 10) and at the Landgericht Marburg (2 of 2 applications). At the Landgericht Aurich, 6 declarations of enforceability (of 6 applications) were issued. In Hamburg 50 of 61 applications were successful. At the Oberlandesgericht Berlin 2 declarations were issued. What is rather astonishing is, that at the Landgericht Schoeneberg only 1 of 6 applications was successful.

With regard to the Oberlandesgericht Cologne, the number of granted declarations of enforceability can only be inferred by means of the appeals lodged at the Oberlandesgericht. In 2004, there have been 13 appeals, thereof 12 on the basis of the Judgment Regulation and 1 on the basis of the Hague Maintenance Convention.

**c) Evaluation of the year 2005**

With regard to 2005, we received figures from one Landgericht in Baden-Wuerttemberg where 20 of 22 applications were successful. At the Landgericht Karlsruhe (11th Civil Division), there are about 25 applications, which are nearly all successful. Further, we obtained detailed information at the Landgericht Traunstein showing that all applications for a declaration of enforceability (301) were granted.

With regard to the Oberlandesgericht Cologne, the number of granted declarations of enforceability can only be inferred by means of the appeals lodged at the Oberlandesgericht. In 2005, there have been 9 appeals, thereof 7 on the basis of the Judgment Regulation, 1 on the basis of the Hague Maintenance Convention and 1 on the basis of the Lugano Convention.

**d) Evaluation of the year 2006**

Further, we received figures for 2006 and 2007 from the Oberlandesgericht Cologne. However, the number of granted declarations of enforceability can only be inferred by means of the appeals lodged at the Oberlandesgericht. In 2006, there have been 15 appeals, thereof 11 on the basis of the Judgment Regulation, 3 on the basis of the Hague Maintenance Convention and 1 on the basis of the Lugano Convention.

Further, for 2007 (until 20.9.2007), 14 appeals have been lodged, thereof 13 on the basis of the Judgment Convention and 1 on the basis of the Hague Maintenance Convention.
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

a) Refusal of declarations of enforceability

In general it can be stated that virtually no applications for declarations of enforceability were refused already in the first instance – these cases are rather rare. This point of view has been confirmed by the following courts, which have not refused any declarations of enforceability: Landgericht Bremen, Landgericht Erfurt, Landgericht Gera, Landgericht Marburg, Landgericht Osnabrück, two Landgerichte in Baden-Wuerttemberg, Landgerichte in Saxony-Anhalt, Landgericht Traunstein, Oberlandesgericht Düsseldorf, Oberlandesgericht Nürnberg.

aa) Evaluation of the year 2003

At the Landgericht Hamburg, one application was refused (reason: date of service of the document instituting the proceedings where judgment was given in default of appearance according to 4.4. Annex V had not been proved).

At the Landgericht Berlin 2 (of 95) applications were refused.

bb) Evaluation of the year 2004

At the Landgericht Hamburg, two applications were refused (reason: date of service of the document instituting the proceedings where judgment was given in default of appearance according to 4.4. Annex V had not been proved).

At the Landgericht Aurich, one application (of about 6) was refused due to a violation of public policy.

At the Landgericht Berlin 2 applications (of 95) were refused.

At the Landgericht Mannheim I application (of 15) was refused since the case did not fall within the scope of application of the Judgment Regulation (no civil or commercial matter).

Landgerichte Saxony: 1 refusal (of 32.5) due to lack of jurisdiction.

cc) Evaluation of the year 2005

Landgericht München I: One declaration was refused since the certificate according to Article 54 JR had not been produced.

b) Subsequent improvements of applications

aa) Evaluation of the year 2003

At the Landgericht Hamburg amendments were demanded in 4 (of 20) cases (mostly since the certificate according to Annex V had not been produced or because further submissions concerning the obligation to pay interests which had not been ascertained in the foreign judgment were necessary).

At the Landgericht Berlin 47 (of 95) applications (50 %) had to be amended.

At the Landgericht Gera 2.5 (of 10) applications (25 %) had to be amended.

At the Landgericht Mannheim I amendments were necessary in 10% of all applications, i. e. in 1 case (complementary information concerning titles which are not enforceable under German law).

According to a Landgericht in Baden-Wuerttemberg, amendments were required in one third of all cases (about 5 cases). Reasons: incomplete documents, lacking determination of supplementary claims, inadequate translation.
Landgerichte in Saxony-Anhalt: Amendments required in 5% of all applications, i.e. in about 1 case of 23 cases.

Oberlandesgericht Düsseldorf: Amendments were necessary in 50% to 90% of all cases, i.e. in 10 to 18 of 20 cases.

Oberlandesgericht Nürnberg: Amendments demanded in 10% of all cases (4 of 40 cases).

bb) Evaluation of the year 2004

At the Landgericht Hamburg amendments were demanded in 13 (of 61) cases (mostly since the certificate according to Annex V had been produced or because further submissions concerning the obligation to pay interests which have not been determined in the foreign judgment was necessary; in 2 cases: no submissions with regard to jurisdiction).

At the Landgericht Berlin 47 applications (50%) had to be amended.

At the Landgericht Gera 2.5 applications (25%) had to be revised.

At the Landgericht Karlsruhe about 30% of the applications had to be amended (ca. 8).

At the Landgericht Mannheim I amendments were necessary in 10% of all applications, i.e. in 1.5 of 15 cases (complementary information concerning titles which are not enforceable under German law).

According to a Landgericht in Baden-Württemberg, amendments were required in one third of all cases (about 6 cases). Reasons: Incomplete documents, lacking determination of supplementary claims, inadequate translation).

Landgerichte in Saxony-Anhalt: Amendments were demanded in 5% of all applications, i.e. in 1 of 23 cases.

Oberlandesgericht Düsseldorf: Amendments were necessary in 50% to 90% of all cases, i.e. in 10 to 18 of 20 cases.

Oberlandesgericht Nürnberg: Amendments demanded in 10% of all cases (i.e. in about 5.5 of 55 cases).

Oberlandesgericht Cologne: There has been one appeal lodged by the creditor on the basis of the Convention: The application for a declaration of enforceability had been refused in the first instance since no evidence regarding the service of the document instituting the proceedings according to Art. 46 (2) Brussels Convention had been presented. This has been made up during the appellate proceedings with the result that the application has been successful.

cc) Evaluation of the year 2005

Landgericht Traunstein: Amendments were required in 15 proceedings.

According to a Landgericht in Baden-Württemberg, amendments were required in one third of all cases (about 7 cases). Reasons: Incomplete documents, lacking determination of supplementary claims, inadequate translation).

At the Landgericht Karlsruhe (11th Civil Division), in about 30% of the applications, an amendment was necessary (ca. 8 applications).

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

In general, the answers received show that revocations occur rather seldom. Thus, the following courts replied that no revocations had taken place: Landgericht Hamburg, KG
Berliner Landgericht Aurich, Landgericht Erfurt (Civil Division), Landgericht Gera, Landgericht Karlsruhe (11th Civil Division), Landgericht Mannheim I, Landgericht Marburg, one Landgericht in Baden-Württemberg, Landgerichte in Saxony-Anhalt, Landgerichte in Saxonia, Landgericht Bremen, Oberlandesgericht Düsseldorf, Oberlandesgericht Hamm, Oberlandesgericht Nürnberg which stated that the remedy sought by the defendant intended a revision au fond of the decision and thus had to be denied.

a) Evaluation of the years 2003/2004

A revocation of a declaration of enforceability in the second instance occurred only once in 2004 according to the Landgericht Bremen. The same was reported by a Landgericht in Baden-Württemberg. The Oberlandesgericht Oldenburg revoked three declarations of enforceability in 2004.

According to the Oberlandesgericht Stuttgart 5 declaration of enforceability were revoked by the court. Main reasons: The Regulation was not yet applicable in the State of origin, the application was made against the wrong party, the original decision had been revoked ad interim in the State of origin, missing certification of the service of the original decision (2 cases). In some cases, the Court requested a security from the debtor before granting the declaration of enforceability.

According the the Oberlandesgericht Cologne, there have been 2 decision which have been revised partly due to a undisputed performance in part: With regard to the first decision, the proceedings had been suspended before according to Art. 46 and the title had been amended. The second case concerned Art. 27 (2) JC and the question whether the requirements of Art. 27 (2) JC are fulfilled if no appeal is lodged. This had been denied by the court. However, the Bundesgerichtshof did not share this opinion later on.

b) Evaluation of the years 2005/2006

The evaluation of the court files at the Oberlandesgericht München showed that only 5 of 30 appeals against a declaration of enforceability were successful in 2005. The main reasons for the success of the appeals: in 2 cases the defendant and the opponent of the application were not identical; in 1 case the Regulation was not applicable, in another case the claimed amount had already been paid to the claimant and in 1 case the documents have not been served properly.

7.

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

a) Lenghts of the proceedings

The statements concerning the lengths of the proceedings differ significantly among the courts: It ranges from 2 days (Landgericht Mannheim I), several days (Landgericht Berlin), one week (Landgericht Hamburg, one Landgericht in Baden-Württemberg), up to two weeks (Landgericht Mannheim II; Landgericht Passau; Landgericht Traunstein), between six weeks (Landgericht Bremen) and several months (Landgerichte Saxony-Anhalt: up to six months; Oberlandesgericht Düsseldorf: 1-2 months, up to three months: Landgericht Gera).

According to the Oberlandesgericht Cologne, proceedings in the first instance take usually only a few days (up to five days), while in one case proceedings took one months. With regard to appeal proceedings the following figures have been submitted (including proceedings on the basis of the Hague Maintenance Convention 1973):

<table>
<thead>
<tr>
<th>lodged at:</th>
<th>decision at:</th>
<th>appellant:</th>
<th>result:</th>
<th>comments:</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>02.01.2003</td>
<td>24.02.2003</td>
<td>debtor</td>
<td>refusal</td>
</tr>
<tr>
<td>6</td>
<td>17.02.2003</td>
<td>in 2006</td>
<td>debtor</td>
<td>withdrawal</td>
</tr>
</tbody>
</table>
Further, it should be noticed that the Oberlandesgericht Cologne usually decides without oral hearings (except in cases where this appears to be necessary). In addition the court refrains in cases where the certificates according to Art. 53 are still in the records possibly from hearing the creditor if the appeal is inadmissible or obviously not justified.

b) Working time of the respective judge

The working time of the judge ranges from 10 minutes (Landgericht München I, Landgericht Traunstein), 30 minutes (Oberlandesgericht Nürnberg), up to 15 hours (Oberlandesgericht Stuttgart). However, most courts indicated a working time of about 1 to 2 hours (Landgerichte in Saxonia, Landgericht Aurich, Landgericht Erfurt, Landgericht Mannheim II, Landgericht Marburg, Landgericht Oldenburg, one in Landgericht in Baden-Wuerttemberg).

The differences can be explained by the following factors: The efficiency mainly depends on the caseload and the specialisation of the judges: Courts regularly dealing with exequatur proceedings often designate specific chambers or presiding judges (experienced in international litigation) for the exequatur proceedings. These judges often develop “best practices” for the handling of these applications. The situation within the Higher Regional Court Munich seems to be a good example for an appropriate handling of appellate proceedings under the Regulation.
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

According to the Landgerichte, which are competent for the recognition of foreign judgments as well as declarations of enforceability, the provisions most frequently applied are the following: Articles 27, 30, 34, 38, 39, 40, 41, 42, 53, 54, 55, 56 JR.

According to the Oberlandesgerichte, the most frequently applied provisions are: Articles 5 (1), (3), 22 (5), 32 et seq., 38 et seq., 45, 53, 54, 55, 59, 60 JR.

B. Evaluation of published German decisions

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

The result of the evaluation of the published decisions was the following:

2003: 25 decisions concerning the Judgment Regulation in total; 2 thereof at the Bayrisches Oberstes Landesgericht (BayObLG), 14 at Oberlandesgerichte and 9 at Landgerichte.

2004: 46 decisions; Bundesgerichtshof 2, BayObLG 1, Oberlandesgerichte 32, Landgerichte 10.

2005: 56 decisions; Bundesgerichtshof 11, BayObLG 2, Oberlandesgerichte 32, Landgerichte 10, Amtsgerichte 2.

2006: 23 decisions until today; Bundesgerichtshof 5, Oberlandesgerichte 14, Landgerichte 3, Amtsgerichte 1.

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

In 2003, 11 published decisions were based on the jurisdictional grounds on the Regulation.

2004: 20 decisions.

2005: 23 decisions.

2006: 7 decisions.

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

2003: 4
2004: 2
2005: 2
2006: 0

2003: 8 declarations of enforceability
2004: 7 declarations of enforceability
2005: 7 declarations of enforceability
2006 until today: 2 declarations of enforceability

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

There were 3 published decisions found refusing an request of a declaration of enforceability.

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

There are decisions found for 2004 (1 decision), 2005 (2 decisions) and 2006 (1). Reason for the revocation: Article 34 (1) or (2); no decision in terms of Article 32, requirements of Article 54 were not met.
Questionnaire No 2: Collection of Empirical Data

2.1 ......................................................................................................................................13
2.2 ......................................................................................................................................13
2.3 ......................................................................................................................................14
2.4 ......................................................................................................................................14
2.5 ......................................................................................................................................15
2.6 ......................................................................................................................................16
2.7 ......................................................................................................................................16
  2.7.1 ............................................................................................................................... 17
  2.7.2 ............................................................................................................................... 17
2.8 ......................................................................................................................................17
  2.8.1 ............................................................................................................................... 17
  2.8.2 ............................................................................................................................... 18
  2.8.3 ...................................................................................................................................20
    2.8.3.1 .........................................................................................................................20
    2.8.3.2 .........................................................................................................................20
    2.8.3.3 .........................................................................................................................20
2.9 ......................................................................................................................................21
2.10 ....................................................................................................................................21
2.11 ....................................................................................................................................22
2.12 ....................................................................................................................................22
2.13 ....................................................................................................................................22
2.14 ....................................................................................................................................23
2.15 ....................................................................................................................................23
2.16 ....................................................................................................................................23
2.17 ....................................................................................................................................24
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?

According to the information given by lawyers and judges, German courts generally apply Articles 38 et seq. JR as mandatory provisions. Thus, courts do not demand additional requirements from the parties. According to one law firm, some courts required conditions of recognition and enforcement, which went beyond those permitted under the Judgment Regulation.

However, according to some statements from the bench, in 2002 some regional courts did not immediately change their previous practice (of the Brussels Convention) and continued to apply Articles 34 and 35 JR. It seems that this practice only occurred during the transition period (2002/03).

As reported below (2.5), most courts regularly require the production of a translation of the foreign title. According to Article 55 (2) Reg. such a translation should only be required if the court needs additional information which is not contained in the form prescribed by Article 54 and Annex V JR.

2.2

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

It is not possible to identify local focus points for all regions. However, it was possible to indicate some courts as local focal points. Two categories can be distinguished: Courts in economic centres and courts in border regions.

Examples for an accumulation of Brussels I cases in economic centres are for instance Düsseldorf where the Oberlandesgericht reported a rate of 3% of all civil litigations which is relatively high in comparison to other courts. The Oberlandesgericht Hamm reported even a higher percentage of about 10%.

A court in border regions with a culmination of cross-border litigation is the Landgericht Karlsruhe. The commercial chambers of this court reported that a percentage of about 10% of their caseload relates to cross-border litigation and indicated that most of the cases relate to France. The Landgericht Passau which reported that 9.2 % of its cases concern the Judgment Regulation indicated that most cases involve an Austrian party, while the Landgerichte Aachen and in Kleve (North Rhine-Westphalia) pointed out that most titles come from the Benelux. The local and regional courts in Saxony also indicated cases with Austria.

This information confirms the expectation that courts located in a frontier region are more frequently involved in cross-border litigation. There is for instance an accumulation of cases in the district of the Landgericht Aachen: Even though this district is much smaller than the one of the Landgericht Cologne, the number of Brussels I-cases is similar. However, the information given by the Landgerichte in Saxony (located close to Austria, Poland and the Czech Republic) shows that cross-border civil litigation in relation to the new Member States has not yet become a broad phenomenon. This impression corresponds to the information obtained by a broad research of the court records in the Landgericht Passau²: While Passau

---

¹ The average is about 0,5-1% of all cases, see supra questionnaire no 1, at
² Prof. Schlosser and Dr. Vollkommer spent a day in the Landgericht Passau. They reviewed the dockets and the records of several civil chambers and interviewed the president of the court and several judges. The results of this research are annexed (as a protocol) to this questionnaire.
is located close to the borders of the Czech Republic and of Austria, the large majority of all cases related to Austria (more than 90%).

The most prominent local focal point seems to be the Landgericht Traunstein (Bavaria) which is located near the border to Austria (Salzburg).\(^3\) In 2005, at the Landgericht Traunstein 301 declarations of enforceability were applied for (Article 38 JR), much more than at the Landgericht München (about 180) or the Landgericht Karlsruhe (about 25 cases).\(^4\) In total, in 2005 18.4% of the cases at the Landgericht Traunstein had a connection with the Judgment Regulation.

A second result of the factual research shows that most of the cross-border litigation relates to enforceable titles from Austria. Even regional courts located far away from the Austrian border indicated that most of their cases related to Austria, for example the Landgericht Hamburg. The Oberlandesgericht Stuttgart reported that 10 of 25 appeals (under Article 43 JR) related to judgments originating from Austria.

2.3

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

We received different answers from courts. In the border regions, most of the titles originate from the neighbouring States, but the extent of the case law seems very different (see supra 2.2). However, in general it can be summarised that throughout Germany most of the titles originate from Austria. In addition, courts indicated that they usually deal with titles from Italy, France, the Netherlands, Belgium and the UK. Sweden, Poland, Spain and the Czech Republic were mentioned less frequently.

International law firms interviewed indicated that most of the titles originate from Western-European countries, in particular from the UK, France, Italy and Belgium.

Research carried out at the German Institute for Youth Welfare Service and Family Law\(^5\) showed that most of the European cases in maintenance matters relate to England and to France.

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.).

In general, all courts agree that the handling of the standard form (Annex V) is working satisfactorily. The Landgericht Karlsruhe reported practical problems with regard to the

---

\(^3\) Dr. Vollkommer spent a day in the Landgericht Traunstein reviewing the files and the records of several civil chambers and interviewing the president of the court and several judges. The results of this research are annexed (as a protocol) to this questionnaire.

\(^4\) These figures only relate to the commercial chambers (3 of 8 chambers in civil and commercial matters). Due to the organisation of the court, it was not possible to scrutinise the whole case law. Prof. Hess interviewed three presiding judges of the Commercial Chambers of the Landgericht Karlsruhe about their experiences with the Judgment Regulation.

\(^5\) The evaluation of the records at the Institute showed that the Regulation has been applied: in 2003: In 3 out of 305 cases; in 2004: in 3 out of 272 cases; in 2005: in 13 out of 286 cases and in 2006 (until April) in 5 out of 91 cases.
application of Articles 27 and 30 (2), in particular with the service according to Article 14 of Regulation (EC) No. 1348/2000. In the case of postal service, standard forms were not fully completed or were not sent back at all. Also the Oberlandesgericht Cologne reports problems: Sometimes the forms were not completed at all or completed insufficiently and incorrectly. Further, the Oberlandesgericht Hamm proposed not only to indicate the date when the document instituting the proceedings had been served but also to indicate whether the defendant had entered an appearance. Since the judgment does not always stipulate whether the defendant has entered an appearance, the form should contain the date. With regard to this problem, the court refers to one case (2005) where it was suspected that the certificate had been issued without indicating the date, although the defendant had not entered an appearance.

According to the judges of the Landgericht Traunstein interviewed by Dr. Vollkommer, the standard form works sufficiently. They reported a case where the applicant presented the standard form for court settlements according to Article 58 JR although the foreign title was a European payment order. In two cases, the standard form was requested by the court after the decision was made, but service of the declaration of enforceability was only effected after the standard form had been delivered by the applicant.

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

The aim of Article 55 JR is – according the the Jenard-Report – to avoid excessive formalism. Thus, the Article provides for three different alternatives of the court if the certificate is not produced: (1) the court may set a time limit for the production of the certificate, (2) or accept an equivalent document, (3) or dispense the creditor from producing the document.

Generally speaking, it seems that the application of this provision mainly depends on the experience of the court (with the exequatur proceedings under Article 38) and on the language skills of the judges. According to the statement of a presiding judge at the Landgericht Kleve, the court usually does not order the production of the certificate when the title comes from the Benelux, from France or from England. The Landgericht is in close contact with the neighbouring courts in the Netherlands. In addition, the court knows the Dutch and Belgian regulations on legal interest and calculates legal interest (which are not specified in the foreign title) separately.

One decision which clearly reflects the policy underlying Article 55 is a decision of the Oberlandesgericht Hamm. Here the court affirmed with decision of 19th December 2003 (29 W 18/03) an earlier decision of the Landgericht Essen (11 O 90/03) which had dispensed from the production of a certificate according to Article 55 JR. The Oberlandesgericht declared it to be justified in the present case to dispense from the production of the certificate since the senate had all information evident from the standard form – in particular the information on service and enforceability. The Court regarded it not to be necessary to produce the original documents.

According to the Oberlandesgericht Cologne, the certificate’s production is dispensed with if it is possible to determine the requirements of Art. 32 otherwise.

---

6 Telephone interview of Nov. 12th, 2006, conducted by Prof. Hess.
The answers of other courts show that not all of them make use of the possibility of Article 55 JR and regard the production of the certificate as necessary. For instance, the judges of the Landgericht Traunstein reported that there is no such practice at the court.7

2.6

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

In general no specific language problems have been reported with regard to recognition and enforcement. However, the reported case law shows that practical problems still exist.

Only two courts, the Landgericht Karlsruhe and the Landgericht Leipzig reported on problems. According to the Landgericht Karlsruhe problems might occur if the statement of claim is not translated (Article 8 of Regulation (EC) No. 1348/00). However, the Third Chamber for Commercial Matters also accepts documents written in French and even applications in French by a non-represented party.8

Generally, it seems that even experienced practitioners are not always sufficiently aware of the availability of the forms at the websites of the Commission, EJN and of the European Judicial Atlas. Even an international law firm indicated problems concerning less prevalent languages since the standard form did not exist in such languages.

2.7

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

Most courts reported that they regularly require the production of translations.

However, the Oberlandesgericht Hamm (12/19/2003– 29 W 18/03) held that translations do not always have to be requested and– deviating from sec.142 (3) ZPO – only have to be notarised. However, even the notarisation can be dispensed with as the Bundesgerichtshof had held with regard to Article 48 (2) JC.9

According to the Oberlandesgericht Cologne translations are produced in the first instance usually without any request. However, in the second instance translations were usually not required, only in exceptional circumstances, for instance in order to determine whether the submitted judgment is a "copy" in terms of Art. 53 JR.

An international law firm also answered this question affirmative. The whole judgment had to be translated. According to the German Institute for Youth Welfare Service and Family Law English courts always require a translation of the foreign title.

---

7 This answer is explained by the fact that due to the common language the use of the claim form is unnecessary. The Oberlandesgericht München (in an unpublished decision) ordered the granting of an exequatur of an Austrian judgment (without the production of the claim form) saying that in the Austrian-German legal relation the production of additional documents would be unnecessary and cause undue delay and costs.

8 This practice seems to be correct as it facilitates the access of foreign applicants to German courts. However, according to sec. 184 of the Act on the Organisation of the Courts (GVG), “the language in court is German.”

9 BGH, 09/26/1979, BGHZ 75, 167.
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?

Here, we received different answers. The *Amtsgericht* Hamburg, the *Landgericht* Bremen, the *Landgericht* Oldenburg, two regional courts in Baden-Württemberg and the *Oberlandesgerichte* Frankfurt/Main, Stuttgart, Koblenz and Cologne (if required at all) usually require the translation of the whole judgment. The following courts assume that regularly the translation of the operative part is deemed sufficient: *Landgericht Leipzig, Landgericht Mannheim, Landgericht Marburg*, regional courts in Saxony.

According to information given by the German Institute for Youth Welfare Service and Family Law (which collects maintenance claims for public creditors abroad) English registrars usually require a translation of the whole judgment.

2.7.2

Do the costs for translations lead to less efficiency?

Here the courts answered unanimously that the costs for translations did not lead to less efficiency. However, there is no doubt that translations are time consuming and therefore an impediment to the free movement of titles in the European Judicial Area. It would be difficult to obtain precise information on this issue, because parties often avail a translation of the title before applying for its exequatur. Accordingly, the losses of time due to the translation do not appear in the statistics of the courts.

According to the German Institute for Youth Welfare Service and Family Law, English courts usually require the translation of decisions on maintenance. However, the Institute does not regard this prerequisite as an efficiency problem.

2.8

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

German law provides for a system of fixed court fees and fixed lawyer’s charges. The legal framework is explained under 2.8.1 and 2.8.2. In addition to these costs, the need for translating the title may encounter additional costs which are not legally fixed. See for a practical example on the operation of the German system at 2.8.2.

In particular:

2.8.1

How is Article 52 implemented?

The German Court Fees Act (*Gerichtskostengesetz, GKG*) provides for a fixed fee of 200 € (no. 1510 *Kostenverzeichnis-GKG*). The creditor must advance that fee when he applies for the exequatur under Article 38 JR. The fee in appellate proceedings (sec. 43 *Gerichtskostengesetz*) is 300 € (no. 1520 *Kostenverzeichnis-GKG*).  

10 With the exception of English judgments.

11 According to information given by the 25th Civil Senate of the *Oberlandesgericht München*, the fee is € 50.00. The senate relied on the general no 1811 of the KV-Gerichtskostengesetz. However, the more specific number (which prevails) is no. 1520 KV-Gerichtskostengesetz.
The production of copies according to Articles 53–56 JR is charged with a fee of 10 € (no 1511 Kostenverzeichnis-GKG).

2.8.2

How are solicitor’s charges calculated?

1. The legal framework

German law provides for a fixed system of lawyer’s fees. The amount depends on the value in dispute, secs. 2 and 13 of the Law on the Remuneration of Attorneys (Rechtsanwaltsvergütungsgesetz, RVG). The amount of the cost can be deduced from a calculation scheme annexed to the RVG (Annex no 2). In exequatur proceedings, the costs are calculated according to no. 3100 of Annex no. 1 to the Law on the Remuneration of Attorneys. In the first instance, the lawyer may charge a fee which is calculated by a quotient of 1.3.\[12\]

In appellate proceedings (Articles 43 et seq. JR), the regular fee is calculated by a quotient of 1.6. Usually, the courts order an hearing which is charged by an additional lawyer’s fee calculated by a quotient of 1.2. In sum, the lawyer gets a fee which is calculated by 2.8. In appellate proceedings, both parties must be represented by lawyers.\[13\]

The attorney’s fees in the proceedings of a second appeal (Article 44 JR) are calculated by a quotient of 5.4 (cf. no. 3206, 3208 and 3210 Annex no. 1 to the Law on the Remuneration of Attorneys). In the proceedings at the Bundesgerichtshof, representation by a (specialised) lawyer admitted to this court is mandatory.\[14\] This lawyer may charge the party with a fee which is calculated by a quotient of 2.3 (no. 3208 Annex no. 1 to the Law on the Remuneration of Attorneys).

2. Practical Example

The functioning of the German system shall be demonstrated by a practical case (file no. 1 O 424/05) which was decided by the Landgericht Freiburg (Baden-Württemberg) in 2005. In this case, a French creditor sought the declaration of enforceability (Article 38 JR) of a French default judgment over 17,370 € and 600 € attorney’s fees in Germany.

a) The creditor mandated a German lawyer who applied for the declaration of enforceability which was granted by the Presiding judge of the Landgericht within a period of 14 days.\[15\]

The proceeding triggered the following costs:

- Court fee 200 €
- Fee for the service of documents 4.27 €
- Translation of the French judgment 503.37 €
- Lawyer’s fees 913.84 €

---

\[12\] In the first instance, representation by a lawyer is not legally required, see sec. 6 (3) AVAG – text infra questionnaire no.3, 1.7.

\[13\] Accordingly, in appellate proceedings the costs for lawyer are twice as high as in the first instance. However, representation by lawyer is only mandatory if the higher regional court orders an oral hearing. The practice of the 25 Senate of the Oberlandesgericht München shows that this senate is well aware of the costs and does not regularly order a hearing. According to the Oberlandesgerichte Koblenz and Stuttgart parties in written proceedings are regularly represented by lawyers.

\[14\] BGH, 03/21/2002, NJW 2002, 2181.

\[15\] This relatively long period of time is explained by the fact that the judge asked the lawyer for the calculation of legal interests according to French law. The application did not indicate the amount required by German law (sec. 253 no. 2 ZPO).
Fee according to the list in annex 2 RVG: 60.00 €
Calculated 1.3 no. 3100 annex 1 RVG 787.80 €
VAT (16 %) 126.04 €
Total amount of the costs 1,621.48 €

Then, the costs for the exequatur-proceedings in the first instance amount up to 10% of the value of the claim.

b) The costs of the second instance (appeal according to Article 43 JR)\(^16\)
- Court fee 300 €
- Fee for the service of documents 4.27 €
- Lawyers' fees 1,968.88 €
  Fee according to the list in annex 2 RVG: 606.00 €
  Calculated 1.6 no 3200 annex 1 RVG 969.60 €
  Calculated 1.2 no 3202 annex 1 RVG 727.20 €
  VAT (16 %) 271.48 €
Total amount of the costs\(^17\) 4,240.86 €

c) The costs of the third instance (second appeal according to Article 44 JR)
- Court fee 300 €
- Fee for the service of documents 4.27 €
- Lawyers' fees 2,671.12 €
  Fee according to the list in annex 2 RVG: 606.00 €
  Calculated 2.3 no 3208 annex 1 RVG 1,393.80 €
  Calculated 1.5 no 3210 annex 1 RVG 909.00 €
  VAT (16 %) 368.32 €
Total amount of the costs\(^18\) 5,646.51 €

d) Should the parties litigate on the recognition of the French judgment over 17,600 € in three instances, the total costs of the litigation would amount to 11,508.85 €. If the Bundesgerichtshof does not decide on the merits (by granting or refusing exequatur) and refers the case back to the appellate court (for the taking of additional evidence), the litigation costs would amount up to 17,155.36 €.

\(^{16}\) The decision of the Landgericht Freiburg was not appealed.

\(^{17}\) As both parties must be represented by lawyers the amount of the lawyer's fees is doubled. Representation by lawyer is mandatory if the court orders a hearing.

\(^{18}\) As both parties are represented by lawyers the amount of the lawyer's fees is doubled.
2.8.3

Are these costs reimbursable?

The costs of exequatur proceedings are reimbursable according to sec. 8 no. 1 phrase 4 AVAG\textsuperscript{19} which refers to sec. 788 ZPO. This provision deals with enforcement costs, which are borne by the judgment debtor.

However, the practical application of these provisions is complicated: The decision granting enforceability does not decide on the costs. Accordingly, the creditor must seek the reimbursement of the costs in the enforcement proceedings. If the debtor does not pay voluntarily on the title, it depends on the success of the enforcement proceedings whether the creditor receives the reimbursement of the costs or not.

In appellate proceedings (Articles 43 and 44 JR), the situation is different, because the decision on the appeal regularly includes a decision on the costs. However, the legal explanations of the courts differ: Some courts apply sec. 8 (2) AVAG\textsuperscript{20}, while others rely on the general provision in sec. 97 ZPO.\textsuperscript{21} According to both provisions, costs are borne by the unsuccessful party.

According to answers given by law firms costs are only reimbursable if this is possible in the State of origin. This answer demonstrates considerable uncertainties about the reimbursement of costs.

In particular:

2.8.3.1

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

According to the results of a comprehensive research of the court files at the Regional Court Traunstein (Bavaria), costs are regularly reimbursed as costs of enforcement. Accordingly, the bailiff or the enforcement court decides on the costs in the enforcement proceedings. But we also found two cases where the Landgericht itself took this decision.

2.8.3.2

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

According to the information given by five regional courts, the execution of reimbursable costs is possible without particular difficulties. A regional court in Saxony reported practical problems with the reimbursement in a case where a new title on costs was necessary. Law firms did not indicate any specific problems.

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?

As the costs are not assessed by the judges competent for exequatur proceedings, but are determined by the enforcement organs, proceedings under Article 38 et seq. JR are not delayed.

\textsuperscript{19} For an English translation of this provision, see supra German Report: questionnaire 3, at 1.7.

\textsuperscript{20} Example: \textit{OLG Düsseldorf}, 08/08/2006 - I-3 W 118/06) – unpublished decision. For an English translation of this provision, see supra German Report: questionnaire 3, at 1.7.

\textsuperscript{21} Example: \textit{OLG Köln}, 02/01/2006 - 16 W 7/03 - unpublished decision.
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?

There is little experience of German courts concerning the application of Article 47 JR. The Langerichte Gera, Leipzig and Mannheim reported that they did not see any problems for the efficiency of the enforcement, because in most cases, the debtor known the decision which had been given against him. Therefore, a surprise effect was not very likely and thus could not be prevented by the exequatur proceedings (especially not by Article 42 JR). An interview with a judge of the Landgericht Traunstein however showed that default judgments are often not served on the debtor, so that a surprise effect can indeed be detected in such cases.

The interviews with two judges which were conducted during the research at the Landgericht Passau showed that the problem of an impairment of efficiency has not yet been noticed at the courts. However, they have considered changing the method of first serving the defendant with the execution clause. An argument against this consideration is that the circulation of files is limited in the traditional way of Article 42.

According to the Oberlandesgericht Cologne, § 10 AVAG might be problematic.

One international law firm states that the possibilities of Article 47 are obstructed by Article 42.

2.10

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

11 out of 19 courts reported that they had no experience with the granting of legal aid according to Article 50 JR. Five courts explicitly mentioned experience with regard to maintenance claims (Landgericht Hamburg, Landgericht Bremen, Landgericht Mannheim, Oberlandesgerichte Hamm and Stuttgart). According to the Landgericht Hamburg, maintenance claims are often governed by the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations. Accordingly, Article 50 JR is not applied. The Oberlandesgericht Hamm refers to applications (of foreign creditors) brought by the Bundesverwaltungsamt where legal aid was applied for and granted without any difficulties. Law firms did not have any experience with the granting of legal aid. According to the Oberlandesgericht Cologne, Art. 50 JR seems not to be very well known by judges as well as lawyers.

The German Institute for Youth Welfare Service and Family Law reports on positive experiences with legal aid in England by enforcing maintenance claims for German creditors.

A decision of the Oberlandesgericht Brandenburg (13 September 2006, file number 12 W 35/06) held that legal aid cannot be rejected on the basis that the court lacked international

---

22 See infra questionnaire no 3, question 4.2.1
23 See sec. 1 (1) (c) AVAG, questionnaire no 3 at.
24 According to its practice, the Institute does not institute maintenance proceedings as a creditor (as assignee), but supports the claim brought by the (private) creditor. Accordingly, the creditor is (regularly) entitled for legal aid while the Institute would not be entitled.
jurisdiction if this issue is disputed in the case law of higher regional courts. In the case under consideration, it was unclear whether jurisdiction could be based on Articles 11 paragraph 2, 8–10. In addition to this, the Bundesgerichtshof was considered to request the ECJ for a preliminary ruling on the legal nature of the reference in Article 11 (2) JR.25 According to the Oberlandesgericht Brandenburg, legal aid must to be granted in such circumstances.

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.).

According to the answers from the courts and the bar, declarations of enforceability of authentic instruments and court settlements do not arise very often. According to a presiding judge at the Landgericht Kleve, applications related to Articles 57 and 58 appear once a year or even less frequently. In the published case law (from 2002 to 2006) we discovered only 3 decisions dealing with Articles 57 and 58 JR: The Oberlandesgericht Köln held on 17 November 2004 (16 W 31/04) that an Italian decreto ingiuntivo did not constitute an authentic instrument in terms of Article 57, but had to be qualified as a judgment in terms of Article 32. A decision of the Oberlandesgericht Koblenz of 04/05/2004 -11 UF 43/04 addressed the enforcement of a foreign court settlement. Further, the Oberlandesgericht Frankfurt/Main dealt with the requirements of Article 58 JR in its decision of 12/07/2004 - 20 W 369/04.

Comprehensive research of the files of the Landgerichte Passau and Traunstein did not show any applications for a declaration of enforceability of authentic instruments or court settlements.

2.12

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

16 courts replied to this question without reporting any problem. This question was answered differently by a law firm, which generally referred to problems – however without specifying what problems had been encountered.

According to the Oberlandesgericht Cologne there are problems: First, because lawyers did not know jurisdiction, secondly because the German version was unclear since it was ambiguous whether the presiding judge of a civil chamber or also presiding judge of a commercial chamber is competent.

2.13

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

14 courts have not encountered any problems. One Landgericht in Baden-Württemberg mentioned discrepancies between the standard form and the title. According to the Oberlandesgericht Düsseldorf, the addresses of the parties are often missing in the forms. The Oberlandesgericht Hamm refers to its answer that not only the date when the document instituting the proceedings had been served should be indicated but also whether the defendant has entered an appearance. Since the judgment did not always stipulate whether

25 In the meantime, the Bundesgerichtshof, 09/26/2006 - VI ZR 200/05 requested the ECJ for a preliminary ruling on the following question: "Is the reference in Art. 11 (2) Reg. 44/01/EC to Art. 9 (1) b) Reg. 44/01/EC to be understood in the way that the injured person can bring an action in front of the court of the place where he/she is domiciled directly against the insurer, provided that such a direct action is admissible and that the insurer is domiciled within a Member State?"
the defendant had entered an appearance, the form should contain the date. According to the Amtsgericht Hamburg Article 44 should be amended. In the present form the service of the judgment and the res iudicata of the judgment are certificated. However, the information on the question as to whether the claimant has been served on time according to Art. 34 (2), is not sufficiently documented in the form. The Oberlandesgericht Düsseldorf reported practical problems arising from the use of use standard forms drafted individually by foreign courts that are not in line with those provided for by the annexes of the regulation.

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?

4 out of 17 courts reported that they do not have easy access (Landgericht Erfurt, Landgericht Leipzig, Landgericht Oldenburg, Landgerichte in Sachsen-Anhalt). One court did not have any experience (Oberlandesgericht Bremen). These answers indicate to some extent the insufficient IT equipment/infrastructure of German courts. Three courts state that the applicants often present translations on their own accord so that the problem does not occur (Landgericht Gera, Landgericht Marburg, a Landgericht of Baden-Württemberg). The other courts answered in the affirmative – partly referring to online databases (Oberlandesgericht Düsseldorf) or literature (Oberlandesgericht Hamm).

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?

The Oberlandesgericht Hamm reports problems regarding Polish titles on maintenance of children. The underlying reason seems to be the practice of Polish courts to decide on issues of paternity by default judgments (which were sometimes considered as contrary to public policy).26

2.16

How much time does it usually take 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 evaluation of the files at the Landgerichte Passau and Traunstein shows that only a few days elapse between the application and the decision when the defendant is served. Thus, the applicant/creditor is served with the execution clause within 1–2 weeks.

According to interviewed judges, applications for exequatur are granted within 1-2 days. However, when the applicant does not present all necessary documents (i.e. the foreign title and the standard form according to Article 54 and annex V to the Regulation), the proceeding may be delayed.

26 According to sec. 372a ZPO, the proceedings in paternity matters are strictly inquisitorial.
The answer of a responding law firm differs significantly from the results obtained in Passau and in Traunstein: According to this law firm, the exequatur proceedings take on average of about 6 months.

2.17

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

Only 3 out of 17 courts answered in the affirmative (District courts of Sachsen-Anhalt, Oberlandesgericht Cologne and Oberlandesgericht Düsseldorf). According to practice of the Oberlandesgericht Düsseldorf, delays are avoided because the court permits only undisputed objections. This case law is not in line with the wording of sec. 12 AVAG.27

According to the Oberlandesgericht Cologne, this occurs in particular in maintenance matters. So far, these problems could be dealt with without discussing the problem of § 12 AVAG – for instance by refusing the objection for not being sufficiently substantiated.

In the practice of the Landgericht Passau (2004/05), jurisdiction under Article 5 JR was challenged in 3 out of 50 cases: In two of these cases the jurisdiction based on Article 5 (1) JR was disputed: In one case (4 O 970/05) the defendant claimed that the place of delivery was not in the court’s district, but abroad. In another case (4 O 176/05) the defendant claimed the existence of a consumer contract. In a third case (3 O 348/05) an action for injunction had been filed to restrain the defendant from gathering information about the claimant. Here, the jurisdiction was based on Article 5 (3). Finally, the action was withdrawn since there was no risk that the defendant would repeat gathering information on the claimant.

27 However, sec. 12 AVAG is not in line with the Regulation. The issue is explained infra, questionnaire no. 3, question 1.7.
1. General Themes........................................................................................................................................27
   1.1 ......................................................................................................................................................27
   1.2 ......................................................................................................................................................27
   1.3 ......................................................................................................................................................28
      1.3.1 ..................................................................................................................................................28
      1.3.2 ..................................................................................................................................................29
   1.4 ......................................................................................................................................................30
   1.5 ......................................................................................................................................................30
   1.6 ......................................................................................................................................................32
   1.7 ......................................................................................................................................................33
   1.8 ......................................................................................................................................................41
2. Provisions of Regulation 44/2001/EC dealing with Jurisdiction.........................................................42
   2.1 ......................................................................................................................................................42
      2.1.1 ..................................................................................................................................................42
      2.1.2 ..................................................................................................................................................43
      2.1.3 ..................................................................................................................................................43
      2.1.4 ..................................................................................................................................................43
      2.1.5 ..................................................................................................................................................44
      2.1.6 ..................................................................................................................................................45
   2.2 ......................................................................................................................................................45
      2.2.1 ..................................................................................................................................................45
      2.2.2 ..................................................................................................................................................46
      2.2.3 ..................................................................................................................................................46
      2.2.4 ..................................................................................................................................................47
      2.2.5 ..................................................................................................................................................47
      2.2.6 ..................................................................................................................................................48
      2.2.7 ..................................................................................................................................................49
      2.2.8 ..................................................................................................................................................49
      2.2.9 ..................................................................................................................................................49
      2.2.10 ..............................................................................................................................................50

The following report is based mainly on the answers received by interviews and from the questionnaires. In addition, the national reporters have also analysed the published case law of German courts on the Judgment Regulation from 2002 to 2006.
2.2.11 ...........................................................................................................................................51
2.2.12 ...........................................................................................................................................51
2.2.13 ...........................................................................................................................................52
2.2.14 ...........................................................................................................................................52
2.2.15 ...........................................................................................................................................53
2.2.16 ...........................................................................................................................................53
2.2.17 ...........................................................................................................................................54
2.2.18 ...........................................................................................................................................54
2.2.19 ...........................................................................................................................................54
2.2.20 ...........................................................................................................................................55
2.2.21 ...........................................................................................................................................55
2.2.22 ...........................................................................................................................................55
2.2.23 ...........................................................................................................................................55
2.2.24 ...........................................................................................................................................56
2.2.25 ...........................................................................................................................................56
  2.2.25.1 ........................................................................................................................................56
  2.2.25.2 ........................................................................................................................................57
  2.2.25.3 ........................................................................................................................................57
  2.2.25.4 ........................................................................................................................................57
  2.2.25.5 ........................................................................................................................................58
2.2.26 ...........................................................................................................................................58
2.2.27 ...........................................................................................................................................58
  2.2.27.1 ........................................................................................................................................59
  2.2.27.2 ........................................................................................................................................59
  2.2.27.3 ........................................................................................................................................59
  2.2.27.4 ........................................................................................................................................59
  2.2.27.5 ........................................................................................................................................60
2.2.28 ...........................................................................................................................................60
3.  *Lis pendens* and Similar Proceedings .......................................................................................60
  3.1 ...............................................................................................................................................60
  3.2 ...............................................................................................................................................61
  3.3 ...............................................................................................................................................62
  3.4 ...............................................................................................................................................62
  3.5 ...............................................................................................................................................63
  3.6 ...............................................................................................................................................63
  3.7 ...............................................................................................................................................64
  3.8 ...............................................................................................................................................64
  3.9 ...............................................................................................................................................65
4. The Recognition and Enforcement of Judgments, Authentic Instruments and Court Settlements According to Regulation 44/2001/EC

4.1 ................................................................. .................................66
4.1.1 ................................................................. .................................66
4.1.2 ................................................................. .................................67
4.1.3 ................................................................. .................................68
4.1.4 ................................................................. .................................69
4.1.5 ................................................................. .................................69
4.1.6 ................................................................. .................................70
4.1.7 ................................................................. .................................70
4.1.8 ................................................................. .................................72
4.1.9 ................................................................. .................................72
4.1.10 ................................................................. .................................72
4.1.11 ................................................................. .................................73
4.1.12 ................................................................. .................................73
4.1.13 ................................................................. .................................73
4.2 ................................................................. .................................74
4.2.1 ................................................................. .................................74
4.2.2 ................................................................. .................................75
4.2.3 ................................................................. .................................75
4.2.4 ................................................................. .................................75
4.3 ................................................................. .................................75
4.3.1 ................................................................. .................................75
4.3.1.1 ................................................................. .................................76
4.3.1.2 ................................................................. .................................76
4.3.1.3 ................................................................. .................................76
4.3.1.4 ................................................................. .................................77
4.3.2 ................................................................. .................................77
4.3.2.1 ................................................................. .................................77
4.3.3.1 ................................................................. .................................77
5. Proposals for Improvements .................................................................77
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)?

German courts follow the line of case law of the ECJ. The autonomous interpretation is generally applied. In practice, however, there is still a clear trend to apply the public/private law distinction under domestic law (as a first step of the interpretation) and to verify the result according to the case law of the ECJ.

According to the answers received from the courts, judges do not see any practical problems related to the autonomous interpretation. Law firms interviewed did not report specific problems regarding the autonomous interpretation of Article 1 either.

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

In matters related to maintenance, German public authorities use the Regulation for the assertion of civil claims (especially private claims assigned to them), example: ECJ, 01/15/2004, Case C-433/01, Freistaat Bayern./Jan Blijdenstein, ECR 2004 I-981. However, the practice seems sparse. Most courts replied that public authorities did not often use the Regulation to assert claims against private persons. Only three courts answered this question affirmative. According to the Oberlandesgericht Nürnberg, public authorities assert claims against private persons in particular with regard to authentic instruments concerning maintenance obligations. If the respective public authority provides maintenance instead of the debtor, the public authority uses this authentic instrument for asserting its recourse claim.

The issue may become more difficult when separate public authorities (such as Chambers of Commerce or of Chambers of Lawyers) seek injunctions or damages from (foreign) professionals (often based on the assumption that the professional infringed his or her professional duties). Formally, these claims are based on the violation of competition law. While the so-called “private law enforcement” (claims of private parties for damages and injunctions) which are inspired by public interests is no problem, the enforcement of professional (or other duties) imposed by public law authorities in civil courts seem a problem, because the legal position of the public authority in the civil lawsuit is directly determined by (public) law. According to the case law of the ECJ, such authorisation of a public entity entails the non-commercial nature of a dispute and, accordingly, the non-applicability of the Regulation.

Recently, the Oberlandesgericht Köln ordered an injunction against several defendants from Austria and Cyprus who offered internet gambling to German consumers. The plaintiff, a corporation, was to 100% owned by the Federal State of North Rhine-Westphalia and was the concessionaire for lotto-gambling in that State. The lawsuit was based on competition law, the plaintiff alleged that the defendant violated the concession (and therefore secs. 3 and 8 of the German Act on Unlawful Competition), because they offered cross-border lotto gambling (via active web sites) to customers in North Rhine-Westphalia. The defendants relied on Articles 39 and 49 of the EC-Treaty. They did not address the applicability of the Regulation to the lawsuit which was in its essence based on the concession of the claimant

---

2 Private law enforcement has been largely advocated by the Green Paper of the EC-Commission on Damage Actions for Breach of EC Competition Rules, COM (2005) 672 final of Dec. 19, 2005. Recently, several actions seeking damage for the breach of competition law were filed in German courts, example: Landgericht Dortmund, 4/1/2004, IPRax 2005, 542.

directly derived from public (administrative) law. The *Oberlandesgericht Köln* did not address the issue either and allowed the injunction. This example shows that the Regulation is sometimes applied in the context of “private law enforcement”. Accordingly, the qualification of this type of litigation as a civil and commercial matter seems doubtful in the light of the case law of the *ECJ* (*Ruffer* and *Sonntag*).

1.3

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

Generally, the delimitation between the Regulation and other instruments must be effected in a systematic way. Before 2001, the delimitation between the application of the Regulation (and the Convention) resulted in a demarcation between the domestic law of the Member States and the Judgment Convention. Today, the delimitation is (often) effected between different EC-instruments. Accordingly, the case law of the *ECJ* on the scope of application of the Judgment Convention must be considered from the perspective of these developments, which have taken place in the meantime.

In particular:

1.3.1

The delineation to Regulation 2201/03/EC (concerning Article 1 (2) lit. a) Regulation 44/2001/EC)? Are there any problems with the assertion of claims concerning maintenance/living costs?

No case law on the delineation between the Regulation (EC) No. 44/2001 and the Regulation 2201/2203 has yet been published.

According to information obtained from the German Institute for Youth Human Services and Family Law (*Deutsches Institut für Jugendhilfe und Familienrecht* (*DIJuF*)), which is entrusted with the recovery of maintenance claims abroad by the German Youth Welfare Offices (*Jugendämtern*), the recovery of such claims is mainly effected under the Hague Convention on Maintenance claims of 1973. With the kind permission of the Institute, the national reporter got access to its records. The following results demonstrate the sparse application of Regulation (EC) No. 44/01/EC in cross-border maintenance proceedings:

In 2003, the Institute dealt with a total of 305 cases, 46 cases related to EC-Member States. The Judgment Regulation was applied in 3 cases, the Judgment Convention in 7 cases. Accordingly, the Hague Convention was applied in 36 cases. In 2004, the Institute dealt with a total of 272 cases, 98 cases related to EC-Member States. The Judgment Regulation was applied in 3 cases, the Judgment Convention in 3 cases. In 2005, the Institute dealt with a total of 286 cases, 104 cases related to EC-Member States. The Judgment Convention was applied in 15 cases, the Judgment Regulation in 13 cases. From January until May 1st, 2006, the Institute dealt with a total of 91 cases, 42 cases related to EC-Member States. The Judgment Regulation was applied in 5 cases, the Judgment Convention in 4 cases.


---


6 Recently, the *ECJ*, case C-104/03, *St. Paul Dairy./Unibel Exer BVBA*, addressed the delineation between Article 31 JR and Article 1 (2) Regulation (EC) No. 1206/01 and held that measures for preserving means of evidence were covered by the Evidence Regulation and not by Article 31 JR. This delimitation does not correspond to the heterogeneous situation in the Member States.
According to the Oberlandesgericht Nürnberg, no particular difficulties have arisen so far concerning the delineation of both legal instruments. Problems rather arise with regard to the delineation between maintenance claims and the matrimonial property regime.

1.3.2

The delineation to Regulation 1346/2000/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?

There is an ongoing discussion in case law and legal literature on the delineation between the two instruments, especially in the case of collective actions. The current state of affairs is demonstrated by the following examples:

The Oberlandesgericht Frankfurt recently (1/29/2006, ZInsO 2006, 715) held that the Regulation applied to avoidance proceedings (secs. 129 et seq. of the German Insolvency Act). The Court rejected the argument that the jurisdiction for the lawsuit should be based on Article 3 (1) of the Regulation (EC) No. 1346/00, which would entail a forum actoris favouring the administrator. The Court also rejected the predominant opinion in the legal literature (based on former case law of the Bundesgerichtshof) that the autonomous law of the ZPO should apply. The Court correctly stated that the avoidance claim of the administrator must be filed in the court competent according to Article 2 JR.

Previously, the Oberlandesgericht Köln held that a lawsuit of the creditors of a joint stock company against the founding partners based on the obvious undercapitalisation of this joint stock company could be claimed under the Judgment Regulation. As the claim was not derived from the Insolvency Act, but based on the general law of torts, the court held that Article 5 (3) JR of the Judgment Regulation was applicable (judgment of 5/14/2004, IHR 2005, 214).

As a result, it can be stated that German courts are now departing from the (restrictive) line adopted by the ECJ in Nadler./Gourdain. As the decision was given before the entry into force of Regulation (EC) No. 1346/00/EC, the current delineation between the instruments does not leave any room for the application of the domestic jurisdictional laws of the Member States in these fields. Accordingly, the scope of Article 1 (2) (b) must be construed more narrowly. A review (and a revision) of Gourdain by the ECJ would be welcome. The current situation is explained by Thole, ZIP, 2006, 1383.

Also one law firm reported practical problems regarding the delineation between these two regulations – the case was finally settled.

---

7 In some legal systems, the avoidance in insolvency proceedings has to be asserted before a court other than the court of origin. Before Regulation (EC) No. 44/2001 and Regulation (EC) No. 1346/2000 came into force, the proceeding was treated as one ruled by insolvency law, the jurisdiction of which was ascertained by national law. Today it is said that the rules of Regulation (EC) No. 44/2001 and Regulation (EC) No. 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 of 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 (EC) No. 44/2001? The same problem arises with actions concerning the liability of a liquidator. Do such problems arise in your country?

8 It seems advisable to add a specific head of jurisdiction for avoidance proceedings to Article 5 JR. The jurisdiction should be based in the Member State where the insolvency proceedings are pending. Such a provision would harmonise the jurisdictional provisions of both Regulations and would align the different solutions in the national procedural and insolvency laws.
1.4

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

No case law or specific information on this problem has been reported. It seems that the delineation of the ECJ in Gemeente Steenbergen./Baten (Case C-271/00) ECR 2002 I-10527 works well in the practice. According to the Oberlandesgericht Nürnberg Article 4 of the Regulation 1438/71/EC facilitates feasible solutions of the relevant cases.

1.5

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

1.5.1. The Exclusion of Arbitration, Article 1 (4) JR

1. Generally, German courts strictly respect the exclusion of arbitral matters. However, the scope of the exclusion is discussed in case law and legal literature. This shall be demonstrated by the following examples:

2. German courts apply the Regulation to the recognition of foreign decisions, which merged an arbitral award. Accordingly, the Oberlandesgericht Frankfurt/Main construed Article 1 (2) (d) narrowly in a judgment of 07/13/2005 (20 W 293/04). The court held that the Regulation applied to a foreign judgment, which merged an arbitral award – in particular if the foreign decision included, as in the case in question, a separate order.

Legal literature follows the same line: According to the dominant opinion, a foreign decision (also) based on an arbitral award is considered as a decision in terms of Article 32 – as long as a separate judgment is given see Rauscher/Mankowski, Article 32, para. 17 (with further references).

3. There is a consensus that provisional measures aimed at supporting parallel arbitral proceedings are available under the Regulation, ECJ, 11/17/1998, C-391/95, van Uden./Deco-Line, ECR 1998 I-7091, paras. 25 et seq. However, not much case law has been reported in this regard: The Oberlandesgericht Nürnberg, 11/30/2004, SchiedsVZ 2005, 50, held that pursuant to sec. 1033 ZPO an arbitration clause does not exclude the jurisdiction of State courts for interim protective measures. However, the Court established its jurisdiction by applying the pertinent provisions of the German ZPO. In the present case, the Oberlandesgericht applied sec. 937 para. 1 ZPO. This provision refers to the general provisions of the ZPO on jurisdiction (secs. 12 et seq. ZPO). In that case, the Oberlandesgericht Nürnberg relied on secs. 23 and 32 ZPO. The Court held, however, that its jurisdiction depended on the absence of a choice of court agreement. The court analysed the arbitration agreement and found the parties’ intention was to concentrate the jurisdiction for all matters related to the dispute in Switzerland, including interim measures of protection by agreeing on Switzerland as the place of arbitration and by submitting the dispute to Swiss law. The court applied sec. 38 ZPO to the jurisdiction clause. As the agreement was in writing, the formal requirements of sec. 38 (2) 2 ZPO were met. The court held that only the court at the place of arbitration or, alternatively, the arbitral tribunal already constituted at that time would be competent to grant the requested measures. This example shows that German courts do not apply the EU-instruments (in the present case the Lugano Convention) in ancillary proceedings, but refer to autonomous law. This practice is not in line with the case law of the ECJ, 11/17/1998, C-391/95, van Uden./Deco-Line, ECJR 1998 I-7091, n. 25 et seq. where the ECJ applied Article 24 of the Brussel Convention (now Article 31 of the Regulation) regarding interim measures related to arbitration proceedings.

9 Erroneously, the court did not apply Article 17 of the Lugano Convention – the arbitration took place in Geneva, Switzerland, see annotation Geimer, SchiedsVZ 2005, 51.
4. In legal literature, some authors criticise that the exclusion of arbitration and mediation proceedings from the Regulation may obstruct the effectiveness of arbitration within the European Judicial Area, because the recognition and enforcement of a decision under Article 32 et seq. JR works more smoothly than the recognition of arbitral awards under the New York Convention of 1958, see Gómes Jene, IPRax 2005, 84 et seq. Thus, in order to improve the procedural efficiency of arbitral awards, it seems advisable to offer the creditor a choice between Articles 38 et seq. JR and the New York Convention in proceedings for the recognition and enforcement of arbitral awards.\(^{10}\) Such a choice would be in line with the former German practice, which gave the creditor a choice between the different (bilateral) conventions on recognition and enforcement in order to improve the cross-border recovery of monetary claims.\(^{11}\)

Additional problems occur with regard to the recognition of foreign judgments on the validity of an arbitration clause. According to the pertinent case law, these judgments are not recognised under Articles 32 et seq. JR, due to the exclusion of arbitration in Article 1 (4).\(^{12}\) Therefore, the arbitration clause may be considered as valid in one Member State and as void in another resulting in conflicting judgments. At the same time, a judgment declaring an arbitral award void or ineffective is not recognised in other Member States.\(^{13}\) As a result, conflicting judgments (and enforcement measures) may impair the judicial predictability in the European Judicial Area. This current situation is not satisfactory. Therefore, it seems advisable to include these decisions in the scope of the Regulation and to restrict the exclusion in Article 1 (4).

However, this proposal (which was formulated by question no 1.5) was not largely supported by the reactions to the questionnaire: Most judges and lawyers preferred to maintain the current situation. For instance, the Oberlandesgericht Nürnberg regarded an extension to arbitration and mediation proceedings not necessary since their exclusion according to Article 1 (2) (d) had not led to any difficulties so far. However, a different opinion was expressed by the Oberlandesgericht Stuttgart, which proposed an extension to arbitration proceedings in order to simplify the current legal position determined by a vast number of international conventions.

5.1.2. The Judgments Regulation and Mediation

The relationship between the Judgment Regulation and ADR has not been discussed in Germany so far, despite the Draft of an EC-Directive on Mediation proposed by the Commission in 2004.\(^{14}\) However, this proposal does not explicitly address the relationship between the Regulation and Mediation. Article 5 of that Draft only imposes a duty on the Member States to ensure the enforcement of settlement agreements (as judgments or settlements). Nevertheless, it seems advisable to link Articles 32 and 58 of the Regulation to

\(^{10}\) This enlargement of the scope of the Regulation should be restricted to arbitral awards rendered by arbitral tribunals within the European Judicial Area.

\(^{11}\) Article VII of the New York Convention (1958) explicitly states that the Convention does not deprive any interested party of any right he may have to avail himself of an arbitral award in the way allowed by a concurring instrument. The European Regulation should be considered as such an instrument for the enforcement of arbitral awards rendered within the European Judicial Area.

\(^{12}\) Therefore, anti-suit injunctions enjoining a party from submitting the dispute to arbitration courts are (despite the ECJs holding in Turner v. Grovit) still admissible. Further, anti-suit injunctions enjoining a party from bringing a lawsuit in a (state) court in another Member State do not fall within Article 1 (2) (d) — even though anti-suit injunctions are in principle inadmissible within the European Judicial Area, Rauscher/Mankowski, Article 1 JR, 29 – 29a.

\(^{13}\) OLG Stuttgart, RIW 1988, 480.

the European instruments on ADR. Article 32 should apply when the settlement is confirmed by a court order (consent judgment), while Article 58 should apply when the agreement is notarised. However, it is not necessary to include an explicit provision to the Regulation. Rather it is sufficient to refer to the application of the Regulation with regard to settlements in a recital.

The reactions from the legal practice were that an extension of the Regulation to mediation would be undesirable: According to the information given by the courts, the idea of including arbitration proceedings in the instrument was met with scepticism. Most judges did not see any necessity to extend the scope of application of the Judgment Regulation to arbitration proceedings. The main reason for this attitude was the expectation that the extension of the Judgment Regulation would lead to complications. However, some judges did not see any problems regarding an extension of the scope of application to arbitration proceedings.

With regard to mediation proceedings, some judges stressed that German law did not provide for uniform rules on the enforcement of agreements concluded by mediation. The Oberlandesgericht Stuttgart emphasises that German law also does not provide for an exact definition of mediation or obligatory minimum standards. At present, it would be premature to include mediation proceedings to the Judgments Regulation.

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?

The protection of the defendant’s rights concerning jurisdiction is assured by Article 26 (1) and (3) which refers to Article 19 of the Service Regulation (Regulation (EC) No. 1348/00). According to these provisions, the court must declare on its own motion that it has no competence under the Regulation, even if a defendant – domiciled in another Member State – does not appear. The main aim of these provisions is to guarantee that the defendant receives the document instituting the proceedings in sufficient time in order to enable him to prepare a defence. According to information obtained from the judges of the Landgericht Karlsruhe, there are considerable difficulties with the application of Article 14 of the Service Regulation, because the forms are often completed insufficiently. Accordingly, it is difficult to ascertain whether the defendant was properly served with the document instituting the proceedings. However, specific case law on Article 26 has neither been reported nor been published.

The position of the defendant in the recognition proceedings has been considerably changed under the Regulation. Under Article 43, the defendant must appeal the decision on the declaration of enforceability. The grounds for the non-recognition of the foreign decision (Article s 34 and 35) are not reviewed by the first instance court (Article 41). In addition to this, the former defence of the defendant states that under Article 27 (2) JC the document instituting the proceedings was not properly and timely served and therefore no longer available. Under Article 34 (2), service is sufficient when the time limits enabled the defendant to prepare a proper defence. As a result, a defendant must appear before a foreign court in order to object the deficient service and to preserve his rights of defence.

The case law shows that German courts apply Article 34 (2) strictly in order to improve the free movement of enforceable titles within the European Judicial Area. For example the decision of the Oberlandesgericht Zweibrücken of 19 September 2005 – 3 W 132/05. Here the Court pointed out that the requirements of Article 34 (2) were only fulfilled if the irregularities in the service were so severe that the defendant was improperly precluded from arranging an effective legal defence.

However, a debtor could successfully challenge the recognition of a default judgment which was rendered by a Belgian court without respecting the prerequisites of Article 19 (b) of the Service Regulation, Oberlandesgericht Zweibrücken, 5/10/2005, IPRax 2006, 487, 488.
The Bundesgerichtshof did not apply the new regime to proceedings which had been instituted before 1 March 2002, judgment of 7/22/2004, IHR 2005, 43.

1.7

Are the rules of Articles 32–58 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?\(^{15}\)

1. The interfaces between the Regulation and the German procedural law are dealt by the AVAG\(^{16}\). When it entered into force in 1988, this Act provided a uniform procedure for the recognition and enforcement of foreign judgments under different international conventions (including the Judgment Convention). In 2002, when the Judgment Regulation entered into force, the Act was adapted to the new instrument, especially to the new regime on recognition (Article 38 et seq. JR).

The main provisions of the Act are set out below\(^{17}\):

Part 1. General

Chapter 1. Scope of application; definitions

Sec. 1. Scope of application.

1. This Act governs

   1. the implementation of the following international treaties (recognition and enforcement treaties):


   2. the implementation of the following European Community Regulations:

\(^{15}\) Example: In Germany, there is an obligation for the parties to be represented by a lawyer 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 (sec. 4 (2)).


\(^{17}\) Translation by Rützel/Wegen/Wilske (ed.), Commercial Dispute Resolution in Germany, Munich 2005, p. 264 et seq.


(2) The provisions of the Regulation referred to in sub-section (1) no. 2 are not affected by the implementing provisions of this Act because they constitute directly applicable European Community legislation. The provisions of the international treaties are not affected, either; this applies in particular to the provisions relating to
1. the scope in terms of subject matter,
2. the nature of judgments and other executory titles that can be recognized in Germany or accepted for enforcement,
3. the requirement that the judgments have res iudicata effect,
4. the nature of the documents to be presented in the proceedings, and
5. the grounds for refusing recognition or authorization of enforcement.

Sec. 2. Definitions.

For the purposes of this Act
1. member states shall mean the Member States of the European Union in which the Regulations referred to in sec. 1 (1) no. 2 apply; and
2. titles shall mean judgments, judicial settlements and public deeds to which the respective recognition and enforcement treaty or the respective Regulation to be implemented applies.

Chapter 2. Authorization of enforcement of foreign titles

Sec. 3. Jurisdiction.

(1) The regional court shall have exclusive jurisdiction to declare titles from another state enforceable.

(2) The court in whose district the party against whom enforcement is sought has his place of domicile or, if he is not domiciled in Germany, the court in whose district enforcement is to take place shall have exclusive local jurisdiction. The seat of a company or legal entity is equivalent to the place of domicile.

(3) The decision on an application for the issue of an enforcement clause shall be issued by the presiding judge of a chamber for civil matters.

Sec. 4. Application.

(1) A title that is executable in another state shall, on application, be authorized for enforcement by adding an enforcement clause.

(2) The application for the grant of an enforcement clause can be lodged in writing with the competent court or made orally for placement on record by the court registry.

(3) If, contrary to sec. 184 of the German Judicature Act, the application is not in German, the court may order the applicant to provide a translation of the application, the accuracy of which has been confirmed by a person authorized to do so
1. in a Member State of the European Union or in another signatory state to the Agreement on the European Economic Area, or
2. in a signatory state to the respective treaty on recognition and enforcement being implemented.

(4) Two duplicates must be added to the executed copy of the title to which the enforcement clause is to be added and to the translation, if any.
Sec. 5. Requirement of appointing authorized recipient for service.

(1) If the applicant has failed to name an authorized recipient for service in the application, all documents may be served on him by way of mailing until such time as he subsequently does so (sec. 184 (1) sentence 2, (2) of the German Code of Civil Procedure).

(2) Only a person domiciled in the judicial district of the court applied to may be appointed as authorized recipient for the purposes of sub-section (1). The court may allow the appointment of a person domiciled elsewhere in Germany.

(3) Sub-section (1) shall not apply if the applicant has appointed a lawyer admitted to practice before a German court or some other person to represent him for the purposes of the proceedings. The authorized representative who is not a lawyer admitted to practice before a German court must be domiciled in the judicial district of the court applied to; the court may dispense with this requirement if the authorized representative is domiciled elsewhere in Germany.

(4) sec. 31 of the Act of 9 March 2000 governing the Services of European Lawyers in Germany (Federal Law Gazette I, p.182) is not affected.

Sec. 6. Procedure.

(1) The court shall decide without hearing the party against whom enforcement is sought.

(2) The decision will be issued without an oral hearing. However, the court may decide to discuss the matter orally with the applicant or his authorized representative, if the applicant, respectively the authorized representative, agrees and such discussion serves to expedite the procedure.

(3) Representation by a lawyer is not required in the first instance.

Sec. 7. Enforceability of foreign titles in special cases.

(1) If, according to the contents of the title, enforcement is dependent on security being provided by the party applying for enforcement, on the expiration of a specific time limit or on the occurrence of some other event, or if the enforcement clause is being applied for in favour of a person other than the party applying for enforcement identified in the title or against a person other than the party against whom enforcement is sought identified therein, the question to what extent the authorization of enforcement is dependent on presentation of evidence to show that certain special requirements are met, or whether the title is enforceable in favor of or against said other person, shall be decided according to the law of that state in which the title was issued. Evidence shall be produced in the form of documents, unless the facts are obvious for the court.

(2) Where evidence cannot be produced in the form of documents, the party against whom enforcement is sought shall, upon motion by the party applying for enforcement, be heard. In such cases all means of evidence shall be permitted. The court may also order an oral hearing.

Sec. 8. Decision.

(1) If the enforcement of the title is to be authorized, the court shall issue an order to the effect that an enforcement clause be added to the title. In such court order, the obligation to be enforced shall be set forth in the German language. As grounds for the court order, it will regularly suffice to refer to the European Community Regulation to be implemented or the treaty on recognition and enforcement to be implemented, and to the documents presented by the applicant. sec. 788 of the German Code of Civil Procedure shall be applied mutatis mutandis to the costs of the proceedings.

(2) Inadmissible or unfounded applications shall be refused by the court by way of a court order providing the grounds. The applicant shall be ordered to pay the costs.

Sec. 9. Enforcement clause.

(1) If a court order is issued in accordance with sec. 8 (1), the registrar of the court shall issue the enforcement clause in the following form:

"Enforcement clause in accordance with sec. 4 of the Recognition and Enforcement Implementation Act of 19 February 2001 (Federal Law Gazette I, p.288). In accordance with the court order of ........................................... (details of the court and the order), the enforcement of ........................................ (description of title) in favor of ........................................ (name of party applying for enforcement) against ........................................ (name of party against whom enforcement is sought) is permitted."
The obligation to be enforced is as follows: .......................... (details, in the German language, of the obligation incumbent on the party against whom enforcement is sought under the foreign title; wording to be taken from the court order pursuant to sec. 8 (1)).

Until such time as the creditor presents a judicial order or a certificate indicating that enforcement may take place without restriction, enforcement measures shall be restricted to protective measures.”

If the title orders payment of money, the following must be added to the enforcement clause:

“As long as enforcement measures are restricted to protective measures, the debtor may prevent enforcement by providing security in the amount of .......................... (amount which the party applying for enforcement is allowed to enforce).”

(2) Where enforcement is admitted only for one or several of the claims adjudicated by the foreign judgment or specified in another form of foreign title, or only for a part of the subject matter of the obligation, the enforcement clause shall be designated as a “partial enforcement clause in accordance with sec. 4 of the Recognition and Enforcement Implementation Act of 19 February 2001 (Federal Law Gazette I, p. 288).

(3) The registrar of the court must sign the enforcement clause and affix the court seal. The enforcement clause shall either be added to the executed copy of the title itself or written on a separate page, to be joined to the title. If the title has been translated, the translation must be joined to the executed copy.

Sec. 10. Announcement of decision.

(1) In cases covered by sec. 8 (1), a certified copy of the decision, and a certified copy each of the title bearing the enforcement clause and, where applicable, of the translation of the title, as well as of the documents referred to pursuant to sec. 8 (1) third sentence, shall be served ex officio on the party against whom enforcement is sought.

(2) If the documents have to be served on the party against whom enforcement is sought abroad or by means of a public announcement, and if the court regards the time limit for miscellaneous appeal under sec. 11 (3) first sentence to be insufficient, then it shall determine a longer time limit for miscellaneous appeal in the order pursuant to sec. 8 (1), or subsequently in a special order which will be issued without an oral hearing. The above is without prejudice to the provisions concerning the commencement of the time limit for miscellaneous appeal.

(3) The applicant shall receive a certified copy of the order pursuant to sec. 8 and, in cases that come under sec. 8 (1), also the executed copy of the title with the enforcement clause, and a certificate confirming that service has been effected. In cases that come under sec. 8 (2), the time limit set for lodging miscellaneous appeal shall be noted on the certificate confirming that service has been effected.

Chapter 3. Miscellaneous appeal, action to challenge enforcement

Sec. 11. Filing of miscellaneous appeal; time limit for miscellaneous appeal.

(1) A miscellaneous appeal against the decision issued in the first instance on the application for grant of an enforcement clause must be lodged with the court of miscellaneous appeal either by filing a written statement of miscellaneous appeal or by having an oral statement placed on record by the court registry. The court of miscellaneous appeal is the Higher Regional Court. The number of copies required for service must be attached to the statement of miscellaneous appeal.

(2) If the miscellaneous appeal is filed with the court of first instance instead of the court of miscellaneous appeal, it will still be admissible; the miscellaneous appeal shall be referred to the court of miscellaneous appeal ex officio without delay.

(3) The miscellaneous appeal of the party against whom enforcement is sought against the authorization of enforcement shall be filed within one month or, in case of sec. 10 (2) first sentence, within the longer time limit determined in accordance with that provision. The time limit for miscellaneous appeal commences upon service in accordance with sec. 10 (1). It is a statutory time limit.

(4) The miscellaneous appeal shall be served on the appellee ex officio.
Sec. 12. Objections against the claim to be enforced in miscellaneous appeal proceedings.

(1) In the miscellaneous appeal directed against the authorization of enforcement of a judgment, the party against whom enforcement is sought may also raise objections against the claim itself insofar as the reasons on which they are based came about after the judgment was issued.

(2) In a miscellaneous appeal directed against the authorization of enforcement of a court settlement or a public document, the party against whom enforcement is sought may raise objections against the claim itself regardless of the restriction set forth in sub-section (1) above.

Sec. 13. Procedure and decision on the miscellaneous appeal.

(1) The court of miscellaneous appeal shall decide by way of court order. Such court order must provide grounds and may be issued without an oral hearing. The appellee shall be heard before the decision is issued.

(2) As long as no oral hearing has been ordered, the parties may lodge applications and statements with the court registry to be placed on record. If an oral hearing is ordered, sec. 215 of the German Code of Civil Procedure shall apply as regards summons.

(3) A full and complete executed copy of the court order must be served ex officio on the party applying for enforcement and the party against whom enforcement is sought also if the court order has been pronounced.

(4) If enforcement of the title is to be authorized for the first time in accordance with the order of the court of miscellaneous appeal, the registrar of the court of miscellaneous appeal shall issue the enforcement clause. sec. 8 (1) second and fourth sentence, sec. 9 and sec. 10 (1) and (3) first sentence shall be applied mutatis mutandis. An additional clause to the effect that enforcement measures shall be restricted to protective measures shall only be included if the court of miscellaneous appeal has issued an order in accordance with this Act (sec. 22 (2), sec. 40 (1) no. 1 or sec. 45 (1) no. 1). How the additional clause is worded depends on how the order is worded.


(1) If enforcement of a title is authorized, the party against whom enforcement is sought may raise objections against the claim itself in proceedings under sec. 767 of the German Code of Civil Procedure, if the reasons on which his objections are based only arose

1. after expiration of the time limit within which he could have lodged a miscellaneous appeal, or,

2. if the miscellaneous appeal has been lodged, after termination of such proceedings.

(2) Actions under sec. 767 of the German Code of Civil Procedure must be lodged with the court that ruled on the application for issuance of the enforcement clause. If the action relates to a title concerning an obligation to pay maintenance, the family court shall have competence; local jurisdiction shall be determined by reference to the provisions of the German Code of Civil Procedure on maintenance matters.

Chapter 4. Miscellaneous appeal on points of law

Sec. 15. Admissibility and time limit.

(1) The order of the court of miscellaneous appeal shall be subject to miscellaneous appeal on points of law according to sec. 574 (1) no.1, (2) of the Code of Civil Procedure.

(2) The miscellaneous appeal on points of law must be lodged within one month.

(3) The time limit for filing a miscellaneous appeal on points of law is a statutory time limit and commences upon service of the court order (sec. 13 (3)).

Sec. 16. Filing and grounds.

(1) The miscellaneous appeal on points of law shall be lodged by filing the written statement of miscellaneous appeal with the Federal Court of Justice.

(2) The grounds for the miscellaneous appeal on points of law must be provided. §575 (2) through (4) of the German Code of Civil Procedure shall be applied mutatis mutandis. To the extent that the miscellaneous appeal on points of law is based on the fact that the court of miscellaneous appeal deviated from a ruling of the European Court of Justice, the ruling from which the appealed court order deviates must be identified.
(3) An executed or certified copy of the court order against which the miscellaneous appeal on points of law is directed shall be filed together with the written statement of such miscellaneous appeal.

Sec. 17. Procedure and decision.

(1) The Federal Court of Justice may only review whether the court order is based on a violation of European Community law, of a recognition and enforcement treaty, other Federal law or some other regulation the scope of which extends beyond the district of a Higher Regional Court. The Federal Court of Justice may not review whether the court wrongly assumed that it had local jurisdiction.

(2) The Federal Court of justice may rule on the miscellaneous appeal on points of law without a hearing. sec. 574 (4), sec. 576 (3) and sec. 577 of the Code of Civil Procedure shall apply mutatis mutandis to the proceedings for the miscellaneous appeal on points of law.

(3) Where enforcement of the title is first authorized by the Federal Court of Justice, the registrar of said court shall issue the enforcement clause. sec. 8 (1) second and fourth sentence, sec. 9 and sec. 10 (1) and (3) first sentence shall apply mutatis mutandis. An additional clause regarding the restriction on enforcement shall not apply.

Chapter 5. Restriction of enforcement to protective measures, and unrestricted continuation of enforcement

Sec. 18. Restriction by law.

As long as the time limit for filing a miscellaneous appeal is still running and as long as the miscellaneous appeal has not yet been adjudged, enforcement shall be restricted to protective measures.

Sec. 19. Verification of restriction.

If the party against whom enforcement is sought wishes to object that the requirement under the European Community Regulation to be implemented, the recognition and enforcement treaty to be implemented, under §18 of this Act or under an order issued on the basis of this Act (sec. 22 (2), sec. sec. 40, 45), i.e. that enforcement be restricted to protective measures, is not being complied with, or if the party applying for enforcement wishes to object that a particular enforcement measure is reconcilable with this restriction, such objections shall be asserted by way of a special motion in accordance with sec. 766 of the German Code of Civil Procedure filed with the court competent for enforcement (sec. 764 of the German Code of Civil Procedure).

Sec. 20 Security to be provided by party against whom enforcement is sought.

(1) As long as enforcement of a title ordering payment of money may not go beyond protective measures, the party against whom enforcement is sought is entitled to avert enforcement by providing security in the amount of the sum in relation to which the party applying for enforcement is entitled to enforce the title.

(2) Enforcement shall be ceased and enforcement measures already taken reversed if the party against whom enforcement is sought produces a public document evidencing provision of the security necessary to avert enforcement.

Sec. 21. Auction of movables.

Where a movable object has been garnished and enforcement is restricted to protective measures, the court competent for enforcing the title may order upon application that the object be auctioned and the proceeds deposited, if the object is exposed to the risk of a considerable loss in value or if its safekeeping would incur unreasonable expenses.

Sec. 22. Unrestricted continuation of enforcement; special court orders.

(1) If the court of miscellaneous appeal rejects the miscellaneous appeal of the party against whom enforcement is sought against authorization of enforcement or if it authorizes the enforcement in response to the miscellaneous appeal of the party applying for enforcement, then enforcement is no longer restricted to protective measures.

(2) Upon application by the party against whom enforcement is sought, the court of miscellaneous appeal may order that until expiration of the time limit for lodging a miscellaneous appeal on points of law (sec. 15) or until a decision has been handed down on said miscellaneous appeal, enforcement may not go beyond protective measures, or - if so - only against provision of security. The order may only be issued if it is credibly substantiated that a more extensive
enforcement would cause irreparable detriment to the party against whom enforcement is sought. sec. 713 of the German Code of Civil Procedure shall be applied mutatis mutandis.

(3) If a miscellaneous appeal on points of law is lodged, the Federal Court of Justice may issue an order in accordance with sub-section (2) upon application by the party against whom enforcement is sought. Upon application by the party applying for enforcement, the Federal Court of Justice may modify or reverse an order issued by the court of miscellaneous appeal in accordance with sub-section (2).

Sec. 23. Unrestricted continuation of enforcement authorized by the court of first instance.

(1) Enforcement of a title to which the registrar of the court of first instance has added an enforcement clause shall be continued beyond protective measures upon application by the party applying for enforcement, if certification by the registrar of said court is presented confirming that enforcement may be effected without restriction.

(2) Said certification shall be issued to the party applying for enforcement upon request,

1. if the party against whom enforcement is sought has not filed a statement of miscellaneous appeal within the time limit for lodging a miscellaneous appeal,

2. if the court of miscellaneous appeal has dismissed the miscellaneous appeal of the party against whom enforcement is sought and has not issued an order in accordance with sec. 22 (2),

3. if the Federal Court of Justice has reversed the order issued by the court of miscellaneous appeal in accordance with sec. 22 (2) (sec. 22 (3) second sentence), or

4. if the Federal Court of Justice has granted admission for the title to be enforced.

(3) Even if enforcement is restricted to protective measures, the enforcement of a title must cease as soon as an order of the court of miscellaneous appeal stating that admission for the title to be enforced is refused is pronounced or served.

Sec. 24. Unrestricted continuation of enforcement authorized by the court of miscellaneous appeal.

(1) Enforcement of a title to which the registrar of the court of miscellaneous appeal has added an enforcement clause with a supplement to the effect that enforcement is restricted to protective measures in accordance with the order issued by the court (sec. 13 (4), third sentence) shall be continued beyond protective measures upon application by the party applying for enforcement, if certification by the registrar of said court is presented confirming that enforcement may be made without restriction.

(2) The certification shall be issued to the party applying for enforcement upon his application,

1. if the party against whom enforcement is sought has not lodged a statement of miscellaneous appeal by the expiration of the time limit for filing a miscellaneous appeal on points of law (sec. 15 (2)),

2. if the Federal Court of Justice has set aside the order of the court of miscellaneous appeal in accordance with sec. 22 (2) (sec. 22 (3) second sentence), or

3. if the Federal Court of Justice has dismissed the miscellaneous appeal on points of law of a party against whom enforcement is sought.

Chapter 6. Determination of recognition of a decision issued by a foreign court

Sec. 25. Procedure and decision on the subject matter of the case.

(1) sec. 3-6, 8 (2), sec. 10-12, sec. 13 (1)-(3), sec. 15 and 16, as well as sec. 17 (1)-(3) shall be applied mutatis mutandis to the procedure for determination of whether a decision issued by a foreign state is to be recognized.

(2) If the application for determination is well-founded, the court shall rule that the decision is to be recognized.

Sec. 26. Decision on costs.

In cases covered by sec. 25 (2), the opponent shall be ordered to pay the costs. The opponent may limit the miscellaneous appeal (sec. 11) solely to the decision on the costs. In this case the applicant shall be ordered to pay the costs, provided the opponent did not give cause for the application for determination on account of his conduct.
Chapter 7. Setting aside or modification of decisions on authorization of enforcement or recognition

Sec. 27. Procedure following the setting aside or modification of the title declared enforceable in the country of origin.

(1) If a title is set aside or modified in the country in which it was made and if the party against whom enforcement is sought can no longer assert this fact in the procedure for authorization of enforcement, it may lodge an application for the setting aside or modification of the admission in a special procedure.

(2) The court that decided on the application for the issuance of an enforcement clause in the first instance shall have exclusive jurisdiction to rule on said application.

(3) The application may be lodged with the court in writing or by placing it on record with the court registry. The court may decide on the application without an oral hearing. The party applying for enforcement shall be heard before a decision is taken in the form of a court order. sec. 13 (2) and (3) shall apply mutatis mutandis.

(4) The court order is subject to miscellaneous appeal in accordance with sec. 567 to 577 of the Code of Civil Procedure. The statutory time limit within which such immediate miscellaneous appeal must be filed is one month.

(5) sec. 769 and 770 of the Code of Civil Procedure shall be applied mutatis mutandis to cessation of enforcement and cancellation of enforcement measures already taken. An enforcement measure may be cancelled without provision of security.

Sec. 28. Damages for unwarranted enforcement.

(1) If the authorization of enforcement is cancelled or modified in response to the miscellaneous appeal (sec. 11) or the miscellaneous appeal on points of law (sec. 15), the party applying for enforcement is obliged to compensate the party against whom enforcement is sought for damage the latter incurred as a result of enforcement of the title or of having to pay to avert enforcement. The same shall apply if the authorization of enforcement is cancelled or modified in accordance with sec. 27 insofar as, at the time when the enforcement was admitted, the decision authorized for enforcement was still appealable by regular means of appeal under the law of the country in which it was issued.

(2) The court that decided on the application to add an enforcement clause to the title in the first instance shall have exclusive jurisdiction for claims for damages.

Sec. 29. Setting aside or modification of decisions of foreign courts that have been recognized.

If the decision is cancelled or modified in the country in which it was issued and if the person benefiting from such setting aside/modification is no longer able to assert this fact in the proceedings concerning the application for determination of recognition (sec. 25), sec. 27 (1)-(4) shall apply mutatis mutandis.

Part 2. Special clauses


Sec. 55. Derogations from provisions in the general section; supplementary provisions.

Sec. 56. Certifications of domestic titles.

2. At present, there is a broad discussion whether sec. 12 AVAG is compatible with Article 45 JR. According to sec. 12 AVAG, the debtor may raise objections against the material claim in the appeal proceedings against the recognition of the foreign decision. Some authors

18 Accordingly, the debtor may declare that he has paid, he may set off against the judgment and he may assert that the claim has been assigned to a third party.
expressed doubts that the admission of these objections might impair the functioning of the exequatur proceedings and that, as a rule, these objections should be heard by the first court, which rendered the decision. The contrary opinion argues that the recognition and the enforcement of the foreign decision are not impaired, because the debtor may object to the foreign judgment under the parallel provision of the ZPO (sec. 767).

The case law takes a middle course: Most of the courts admitted objections based on undisputed facts or on uncontested evidence. This question has been touched upon in a decision of the Oberlandesgericht Frankfurt/Main (07/13/2005 – 20 W 293/04), whereas it could be left open. The Oberlandesgericht Düsseldorf, 03/01/2005 – 3 W 335/04: held that sec. 12 AVAG was applicable as far as an uncontested objection was concerned. The Oberlandesgericht Köln, decision of 06/04/2004 – 16 W 7/04 (IHR 2005, 216) and decision of 11/17/2004 – 16 W 31/04 held that undisputed objections against the claim could be heard in the appeal proceedings under Article 45. The Oberlandesgericht Stuttgart, however, points out that Article 45 and its ban on the assertion of objections against the material claim is not easy to understand for an average citizen. With regard to the contested claim, the enforcement is often regarded as unjust. The practical experience of the court is that material objections are frequently raised due to the lawyer’s lack of knowledge.

The Oberlandesgericht Oldenburg held in a decision of 03/29/2006 (9 W 6/06) that sec. 12 AVAG could not be applied within the scope of Article 45. Same opinion: Oberlandesgericht Koblenz (04/05/2004 – 11 UF 43/04).

Apart from the discussion whether sec. 12 AVAG is compatible with Article 45 JR, the Articles 32 to 58 are – at least according to a statement of the Oberlandesgericht Nürnberg – regarded to be in line with the AVAG. According to the Court there remains – despite the fact that the main source is the Regulation itself – a relatively broad and independent scope of application for the AVAG. Further, it is pointed out that there are no differences between the AVAG and the ZPO.

1.8

Is the meaning of these conventions in relation between the Member States reduced by the application of Article 71 of Regulation 44/2001/EC?

1.8.1. Since the decision of the ECJ in The Tatry (Case C-406/92, [1994] ECR I-5439) it is settled case-law that specialised conventions prevail over the rules of the Regulation. According to the answers obtained from the German courts, a continuing significance of bi- and multilateral conventions (for instance Lugano Convention, Judgment Convention) can be assumed mostly for older cases outside the scope of the Judgement Regulation (Article 70 (2)) and for cases in relation to Denmark. Further, as the Oberlandesgericht Nürnberg points out, conventions are – according to Article 70 (1) – still of significance, as far as they deal with questions which are out of the Regulation’s material scope of application. Theses are for instance conventions on the recognition and enforcement of judgments in matrimonial property regime matters and succession. Further, the Hague Maintenance Convention is regarded to be still relevant. The case-law of the ECJ in this field is strictly applied by the German practice and shall be demonstrated by the following examples:

1.8.2. Maintenance Claims: Information obtained from the “German Institute for Youth Human Services and Family Law” (Deutsches Institut für Jugendhilfe und Familienrecht (“DIJuF”)) which is entrusted by the German Youth Welfare Offices (Jugendämter) for the recovery of maintenance claims abroad, clearly demonstrates that the recovery of such claims is mainly effected under the Hague Convention on Maintenance claims of 1973. Detailed figures are documented supra at 1.3.1.

According to a decision of the Oberladdesgericht München (7 June 2004 – 25 W 2814/03) the applicant may freely choose between the Hague Maintenance Convention 1973 and the Judgment Regulation.
1.8.3. Apart from Conventions which are still of significance according to Article 70, there are other international instruments which are given priority according to Article 71. These are for instance the Hague Maintenance Conventions of 1958 and 1973 as well the Convention on the Contract for the Carriage of the International Goods by Road (CMR). There are several decisions, which address the relationship between the Regulation and the CMR. Most of them deal with pendency under Article 21 JC (= Article 27JR). The Bundesgerichtshof (11/20/2003, Transportrecht 2004, 302) held that Articles 26 and 27 JR also applied to concurrent lawsuits under the CMR and under the Regulation. This case law is in line with the decision of the ECJ in the case C-148/03 Nuremberger Transportversicherungs AG/Protbridge, ECR 2004 I-10327.

2. Provisions of Regulation 44/2001/EC dealing with Jurisdiction

2.1 General Issues

The Bundesgerichtshof recently referred to the ECJ the interpretation of Article 11 (2) and the reference to Article 9 (1) (b). The BGH asked the ECJ whether the aggrieved person can file a direct action against the insurer in the court of his domicile (BGH, 9/26/2006 - VI ZR 200/05)\(^\text{19}\). According to the wording of Articles 9 and 11, only the contractual party may sue the insurer at his domicile. The Bundesgerichtshof relied on the recital no. 16 a) of Directive EC 14/2005,\(^\text{20}\) which explicitly states that the victim of a traffic accident may bring a lawsuit against the insurer in the courts at his domicile. Accordingly, the Bundesgerichtshof held that the Regulation had to be interpreted in the context of new Community instrument and, accordingly, Article 9 should be broadly interpreted in the light of the recital 16 a) of Directive EC 14/2005.

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

In general it does. This is affirmed, e.g., by the Oberlandesgericht Nürnberg. However, this does not – according the Court - preclude doubts in singular instances as to how a certain subject matter has to be classified. This is in particular true concerning the grounds of jurisdiction for contractual matters and tort. Further the revision of Article 5 (1) has led to some uncertainty about the application of the autonomous definition of the place of performance in cases where the parties agreed on Incoterms (FOB- and similar clauses). The Oberlandesgericht Stuttgart also sees the problem of uncertain autonomous definitions which are often derived from a national point of view.

Law firms answered contradictory. Partly it has been stated, that this aim is only fulfilled to a certain extent and that the systems was too complicated. On the other side the question has been answered affirmative.

Courts: In general courts answered this question affirmative. Only one court pointed out that there are some interpretation problems with regard to Article 5 (1) (b) in the case of a sale by delivery to a place other than the place of performance and in case of a payment by bank transfer.

\(^\text{19}\) The same question arose in a case at the Oberlandesgericht Brandenburg (9/13/2006 - 12 W 35/06).

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?

Most klaw firms gave positive replies – problems were reported with regard to Article 5 (1) (b) and Article 5 (3). All courts gave affirmative answers. The Oberlandesgericht Nürnberg stresses approvingly the fact that courts do follow the ECJ’s case law according to which the grounds of jurisdiction provided for by Article 5 have to be regarded as exclusive grounds of jurisdiction.

2.1.3

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

Practical cases show a need for (non exclusive) jurisdiction based on the situs of movable assets.

The Oberlandesgericht Stuttgart discusses – in the context of a contract for the performance of a continuing obligation (i.e. ongoing counselling, administration of assets) – a uniform ground of jurisdiction at the place where the party who has to perform the service was domiciled when the contract was set up. The provision of Article 5 (1) (a) JR seemed to request existing claims. This could be a problem when the party changes domicile in the course of the performance of the contract.

According to a law firm this is in practice only possible if the defendant has his residence in Germany.

Courts: One court regards Article 5 (1) JR as problematic since – if Article 5 (1) (b) JR is not relevant – it has to be asked, according to the ECJ, what is the obligation in question. This would lead to the result that it is rather difficult to determine jurisdiction.

Another court pointed out problems, which arise with regard to patent law. According to the Bundesgerichtshof, claims for compensation cannot be based on the jurisdictional ground of tort. As a consequence of this jurisprudence, the defendant has to sue at different places regarding an injunction relief on the one hand and a claim for compensation on the other hand.

All other courts answered this question affirmative. In particular the Oberlandesgericht Nürnberg regards the catalogue as sufficient and states that an extension would not be desirable since this would further weaken the actor sequitur forum rei principle. Further, the Court assumes that delineation problems would increase in case of an extension.

2.1.4

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

It does. However, there is only little complaint in this respect.

The Oberlandesgericht Stuttgart negates a problem regarding Article 3 (2) and Article 4 (2) in connection with sec. 23 ZPO. The German provision can be applied at the disadvantage of a third state member – yet, this discrimination is justified by the respect for the legal systems in the EU Member States. In third States, such a respect does not exist to a comparable extent.

Law firms answered this question differently: One law firms sees discriminations of parties from third states, another one does not see any discriminations.

This question has been answered negative by courts.

According to the Oberlandesgericht Nürnberg, Article 4 (2) is of no significance in Germany since Article 4 (1) refers to sec. 23 ZPO and this provision did not distinguish between home and foreign claimants.
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 claimant that there is no derogation?

Ex officio application: Exclusive jurisdiction of another forum has to be respected by every court on its own motion. Whilst the general principle of presentation of facts by the parties applies, the court is obliged to ask for further facts or evidence if the facts and the evidence submitted are insufficient. According to German general procedural principles, jurisdiction is a necessary requirement for the proceedings. The court must therefore examine its jurisdiction ex officio. However, Article 24 considerably limits the scope of this duty. Article 26 is generally respected. Choice of forum clauses are respected by the courts ex officio if the factual representations made by the parties show that they have validly agreed on such a clause.

According to the Oberlandesgericht Stuttgart, it is very likely that Article 25 is accidentally ignored if the defendant does not contest jurisdiction.

Moreover, the Court explains that Article 25 also covers the unlisted grounds of jurisdiction – but Article 24 only applies if the defendant does not get involved in the proceeding (either being absent or not contesting jurisdiction). In the case of default, the court examines the existence of a choice of court clause (Article 23) ex officio. The plaintiff has to present the respective documents. The reporters received i.a. the following statement by the Oberlandesgericht Stuttgart, which quite correctly demonstrates the general practice:

The court states that courts – as far as ascertainable – adhere to the wording of Articles 25 and 26. It stresses the different scopes of application of both provisions: Article 25 is referred to if the defendant participates in the proceeding. It includes only exclusive jurisdiction according to Article 22 – not jurisdiction based on a jurisdiction agreement in terms of Article 23. In contrast, Article 26 deals with cases where the defendant does not participate in the proceeding. Since here entering an appearance does not come into consideration, it has to be examined whether the court’s jurisdiction can be “derived from the provisions of this Regulation”.

According to the Oberlandesgericht Nürnberg “examination ex officio” means that courts examine ex officio whether they have jurisdiction and inform the parties in case they have doubts about it. However, courts do not investigate the necessary facts and pieces of evidence since such an investigation is unknown to German civil litigation. The onus of procuring the relevant facts is on the parties. Therefore, the court will only ask the claimant to produce a jurisdiction agreement if Article 26 is applicable. However, a court examining that there is no derogation agreement will order such a submission only in exceptional cases since such an order would require that the claimant’s assertion provides an indication for the existence of such a derogation agreement – which will hardly be the case. Examination ex officio does not mean that the court investigates without cause in all directions.

According to one law firm the lawyers take part in the proceedings concerning Articles 25 and 26.

Courts: One court pointed out that it is not examined ex officio whether an agreement excluding the jurisdiction of an otherwise competent court exists.

Another court stated that the international jurisdiction is examined ex officio and that doubts are discussed with the parties.
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 complexity of jurisdictional issues depends on the facts of each case. In most cases, jurisdiction does not raise complicated issues. This view is affirmed by the Oberlandesgericht Nürnberg, which states that the examination of jurisdiction is neither costly nor time-consuming. The situation is different in more complex cases, e.g., multi-party suits or cases in which jurisdiction is influenced by a complex scheme of contractual relations. According to public regulation, there are no special courts’ or lawyers’ fees for the determination of jurisdiction. Lawyers may, however, agree with their clients on higher fees than those provided for by public regulation, e.g., by stipulating an hourly billing rate. In general, determination of jurisdiction does not make the litigation more expensive. However, a different situation with regard to costs may arise — as the Oberlandesgericht Nürnberg explains — if the ECJ is requested to give a preliminary ruling. Then extraordinary fees may incur. Further, additional cost may arise if — in the context of examining jurisdiction — the investigation of foreign law is necessary. However, such questions do arise more rarely under the Regulation than under the Judgment Convention.

In most cases, jurisdictional issues are decided in the final judgement. This is also set forth by the Oberlandesgericht Nürnberg, which points out that there have been no complaints so far. Usually, a final judgment of a court of first instance is given within a period of 6–9 months. However, the court, on its discretion, may order a preliminary hearing on the admissibility of the proceedings and give an interim judgment on the admissibility of the lawsuit. This judgment is fully appealable (sec. 280 ZPO).

According to the information obtained from the lawfirms, the examination of the jurisdiction is not expensive, but time-consuming (from 2–14 months). The possibility of giving an interim judgment on the jurisdiction after a separate hearing on jurisdictional issues was considered as an appropriate procedural tool for avoiding lengthy proceedings.

Partly the courts answered that the examination of the issue of jurisdiction is not expensive and not time-consuming. However, some courts replied that the examination is time-consuming. Further, it has been stated that there are no separate fees. It takes about 1–3 months to obtain a final decision on jurisdiction.

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?

Courts regularly refer to the definition of domicile in sec. 7 German Civil Code (Bürgerliches Gesetzbuch (BGB)). Under German law, someone has his domicile where he is residing with the intention to stay permanently. According to the Oberlandesgericht Nürnberg, the determination of domicile is unproblematic. As German civil law adopted a subjective approach (placing much emphasis on the intention of the person concerned), it is possible to have several domiciles under German law. Such a question of several domiciles will soon be decided by the Oberlandesgericht Stuttgart. The special problem is that one domicile is situated in a Non Member State. Therefore, it is questionable whether sec. 23 ZPO — an exorbitant ground of jurisdiction according to Article 4 (2) — can be applied or whether the
exclusion of sec. 23 ZPO in Article 3 (2) also covers non member state domiciles in such a case.

One court pointed out the situation if the matter in dispute is a foreign patent: The court has to decide upon the question whether an infringement has occurred according to the (foreign) lex causae of the patent. Therefore, it is necessary in many cases to obtain an expert opinion on foreign law. A special problem arises, if jurisdiction has been based on Article 2 and the foreign law allows the objection of the patent's nullity. In this case the question arises whether the jurisdiction based on Article 2 has to be negated due to the fact that Article 22 (4) establishes an exclusive jurisdiction for these cases. This question is contentious: According to a judgment of the Landgericht Düsseldorf of 05/31/2001 (InstGE 1, 261 – Schwungrad), the original jurisdiction remains unchanged. However, the Oberlandesgericht Düsseldorf referred this question to the ECJ for a preliminary ruling (decision of 12/5/2002 - InstGE 3, 80 – Torsionsdämpfer = GRUR Int. 2003, 1030).

2.2.2

Does Article 60 with its alternative connecting factors appear feasible?

After the ECJ decisions in Centros, Überseering and Inspire Art, the number of foreign law companies having their statutory seat abroad whereas all activities are concentrated in Germany has dramatically increased (there are rough estimations of about 60.000 plc. which are incorporated in England, but (exclusively) transacting their businesses in Germany) . For these cases, the solution provided for by Article 60 (1) (a) is not adequate.

According to the information obtained from law firms, the different possibilities to locate the domicile according to Article 60 cause positive conflicts of competence. The current situation is not predictable for the parties and their representatives.

Courts: Most courts answered this question affirmative. In particular the Oberlandesgericht Nürnberg pointed out that Article 60 appears to be feasible. However, it is also stressed that conflicts of competence may arise nevertheless by the Court. In such cases they could be solved by means of Articles 27 et seq.

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?

There is no clear case law yet. Consequently, there is some uncertainty in legal practice as to this issue.

Despite the lack of consistent case law, the Oberlandesgericht Nürnberg sets forth that there seemed a tendency to regard this place as the place of delivery where the buyer accepted the goods. This is regarded to be desirable also with regard to claims based on warranty since according to this approach the courts of the place where the goods are located have jurisdiction. However, the fact that Article 5 (1) (b) 1st indent leaves open the place of fulfilment if goods are handed over to a carrier, is regarded as one of the Regulation’s weak spots since such contracts are concluded frequently. However, despite the weakness of the Regulation, no particular problems have arisen so far, therefore the functioning of Article 5 (1) is regarded as sufficient. These descriptions are well in line with the prevailing opinion in legal writing.

Landgericht Freiburg, Interlocutory Decision of 5/13/2005 - 2 O 401/04: The place of delivery has to be determined by an autonomous interpretation without regard of the applicable substantiv law. The actual place of performance is the place, where the buyer gets the physical control of the goods according to the contract. If the goods are delivered by the
seller himself without the help of an independent carrier, the physical control is transferred to
the buyer not before the goods have reached the place of destination. This is the place of
delivery and therefore the place of performance in terms of Article 5 (1).

There has been another case at the Landgericht Passau (4 O 970/05) where the German
jurisdiction based on Article 5 (1) has been questioned due to the fact that defendant claimed
the place of delivery was Austria.

The different determination of the place of performance according to Article 5 (1) (a) and (b)
is problematic.

The practical determination of the place of performance is especially difficult in cases of
contracts with consumers, litigation between associates, when there is no exclusive
jurisdiction according to Article 22 (2), litigations between a company and their elements and
when a service has to be performed in several Member States.

Article 5 (1) (b) does not rule how to determine the place of delivery. A solution like the one in
Article 5 (1) (c) (*lex causae*) does not seems possible, when the determination shall be made
in an unified, autonomous way.

2.2.4

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

Not yet. But such problems are foreseeable, especially in online service cases.

Courts: Some courts state they have difficulties to determine the place where a service was
provided, others not. According to the Oberlandesgericht Nürnberg, courts do not have any
problems to determine the place where a service was provided or should have been
provided. If several places come into consideration, courts ask – following the ECJ (Besix) –
to which place the strongest connection exists. With regard to Article 5 (1) (b) 2nd indent it is
not clear so far whether this provision is also relevant after the service has been provided.

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?

In accordance with the de Bloos and Tessili case law of the ECJ. This is affirmed by the
Oberlandesgericht Nürnberg which points out that the ECJ’s case law concerning Article 5
(1) JC is still relevant – which is underpinned by the fact that this provision has been adopted
literally by the Regulation. This solution is regarded to be satisfactory since the most
common contracts – sale of goods and provision of services – are covered by Article 5 (1)
(b).

Landgericht Frankfurt, 9/8/2004 - 4 U 23/04: The place of fulfilment has to be determined by
the international private law of the *lex fori* according to the jurisprudence of the ECJ (Tessili).

Oberlandesgericht Stuttgart, 3/24/2004 - 14 U 21/03: For the determination of the place of
fulfilment it is necessary to take into account the obligation, which corresponds to the
contractual claim, the claimant bases his action on.

Oberlandesgericht Braunschweig, 7/4/2005 - 7 U 105/04: Actions concerning the payment of
a prize notification have to be raised in the country where the obligation has to be fulfilled, i.
e. the country of the dispatch of the promise according to the jurisprudence of the ECJ 20. 1.
2005.

Landgericht Hamburg, 5/2/2005 - 415 O 184/04: For the determination of the places of
fulfilment of the contractual obligations it is not crucial that the debtor denies the conclusion
of a contract with the claimant. The jurisdiction of the place of fulfilment is granted even and
especially in the case that the conclusion of a contract as the base for the claim is contested.
The contractual relations between the parties has to be assumed as far as the examination of the jurisdiction is concerned. Autonomous ascertainment of the term „place of performance“ (LG Münster, 7/8/2005 – 22 O 66/05).

2.2.6

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

Services is construed autonomously in accordance with ECJ case law to Article 50 EC-Treaty. This is pointed out by the Oberlandesgericht Nürnberg. Services include contracts for works and services, franchising, transportation, and with lawyers, doctors, banks, hotels, restaurants, architects and agents.

According to the Oberlandesgericht Nürnberg, the localisation of services is mostly possible without any problems since there is only one place where the services were provided or should have been provided. In cases, where – under the contract – the services were to be provided at different places, courts try to determine the place with the strongest connection (see BGH, NJW 2006, 1806).

See as an example for this jurisprudence: Oberlandesgericht Düsseldorf, 1/30/2004 – I 12 U 70/03.


The Bundesgerichtshof (3/2/2006 - IX ZR 15/05) stressed that one single place of performance has to be determined in the context of Article 5 (1) (b) JR. Therefore it is necessary to identify – in cases where the service has to be provided in several Member States – the focal point of the activity.

Oberlandesgericht Köln, (6/16/2005 - 16 U 47/54, IHR 2006, 86): An agreement regarding the place of performance does not exist when the parties only confirm the statutory place of performance.

Oberlandesgericht Köln (3/14/2005 - 16 U 89/04): Because of the autonomous interpretation of the place of fulfilment the determination of this place is not done according to the international private law of the state of jurisdiction as far as the selling of goods and the providing of services are concerned. Only the place in a Member State where the goods are delivered to or should have been delivered to or where services should be provided or should have been provided according to the contract is relevant.


According to the Oberlandesgericht Köln (12/21/2005 - 16 U 47/05) the place of delivery is the place where the goods are handed over to the partner of the contract. It does not matter who has organised and paid for the transport.

Oberlandesgericht Naumburg, 12/20/2002 - 2 W 5/02: Contracts concerning credits fall within the scope of Article 5 (1) (b) as far as none of the parties is a consumer.

Specific problems arise when Article 5 (1) (b) is applied in the context of the CISG. According to the Oberlandesgericht Hamm 12/2/2005, IHR 2006, 84, the place of performance under Article 5 (1) (b) must be determined autonomously from the procedural law of the forum state. In a sales contract concerning movables, the place of performance is the place where the buyer takes the delivery of the goods or was supposed to do so.

Courts in general: The term “provision of services” is interpreted broadly – everything which cannot be subsumed under “sale of goods” is regarded as “provision of services”. Further, it has been stressed by another court, that the term has to be defined autonomously.
2.2.7

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

This provision is applied to all types of contracts. According to the *Oberlandesgericht Nürnberg* Article 5 (1) (c) is always applied if jurisdiction cannot be based on lit. b). This means it applies to all contracts which concern neither the sale of goods nor the provision of services as well as to contracts dealing with the sale of goods as well as the provision of services if the place of performance is not in a Member State of the EU.

Courts in general: With regard to patent litigations, it has been answered that each act in terms of sec. 9 German Patent Law is regarded as a ground of jurisdiction. In case of the forwarding of an offer, which violates industrial property rights, the place of infringement is where the offer has been forwarded as well as the place where the offer has been sent to. (see *Landgericht Mannheim*, judgment of 08/26/2005 - 7 C 506/04).

2.2.8

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

German courts follow the *ECJ* case law according to which only voluntary obligations fall under Article 5 (1) (c). This is also pointed out by the *Oberlandesgericht Nürnberg*, which draws the line to Article 5 (3) by stating that jurisdiction can be based on this provision if the lawsuit concerns claims based on liability for a damage, which is not linked to a contract.

See regarding this jurisdiction for instance: *BGH*, judgment of 24 October 2005 – II ZR 329/03.

*Oberlandesgericht Frankfurt a. M.*, Judgment 21. 2. 2003, ref. No: 25 U 149/02: A claim concerning the payment of a prize notification falls within the scope of Article 5 (3) and not within the scope of Article 5 (1). According to the case law of the *ECJ*, the term “matters relating to tort” refers to actions which are not connected to a contract in terms of Article 5 (1) and with which the claimant demands the liability of the respondent for damages. There is no connection to a contract in terms of Article 5 (1), if a claim is the result of an infringement of law and not of a voluntary incurred obligation. Even claims resulting from the initiation of a deal (sec. 311 BGB) belong to the group of matters relating to tort, as long as the obligations resulting from this initiation of a deal are not taken voluntarily.


This is seen differently by the *Bundesgerichtshof*, Judgment of 01.12.2005 – III ZR 191/03 where it stated that a claim based on a prize notification falls within the scope of Article 5 (1) JC.

The delineation of Article 5 (1) and Article 5 (3) is problematic, especially concerning claims based on the infringement of pre-contractual obligations. It seems not appropriate to classify them under Article 5 (3). This is obvious in cases with claims resulting from the infringement of contractual and pre-contractual obligations when there are different places of jurisdiction for claims based on a contract and claims in tort and when it is not possible for the court to decide on both claims.

Courts in general: Courts refer to the *ECJ’s* case law.

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?**

Based on the *ECJ* case law (*Tacconi* and *Gabriel* cases), the courts are able to draw a line. However, it is argued that judicial efficiency could be improved if the plaintiff was able to include connected tort claims (if available under the applicable law) in the Article 5 (1) forum
or connected contractual claims in the Article 5 (3) forum. This view is also shared by the Oberlandesgericht Nürnberg which points out that the non-existence of annex grounds of jurisdiction does not lead to difficulties for courts but rather potentially for the parties since the non-existence of an annex ground of jurisdiction may lead to the result that one issue is dealt with at several places.

s. question 2.2.8.

2.2.10

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

Torts arising from: traffic accidents, environmental liability, product liability, capital market controversies, anti-cartel law, Transportation without contract, unfair competition, infringement of intellectual or industrial property, slander and libel, violation of privacy rights; cases of statutory non-fault liability, including cases of injunctive relief in all these areas.

According to the Bundesgerichtshof (judgment of 24 October 2005 – II ZR 329/03) Article 5 (3) includes applications for an injunction according to sec. 1004 BGB.

Oberlandesgericht Naumburg, Decision 20. 12. 2002, ref. No: 2 W 5/02: According to the jurisprudence of the ECJ of 27. 9. 1988 the term of matters relating to tort has to be determined by an autonomous interpretation. Article 5 (3) relates to claims dealing with the liability for damages resulting from tort, which are in no way connected to a contract in the sense Article 5 (1). This is not the case in the case of the infringement of pre-contractual obligations and a fraud committed during the negotiations on the contract.

Ditto: Oberlandesgericht Düsseldorf, Decision 19. 05. 2006, ref. No.: I-17 U 162/05.

Oberlandesgericht Köln, Decision 14. 5. 2004, ref. No: 16 W 11/04: Claims made by the creditors of a incorporated company against the subscriber at the instance of an evident material undercapitalization fall in the scope of Article 5 (3).

Oberlandesgericht Naumburg, Judgment 30. 9. 2003, ref. No: 7 U 79/03: Article 5 (3) has to be given a broad interpretation, so that also claims for the payment of a prize notification according to sec. 661 a BGB fall within the scope of Article 5 (3).

Ditto: Oberlandesgericht Frankfurt a. M., Judgment 21. 2. 2003, ref. No: 25 U 149/02 (s. above.).

Landgericht Bonn, 25. 11. 1003, ref. No.: 2 O 495/02.

Landgericht Aachen, 11. 09. 2003; ref. No.: 4 O 377/02.

Differently: Bundesgerichtshof, Judgment of 01.12.2005 – III ZR 191/03: Claim based on a prize notification is based on Article 5 (19 (and not no. 3) Judgment Convention

This rule is very important for actions based on the infringement of industrial property.

Courts: Claims based on (intentional or negligent) torts (inclusive rights to information, claims to compel someone to refrain from doing something etc.). Article 5 (3) is also applicable with regard to negative actions for a declaratory judgment. However, Article 5 (3) is not applicable with regard to claims based on an unjustified enrichment and claims for compensation according to sec. 33 German Patent Act.

Another court replied that Article 5 (3) includes all non-contractual infringements – no matter whether they have been committed culpable or not, as well as quasi-delicts, strict liability in tort and unfair competition.
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?

The prevailing viewpoint shared by the Oberlandesgericht Nürnberg is that Shevill is workable and a well balanced compromise. It is considered to be a function of substantive law (and not of jurisdictional rules) of the state where only a few samples of a newspaper have been sold to provide for an adequate "de minimis" defense.

The Oberlandesgericht Stuttgart assumes a delict in terms of Article 5 (3) in product liability cases – even if it is a preventive action for injunction (vorbeugende Unterlassungsklage). In the case of a claim for damages a delict is assumed if (voluntary) preventative expenses are spent in order to avoid other damages.

Oberlandesgericht Düsseldorf, Judgment 24. 8. 2005, ref. No: I 15 U 190/04: The place where the harmful event occurred or may occur is not only the place where the damaged arises, but also the place of the causal event. The Oberlandesgericht Nürnberg is of the same opinion.


There is a very generous practice to be found at the courts.

No problems of importance emerge while determining the jurisdiction under Article 5 (3). The ECJ case law corresponds to the German national jurisdiction regarding sec. 32 ZPO, sec. 14 Par. 2 UWG.

2.2.12

Functioning and practical relevance of Article 6 No. 1 and No. 2 Regulation 44/2001/EC: Are there any doubts as to the compatibility of Article 6 No. 1 Regulation 44/2001/EC with Article 6 European Convention on Human Rights?

Sometimes, this argument is made. However, the prevailing attitude shared by the Oberlandesgericht Nürnberg seems that Article 6 JR is acceptable under Human Rights aspects.

The Oberlandesgericht Nürnberg sets forth that Article 6 (2) did not have any practical relevance in Germany since it was – due to the caveat in Article 65 – not applicable. With regard to Article 6 (1) it explained that it aimed at facilitating the prosecution of connected law suits before one single court and at preventing contradictory judgments.

Oberlandesgericht Saarbrücken, Decision 29. 8. 2003, ref. No: 5 W 159/03: Regarding the necessary connection of the claims in terms of Article 28 (3) it is sufficient for the purposes of Article 6 (1) that the circumstances of the case are the same.

Landgericht Passau (4 O 1063/05): Jurisdiction has been based on Article 6 (1) with regard to a claim against a debtor and the guarantor.

Some lawyers complained the anomalous risk to be sued in the “wrong state.”

 Appropriately applied, no doubts exist as to the compatibility of Article 6 Regulation with Article 6 European Convention on Human Rights. The "spider-in-the-web"-approach is not used by the courts.
2.2.13

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

The Oberlandesgericht Nürnberg points out in its statement that the place of contracting is – in contrast the Judgment Convention – not relevant anymore for determining whether jurisdiction can be based on Article 15.

Oberlandesgericht Koblenz (9/29/2005 - 5 U 131/05) does not decide the question whether it is sufficient for Article 15 (2) that it is likely, according to the behaviour of the respondent, that a company with a name similar to the one of the respondent’s company is a branch of the respondent’s company (in contrast to Landgericht Bad Kreuznach, 12/17/2004 - 2 O 385/02).

Landgericht Darmstadt (5/18/2004 - 8 O 147/03): Also claims of unjust enrichment due to a void contract fall within the scope of Article 15 (1), because the object of this special rule concerning the jurisdiction of a court is to protect the consumer as the weaker and in legal matters inexperienced party and not to hamper his decision to assert his rights in the court by demanding from him to raise the claim in a State, where the other party has a branch (according to ECJ, 1/19/1993, case 89/91, Shearson Lehman Hutton Inc./TVB, [ECR] 1993-I, 139).

Landgericht Kaiserslautern (5/12/2004 - 2 O 434/03): A claim concerning the payment of a prize notification falls within the scope of Article 15 (1). Such a proposal has the purpose of initiating a contract (pre-contractual contact) and thus has to be judged like an existing contract.

Ditto: Oberlandesgericht Rostock (2/17/2004 - 3 U 269/03); Oberlandesgericht Stuttgart (1/26/2004 - 5 U 141/03); Oberlandesgericht Brandenburg (1/13/2004 - 6 U 79/03); Kammergericht Berlin (12/16/2003 - 7 U 9/03); Landgericht Mosbach (12/16/2003 - 2 O 145/03); Landgericht Hagen (2/10/2003 - 4 O 207/02).

2.2.14

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

German courts follow the ECJ case law. Until recently, however, the prevailing viewpoint in Germany for “dual use” cases was that courts should follow the so called preponderance theory, i.e. a contract is outside business purposes if the object will preponderantly be used for private persons. Now that the ECJ in Grube./BayWa AG has defined the term consumer more narrowly (i.e., the business element must be "limited as to be negligible in the overall context of the supply"): It seems likely that German courts will amend their case law.

Landgericht Karlsruhe (12/8/2004 - 9 O 188/03): A consumer in terms of article 15 is a person, who has contracted without professional or commercial purposes. The determination of a consumer must be done by a coherent European term of “consumer” in the case of rules that are, like the Judgment Regulation, European Law by origin. As a result of this conclusion, one has to go back to the jurisdiction of the ECJ concerning the term of “consumer” (ECJ, 7/3/1997, case 269/95, Benincasa/Dentalkit Srl. [ECR] 1997-I, 3767).

Ditto: Oberlandesgericht Nürnberg (7/20/2004 - 1 U 991/04): A consumer in terms of Article 15 (1) is only the private end-consumer not acting for commercial or professional purposes but acting for the satisfaction of his personal requirements; Landgericht Saarbrücken (10/7/2003 - 1 O 450/01).

The Oberlandesgericht Hamm (3/10/2006 - 21 W 12/05) held that an action based on a prize notification can be raised at the court of the consumer’s domicile according to Articles 15 (1) (c), 16.
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?

An "active website" which accepts orders from the State of the consumer's habitual residence is generally deemed sufficient in order to classify it as a website directed at this State.

The Oberlandesgericht Nürnberg deduces its statement from a common declaration of the European Council and the Commission made on Article 15, that the accessibility of a website alone is not sufficient for the application of the Regulation; rather it should be necessary that this website requests the conclusion of a contract by means of distance selling, and that a contract has actually been concluded by these means. Furthermore, an agreement seems to exist concerning the fact that the operator of the website can exclude individual countries by an explicit reference (disclaimer).

In its judgment of 3/30/2006 – VII ZR 249/04 the Bundesgerichtshof held that it was not sufficient for the requirement set out in Article 15 (1) (c) “(to) pursue commercial or professional activities” or to “direct such activities” that the contracting party pursues commercial activities in the Member State of the consumer's domicile only due to the contract concluded with the consumer. It was rather necessary that the contracting party had directed commercial activities to that Member State independently from the consumer and before the contract in question had been concluded.

This provision is the ground of jurisdiction for all internet-related offers with domestic elements. It is construed extensively for the benefit of consumer protection. In one case, a ground of jurisdiction in Germany was adopted because a British company advertised via internet.

2.2.16

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

The interpretation is identical to Article 5 (5). It includes all places of business under the direction of the principal place of business and appears as a part of the principal place of business unit. Self-employed sales agents do not form an establishment of the principal place of business.

Landgericht Darmstadt (5/18/2004 - 8 O 147/03): The term of “establishment” has to be interpreted autonomously. An establishment is characterized by being under the supervision and direction of the parent company. According to the jurisprudence of the ECJ, establishment means the centre of the commercial action, which is a long-term branch of the parent company, has an executive board and is equipped in a way that makes it possible to handle business with third persons in a way, that these persons do not have to turn to the parent company, but can conclude business at this branch.

The interpretation of the term is rather extensive. If a formal counter-claim for invalidity of the trademark right – aiming at its nullity erga omnes – is not brought to court, but only the objection of invalidity is asserted as reaction to the accusation of infringement, the court accepted its jurisdiction even with regard to the objection of invalidity. After a preliminary ruling of the ECJ concerning Article 16 (4) JC the Chambers for patent matters suspended the case until a preliminary ruling is given by the ECJ.
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)?

Article 6 Rome Convention is used as a guideline for the interpretation of Articles 18-21. Germany has also transformed Article 6 of Directive 96/71/EC into national law.

Oberlandesgericht Hamburg (4/14/2004 - 13 U 76/03): Applying the criteria established by the ECJ, an agent cannot be qualified an employee or similar to an employee (ECJ, 7/3/1986, case 66/85, Lawrie-Blum/Land Baden-Württemberg, [ECR] 1986, 2121).

2.2.18

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

The term is construed as to include all types of rights in real (property or limited rights) known to the German Civil Code or other civil law codifications as well as any legal rights or equitable interests in real estate having a similar function.

The Oberlandesgericht holds that the term “material rights” in Article 22 is not determined according to the right of the state of the situs according to the jurisdiction of the ECJ, but autonomously. The right in rem differs from the right in personam insofar as it can be alleged against everyone. However, the scope of application of Article 22 is not opened, only because the subject of an action is a right in rem; aim of the action must be the determination of the range or the existence of an immovable thing, the property, the protection of the privileges connected with this legal status, to secure the possession or the existence of other material rights (ECJ 1990, 27 enriches and Kockler). Actions raising from property, actions concerning the correction of the land register fall within the scope of Article 22, not however actions on dissolution of a sales contract over an immovable thing and on payment of damages because of this dissolution, even if this action affects the property.

Oberlandesgericht Naumburg, Decision 20. 12. 2002, ref. No: 2 W 5/02: According to the jurisprudence of the ECJ, S1g. I 2001, 2771 concerning Article 22 (1), there is an exclusive jurisdiction of the Member State’s courts of the place where the immovable property lies for actions concerning the adjustment of the land register, without regard of the domicile. However, it is not sufficient that a right in rem at an immovable property is connected to the action. The action must be based on a right in rem and not on a personal right.

BayObLG, Decision 6. 6. 2003, ref. No: 2 Z BR 103/03: Claims of accommodation allowance are no claims concerning a right in rem. It is true, that there is a certain connection to the condominium which is a right in rem and a affinity to claims of tenancy and lease, but this is not enough for granting the jurisdiction of Article 22 (1). This rule has to be interpreted in a narrow way, at least not broader than it is necessary for the goal of the rule.

Rights from a guarantee in tenancy do not fall under the “rights in rem in tenancies of immovable property” (Article 22 (1)).

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?

Published case law is rare. There is one published case where a partner to a company was sued for paying his share of capital. It seems from unpublished material that, in a few cases, law suits concern the validity of decisions of the shareholder meeting.
2.2.20

Are there any positive or negative conflicts of competence?

Not as to no. 2. The most problematic provision is no. 1 with 60 published court decisions. No conflicts of competence occur. However, some parties take advantage of the fact that in certain countries the determination of non-jurisdiction is very time-consuming (“torpedo”).

2.2.21

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

There is no case law available yet.

The Oberlandesgericht Nürnberg holds that the question, where the seat of a society according to Article 22 (2) sentence 2 is, has to be decided not according to Article 60 of the Regulation, but according to the provisions of the private international law of the court’s state. This means at least for the scope of application of the freedom of establishment of the EC-Treaty the decisiveness of the statute of establishment. As long as the statute of establishment is applicable, no conflict with the jurisdiction of the ECJ might arise.

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?

According to national law, the defendant in a case of patent infringement cannot argue that the patent is not valid. In case of an action of nullity, the national court has to examine the prospects of success and, if necessary, it has to suspend the action. German Courts do not have jurisdiction to adjudicate the validity of foreign patents (or respective parts of European patents) – according to Article 22 (4).

The Oberlandesgericht Nürnberg states that the delineation between Article 5 (3) and Article 22 (4) has to be made according to the subject-matter. Actions concerning the infringement of commercial patent rights, in particular actions for payment of damages as well as negative declaratory actions fall within the scope of Article 5 (3), actions concerning a contractual requirement, for example on the transmission of the patent right, fall within the scope of Article 5 (1). Only actions, subject-matter of which is the validity of patents or other intellectual property rights, fall within the scope of Article 22 (4).

2.2.23

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

Article 22 (4) JR is very problematic as far as the objection of nullity in actions concerning the infringement of a patent is concerned. The German courts are used to decide on the validity on the patent even when they have no jurisdiction as far as the declaration of the nullity of the patent is concerned. The problem lies within the differences between the French and the German version of the rule. There should be an amendment of Article 22 (4) according to the forthcoming decision of the ECJ as far as this seems necessary.

According to the Oberlandesgericht Nürnberg the reason for the exclusive competence of the courts of the enforcement state for all procedures, which deal with the execution of judgments, regulated in Article 22 (5), is the fact that enforcement measures are part of the sovereignty of every state. The provision wants to avoid encroachments on foreign territory. Only procedures with an immediate connection to enforcement fall in the scope of this provision (ECJ 1992, 2149 enriches). The preparation and the granting of the single...
enforcement act do not have such a connection, in contrast to the avoidance of these acts. On the other hand, the provisions concerning the free movement of judgments in Articles 38 et seq. are part of a procedure, pre-aged to the enforcement. In contrast to this Article 22 (5) concerns the question, which courts have jurisdiction for procedures in connection with an enforcement made possible by Articles 38 et seq. According to the German law the debtor can raise objections against the claim that is subject of enforcement in Germany and which have arisen after the procedure in the court of origin by raising an action according to sec. 767 ZPO, secs. 12, 14 AVAG. It is doubtful however whether this is not in contrast to the Regulation.

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 remedy is an action which raises an objection to the judgment claim (sec. 767 German Civil Procedure Code (ZPO)).

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?

**ECJ** Case law is applied. Before **Ingmar GB**, there were doubts in cases of choice of forum clauses in contracts between German and non member state parties; **Ingmar GB** is, however, respected.

a) **Landgericht Mainz** (13 September 2005, 10 HK. O 112/04 = WM 2005, 2319) deals with the criteria established by the **ECJ** regarding the effectiveness of a prorogation of jurisdiction. The court implements the case law by putting the **ECJ**s rules into concrete form. The ratio decidendi (No. 3–5): “3. Following the decisions of the **ECJ** regarding Article 17 Convention “Brussels I the prorogation of jurisdiction can only be examined on the basis of criteria which relate to the requirements of Article 17. The following do not relate to the requirements: Considerations to the connection between the destination court and the legal relationship in question, to the reasonableness of such clause, to the substantive liability law that is in effect at the place of the destination court (**ECJ**, 03/16/1999 = WM 1999, 1187, 1197); 4. No connection when contract containing the prorogation is contrary to public policy. 5. No general European check on abuse.

b) **Landgericht Hannover** (04/16/2003, Az: 22 O 169/02): The requirement of certainty of a jurisdiction clause must not be interpreted too strictly (following **ECJ**, NJW 2001, 501).

The implementation of the practice of the **ECJ** is rather poor. The courts do not know the decisions and lacking experience with handling the Regulation is lacking. Sometimes the parties have to point out the practice of the **ECJ** to the courts.
The valid inclusion of a clause determining the place of performance requires that the general terms and conditions get into the sphere of control of the other party (Oberlandesgericht Celle, 4 U 54/05).

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?

Courts usually do not address this question (see for instance BGH, judgment of 03/30/2006 – VII ZR 249/04). However, it is recognized that the lex causae applies. This question has been addressed by the Oberlandesgericht Düsseldorf (01/20/2004 - I 23 U 70/03), but could be left open in this particular case.

There are different answers: According to one law firm, a determination is made by the lex fori, according to another one a determination is made according to the lex causae and a third one says both ways are used in practice.

However, there is agreement in legal writing that ECJ case law does not leave much space, if any, for national law.

2.2.25.3

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

No. The clauses are only controlled under Article 23 – especially with regard to the inclusion of the clause into the contract.

Landgericht Münster – 21 O 123/04 („II./1.“): No.

Oberlandesgericht Hamburg (04/14/2004 – 13 U 76/03): No.

According to two law firms, choice-of-forum-clauses are subject to a judicial control. One law firm reports that such clauses are not subject to a judicial control when they are part of bill of loadings or charterparties.

The application of Article 23 JR is difficult due to the fact that a prorogation clause often is invalid – frequently, a “written” agreement us missing because the general terms are sent on bills of delivery etc.

2.2.25.4

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

The ECJ case law is respected. The German law principles relating to confirmation letters are applied if the other party ought to know this usage.

21 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?
According to the Oberlandesgericht Nürnberg the determining of the usages is done with the help of the competent board of trade or similar organisations.

According to the Oberlandesgericht Köln (12/21/2005 - 16 U 47/05) it is necessary for an usage of international trade that it is usage in several countries to use general terms and conditions enclosing choice of court clauses concerning the international jurisdiction.

From law firms we received positive replies – only with regard to Article 5 (1) (b) and Article 53 there are obviously some problems.

The parties are questioned and, if necessary, a hearing of evidence takes place.

2.2.25.5

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

See question 2.2.25. 1.

ECJ case law (Owusu) is interpreted as to render Article 23 JR applicable if one party has its domicile in a Member state, also if the other is domiciled in a third state.

The Oberlandesgericht Nürnberg holds that this provision is not applicable in case that the jurisdiction of a court of a third State is prorogated. Furthermore, the connected derogation of the jurisdiction of the courts of the Member States not has to be judged according to the Regulation but according to the national law. Article 23 JR is also not applicable when both parties are domiciled in a third state.

2.2.26

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

There is no case law available yet.

The Oberlandesgericht Nürnberg states that Article 26 (1) JR makes sure that a defendant domiciled in a Member State can not found jurisdiction simply by proceeding with the trial. The court must examine ex officio, whether a jurisdiction according to the Regulation is founded. The provision shall protect the defendant against an infringement of the rules of jurisdiction of the Regulation. Article 26 (2) and (4) JR assure the right of the defendant to be heard. The provisions of Regulation (EC) No. 1348/2000 have priority to Article 26. Especially Article 19 (2) of Regulation (EC) No. 1348/2000 has priority to Article 26 (2) Regulation (EC) No. 44/01 so that it is doubtful, whether this provision is really necessary.

However, there is consent in legal writing that there are still cases covered by this provision.

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”?  

Yes, but only in exceptional cases.

2.2.27.2

Territorial connection with the State where the measure was rendered  


2.2.27.3

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

The exorbitant provision of sec. 23 ZPO applies. This is, however, not seen as a problem in Germany.

2.2.27.4

Relation between interim protective measures and main proceedings

German courts respect the principle of non-anticipation of the proceedings in the main action.

---

22 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?

23 In the judgments quoted above, the ECJ has set up the requirement that a provisional measure issued by a court that has no jurisdiction on the proceedings of the main action must have a territorial connection to the State of the forum. The question is, whether this criterion is also capable in cases, where the provisional measure shall impose or interdict an action to the opponent, e. g. not to distribute goods, which have been produced by infringements of the legal protection of industrial property. Are there any experiences concerning such cases in your State?
2.2.27.5

Enforcement of provisional measures under national law

As specified e.g. by the statement of the Oberlandesgericht Nürnberg the execution of provisional measures is carried out according to the general provisions. In general this is also the cases as far as English freezing injunctions are concerned, when they come from a court which had jurisdiction according to Article 24 (2) – (4) and the right of the defendant to be heard was granted there.

2.2.28

Is there any case law relying on Article 24 (jurisdiction by appearance)?

There is. Most cases address (1) the question what constitutes appearance without challenging jurisdiction and (2) the problem at which time jurisdiction may, according to the Elefanten Schuh ECJ-judgment, be challenged.

The Oberlandesgericht Stuttgart states that the autonomous definition of the term “enters an appearance” causes trouble in practice. For example, in a case which requires the involvement of a lawyer (lex fori) a ground of jurisdiction according to Article 24 can only be assumed if a lawyer is present, but does not contest the jurisdiction.

See as examples where Article 24 has been applied Oberlandesgericht Köln, 03/19/2004 – 16 W 39/03 and Oberlandesgericht Frankfurt a.M., 04/20/2005 - 4 U 233/04. The Amtsgericht Berlin based its jurisdiction in its judgment of 07/11/2003 - 36 O 560/02 alternatively on Article 24 JR.

In its judgment of 03/02/2006 - IX ZR 15/05 the Bundesgerichtshof held that Article 24 JR is not fulfilled if the defendant enters an appearance or if he alternatively continues to contest jurisdiction. This judgment is in line with an earlier judgment of the Bundesgerichtshof (06/01/2005 – VIII ZR 256/04). In the latter judgment, the Bundesgerichtshof also held that contesting the local jurisdiction also entails a contesting of the international jurisdiction.

The prerequisites of Article 24 JR were not in question (LG Mannheim).

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?

Under Article 21 JC the German text “Klage” (“proceedings” in the English wording of the Convention as well as the Regulation) was interpreted – in accordance with the jurisprudence of other Member States’ courts and the ECJ – broadly as encompassing e.g. proceedings concerning maintenance connected to divorce proceedings

---

24 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?
("Verbundverfahren"), see Bundesgerichtshof, 10/09/1985, NJW 1986, 66; or third party notices against foreign parties, if the applicable foreign law considers the notice as equivalent to the institutions of proceedings, see e.g. Oberlandesgericht Frankfurt a.M., 06/15/1989, IPRspr. 1989 No. 2b, upholding Landgericht Frankfurt a.M., 02/22/1988, IPRax 1990, 234.

The Oberlandesgericht Koblenz, 11/30/1990, held, under the Convention that the provisions on *lis pendens* did not apply to proceedings instituted at the same day. In light of the clear wording of the Convention as well as the Regulation ("Zeitpunkt", "at the time when", but see the French version "à la date à laquelle") that refers to the point of time rather than the date, this holding appears to be in violation of the Convention/Regulation. However, determining the priority on the basis of the moment of institution of proceedings in times presupposes that this information is noted in the files, which does not seem to be the case in court practice (in Germany, Article 30 (1) JR applies).

As stated by the Oberlandesgericht Nürnberg, an exemption to the rule of *lis pendens* of Article 27 has to be made with provisional measures. They do not concern the same matter in connection with the main proceedings or other provisional measures.

We received different statements from law firms. One law firm pointed out that Article 27 did not contain any rule for the situation that two courts in different Member States were seised at the same day (this problem has occurred in practice). Further, it was reported that Article 30 was not interpreted in a uniform manner within the EU. Further, it has been stated by different law firms that the subject matter of the action has to be interpreted autonomously within the EU and that *lis pendens* is interpreted strictly. Further, another law firm pointed out that in case of a European patent identity of the matter is assumed.

Courts: Courts are rather critical towards the ECJ’s case law since this jurisprudence (broad understanding of the subject matter of the action; action for performance and negative action for a declaratory judgment have the same subject matter of the action) leads to “Torpedos”. This situation leads to the result that lawyers advice their clients to file an infringement action.

### 3.2

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

German courts do respect the strict *lis pendens* rule under the Convention/Regulation, in particular in light of the possibility of instituting proceedings about counter-claims at the court first seised hearing the original claim under Article 6 (3), see e.g. Bundesgerichtshof, 12/1/1996, BGHZ 134, 201.

However, academic writing widely criticises the danger of abuse of this rule by “Torpedos” in light of the jurisprudence of the ECJ that proceedings seeking execution of obligations as well as proceedings seeking declaratory relief that the respective obligation is invalid, involve “the same cause of action”, see e.g. Kropholler, Article 27 JR, para. 10. This danger is particularly imminent in respect to proceedings involving patent infringements, see e.g. Landgericht Düsseldorf, 02/27/1998, GRURInt 1998, 804, stay of proceedings upheld by Oberlandesgericht Düsseldorf, 09/30/1999, GRURInt 2000, 776. The Oberlandesgericht Nürnberg supports this point of view.

All replies from law firms show that the concept of *lis pendens* often causes a race to the court room. One law firm suggested amending Article 27 to that effect that the court which has been seised later does not have to stay its proceedings if the court seised first does not have jurisdiction and there is evidently no connection to the Member State of the court first seised.

Courts: In particular, in patent cases there is an incentive to race to the court room. A lawyer would even be liable for compensation if he did not suggest these possibilities to his clients.
3.3

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

Under Article 30 (2) JR it seems controversial how the requirement “at the time when it is received by the authority responsible for service” should be understood since the huissier judiciare in France, Belgium and the Netherlands receiving the documents first, are apparently not considered as an “authority responsible for service” under the respective national procedural law, in case that the documents have to be served on a defendant abroad. This is, of course, a difficulty arising from different procedural cultures that do not stem from the differences between Civil- and Common Law systems.

The Oberlandesgericht Nürnberg has not encountered any problems in this respect.

According to the interviewed law firms, there are differences between these two legal systems: Courts in common law systems decided faster than courts in civil law systems and judges played a more important role in civil law countries. Further, there are differences regarding the qualification of the burden of proof as a substantial or procedural question.

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?

German courts apply Article 28 in light of its objective to “avoid the risk of irreconcilable judgments resulting from separate proceedings”, as formulated in Article 28 (3). German courts therefore do not stay proceedings if there is no such risk; e.g. if the possibility of a set-off with an obligation the existence of which is subject of proceedings pending abroad, is excluded by agreement (Oberlandesgericht Hamm, 10/18/1982, NJW 1983, 523, decided under the Convention), or if the effects of proceedings pending abroad are limited territorially (Oberlandesgericht Köln, 12/20/1996, IPRspr. 1996 No. 172: no stay in light of proceedings about admissibility of the parent company’s name pending in the Netherlands while proceedings about the admissibility of the name of the company’s German subsidiary is pending in Germany).

Some doubts have arisen in respect to the criteria according to which the discretion granted under Article 28 JR (Article 22 JC) has to be exercised. For example, the Landgericht Darmstadt, 4 O 206/98, expressly excluded the chances of success for recognition and enforcement as a criterion, whereas, on appeal, the Oberlandesgericht Frankfurt a.M., 06/19/2000, NJW-RR 2001, 215, overruled this point and held that this criterion has to be taken into account.

Further doubts have arisen in light of the Advocate General’s opinion in the Case 539/03 – Roche, nos. 82 et seq., where he distinguished between Article 6 (1) and Article 28 in their respective effects on derogations from the general principle of actor sequitur forum rei, as laid down in Article 2, despite the identical wording of the two provisions. This point in the opinion might indicate that it should be taken into account in exercising discretion under Article 28 whether a stay affects a proceeding under Article 2. Given these doubts it appears advisable not only to think about criteria in respect to the requirement of a close connection, but also in respect to the exercise of discretion under Article 28.

The Oberlandesgericht Nürnberg refers to the ECJ in EuZW 1995, 312. The ECJ held that the “close connection” had to be interpreted autonomously and widely. A connection could not be denied only because the decisions could be enforced separately and the legal consequences were mutually exclusive.

The Gericht Nürnberg points out that the court seised second in terms of para. 2 can reject the claim by means of a judgment on procedural questions only. The Court adds that the ZPO does not allow a consolidation of the two claims in terms of Article 28 (2). As a result, the court seised second would have to continue the proceedings if the court first seised is a
German one. Article 28 allows a coordination of the jurisprudence within the EU, but it does not enable the judge to force this result (i.e. by reference of the case to the first seised court).

Law firms support a clear and positive differentiation by hard criteria.

Courts: One court applies Article 28 very restrictive with regard to patent cases. In most cases, there is not usual to stay the proceedings since proceedings are continued in another Member State. Therefore, contradictory decisions cannot be avoided.

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?

The Oberlandesgericht Nürnberg held that the same claim is concerned if the pending actions pursue the same intention and have corresponding bases. It is sufficient that the main issue is the same, formal identity is not required. For example, two actions concern the same subject-matter when the question of the existence or non-existence of a liability is the central point of both proceedings (i.e.: claim for damages and counterclaim aiming at the declaration of the non-liability (Tatry, ECJ, EuZW 1995, 309) or claim and counterclaim concerning the validity of a contract (Bundesgerichtshof, NJW 1995, 1758; NJW 2002, 2795).

The Bundesgerichtshof, 02/06/2002, held, under the Convention, that proceedings of the principal seeking a declaration of voidance of a sales agent contract and proceedings of the sales agent for damages and/or compensation for work done prior to the termination of the contract involved “the same cause of action”.

The Bundesgerichtshof, 10/09/1985, NJW 1986, 662, held, under the Convention, that proceedings of the child for maintenance and proceedings of the mother for child maintenance did not take place “between the same parties”. The Oberlandesgericht Karlsruhe, 10/18/2002, IPRspr. 2002 No. 181, held that proceedings of a foreign party at a foreign Member State’s court and the participation of that party by way of third party intervention in domestic proceedings did not constitute proceedings “between the same parties”.

The interviewed law firms refer to the ECJ’s “heart theory” as well as the “Dronot” – jurisprudence, which had to be amended and extended.

Courts: Courts orientate themselves according to the ECJ’s jurisprudence. With regard to patent law, “the same cause of action” is negated if different parts of a European patent are concerned.

Another court pointed out that – according to the ECJ’s “heart theory” – it was not decisive what could be regarded as the subject matter of the action according to the lex fori, but what could be regarded as the “heart” of the proceedings.

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.

According to the Oberlandesgericht Nürnberg, practical problems might occur when several parties are involved, but are only partly identical in both proceedings. In such a case, Article 27 can only be applied to one part of the action. As far as the parties are not identical, the court seised second must continue the proceeding – which makes irreconcilable decisions possible. However, such cases might be solved under Article 28 JR. In the majority of these cases, international jurisdiction can be based on Article 6 (1) JR.

The Oberlandesgericht Köln, 09/08/2003, IPRax 2004, 521, held, under the Convention, that foreign proceedings of the assignor and domestic proceedings of the assignee constituted...
proceedings “between the same parties” even in the absence of res iudicata effects of the foreign judgments against the assignee. This judgment has been criticised as interpreting the requirement “between the same parties” too broadly (e.g. Kropholler, Article 27 JR, para. 5; Geimer, IPRax 2004, 505).

One law firm reported practical problems in the context of Article 6 (2) and typical “topedo-countries” (Belgium, Italy and the New Member States).

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 danger for abuse of the lis pendens rule is particularly imminent in respect to proceedings involving patent infringements because they strongly depend on the time factor. Abusive tactics therefore seek to institute proceedings for declaratory relief that no patent infringement occurred with courts of Member States known to be very slow. Nevertheless, German courts usually strictly respect the priority rule, see e.g. Landgericht Düsseldorf, 02/27/1998, GRURInt 1998, 804, stay of proceedings upheld by Oberlandesgericht Düsseldorf, 09/30/1999, GRURInt 2000, 776. However, in proceedings on patent infringements the Landgericht Düsseldorf, 12/19/2002, InstGE 3, 8, recently made clear that it would ignore abusive torpedo actions. The Oberlandesgericht Nürnberg sees a possible solution in Article 6 ECHR.

According to law firms, there is a loss of efficiency since in many cases jurisdictions within the EU were blocked by filing actions for a declaratory judgment in Belgium or Italy.

Courts: The possibility of a “Torpedo”-action leads indeed to a lack of efficiency.

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)?

It has been indicated by practitioners to the Rapporteur that appeal proceedings are currently pending at the Bundesgerichtshof in which the appellant argues that negative declaratory relief at German courts should be made available in light of extremely long and costly proceedings for securing evidence in France, i.e. proceedings not concerning “the same cause of actions” but nevertheless a negative declaratory judgment might be able to terminate the French proceedings for securing evidence, depending on the applicable French procedural law on this point. Thus, the proceedings in Germany do not directly aim at using the rule of priority in order to turn away oppressive actions, but nevertheless illustrate that actions for negative declaratory relief might be able to serve this purpose in general.

The Oberlandesgericht Nürnberg affirms the success of such tactics and refers to ECJ, EuZW 2004, 188; BGH, NJW 2002, 2795.

This question has been answered affirmatively by law firms.
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?25

As the questionnaire rightly explains in its footnote to this question, in Germany any judgment on the nullity of a patent extinguishes it as a part of the res iudicata effect and does not merely declare the patent invalid. Therefore, only courts having subject-matter jurisdiction in patent matters are competent to hear such cases. Thus, the objection of the nullity of the patent cannot be decided upon in infringement proceedings of the patent but has to be decided in a separate proceeding by another court, and until the judgment on nullity is rendered the infringement proceedings will be stayed – a situation that inevitably causes delay (see generally Grabinski, GRURInt 2001, 199).

The Oberlandesgericht Nürnberg notes that the German provision for the suspension of the case (sec. 148 ZPO) is more flexible than Article 27 JR.

In the vast majority of patent-infringement-cases the defendant brings a counter-claim raising the objection of nullity of the patent. However, this does not prolongate the process. In fact, it leads to an acceleration. This is due to the fact that the suspension of the lawsuit is not a necessary consequence of a counter-claim raising the objection of nullity of the patent. In contrast, the suspension depends on a summary examination of the prospects of success of the counter-claim. The suspension in first instance is rare.

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?

The Rapporteur is not aware to any case law to that point. However, it appears possible to institute comprehensive infringement proceedings under Article 2 JR/JC against e.g. a parent company directing its subsidiaries in the respective MS towards a consistent strategy of marketing (see e.g. Landgericht Düsseldorf, 09/22/1998, GRURInt 1999, 458; Adolphsen, Europäisches und internationales Zivilprozessrecht in Patentsachen, Cologne 2005, p. 97 para. 492; Geimer/Schütze, Article 22 JR, para. 249). Under Article 5 (3) Regulation/Convention, however, German courts hold that in the case of Community-wide infringement of a European patent the place of the action as well as the detrimental “success” of that action both are to be located at the MS that issued the patent (Oberlandesgericht Düsseldorf, 06/29/2000, IPRspr. 2000 no. 128; but compare Adolphsen op. cit.). Comprehensive infringement proceedings seem excluded now under Article 6 (1) according to the judgment of the ECJ (Case C–539/03 – Roche). Even under Article 2 comprehensive proceedings appear to be impossible once the defence of nullity of the patent is raised (ECJ, Case C–4/03 – GAT).

According to a law firm, this is in practice only possible if the defendant has his residence in Germany. Article 6 is of minor relevance.

Courts: A consistent action of infringement is not possible. The raising of the objection of nullity of the patent, which is permitted by the national law, would make the action inadmissible according to Article 22 (4) JR.

25 In Germany the judgment ending 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 patent court 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 with regard to the the nullity of the patent, when such an objection is raised. To what extent is the court concerned with the action of infringement of the patent able to decide whether the announced action concerning the nullity of the patent in the foreign country is serious?
4. The Recognition and Enforcement of Judgments, Authentic Instruments and Court Settlements According to Regulation 44/2001/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?

The national procedure Article 40 JR refers to is contained in sec. 55 and secs. 3 et seq. AVAG. The presiding judge of a Civil Chamber of a Landgericht has exclusive competence to declare the title enforceable. Applications must be lodged in writing or made orally on record of the court registry. No representation by a lawyer is needed (sec. 6 (3) AVAG). However, non-represented applicants who are not domiciled in Germany must designate an authorised recipient for the application in the court’s district (sec. 5 AVAG). All decisions relating to the exequatur proceedings are served on this person by mail. German law does not require the use of a specific form; the application does not have to be lodged in German, but the court may (by discretion) order the translation of the documents. German law does not provide for an initial processing by a court clerk. Therefore, the handling of the procedure mainly depends on the experience of the judge. In many courts, the schedule of responsibilities (Geschäftsverteilungsplan) designates a specific judge competent for exequatur proceedings. Accordingly, these judges (especially in border regions) are experienced in the handling of the procedure. The most important task of the judge is the implementation of the foreign title and its adaptation to the procedural needs of the German law of enforcement. Thus, foreign titles on interests (without the indication of a specific amount due) must be clarified for the enforcement proceedings. This clarification is usually contained in the order granting exequatur and in the enforcement clause issued by the court’s registrar. A certified copy of the decision bearing the enforcement clause is served on the debtor.

In general, the procedure regarding the recognition and enforcement of judgments and other instruments works sufficiently. According to the empirical research in the Landgerichte Karlsruhe, München, Passau and Traunstein the average length of the proceedings lies between one and two weeks. The proceedings may be delayed when the application is incomplete – additional delays may result from the translation of documents. These results correspond to the answers received from the courts: Judges agree that the procedure works properly. Practitioners expressed different opinions on the functioning of the procedure for recognition and declarations of enforceability: One law firm reported good experiences, another reported negative ones without giving further details. These reactions reflect the different experiences within the German judiciary: In some courts, the handling of exequatur proceedings is part of the usual workload while in other courts, exequatur proceedings are seldom exceptions.

There are, however, still some indications that the courts of the first instance still apply Articles 34 and 35. This practice mainly took part in 2002 and 2003 when courts were not yet familiar with the new procedure under Articles 41 et seq.

---

26 See supra at 1.7.
27 Such representation is, nevertheless, the rule.
28 It seems to be doubtful whether this requirement is consistent with Article 12 EC-Treaty, as postal service may be effected on the applicant abroad under Article 14 of the Service Regulation.
4.1.2

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

The courts expressed different opinions. According to the Oberlandesgericht Nürnberg, additional standard forms would be useful because not all applicants are represented by a lawyer. Some other courts did not see any need for further standard forms. Others again would appreciate new standard forms, because they could help the parties and even inexperienced lawyers to make a precise and complete application for a declaration of enforceability. However, due to the practical problems with the implementation of interests it seems advisable to complement the standard forms prescribed by Articles 54 and 55 JR. This amendment should be in line with the forms prescribed by parallel instruments such as the European Enforcement Title for Uncontested Claims (Annex 1) or the European Payment Order (Annex 1):

The relevant provisions read as follows:

Annex no 1 of the Draft Regulation for a European Order for Payment (Council Common Position)\(^{29}\)

7. Interest

Codes (please combine number with letter):

- 01 Statutory
- 02 Contractual
- 03 Capitalisation of interest
- 04 Interest rate on a loan
- 05 Amount calculated by the claimant
- 06 Other

A per year B per half year C per quarter D per month E Other

7.1. ID
7.2. Code
7.3. Interest rate (%)
7.4. % over base rate (ECB)
7.5. on (amount)
7.6. Starting from
7.7. To

European Enforcement Order for uncontested claims (Reg. EC 805/2004 of 21/04/2004)\(^{30}\)

Annexes I - III

5. Monetary claim as certified
5.1. Principal Amount :
5.1.1. Currency
  - Euro
  - Swedish Kronor
  - Pounds Sterling
  - other (explain)

\(^{29}\) Of 30.06.2006, 7535/3/06 REV 3 JUSTCIV 65; 7535/3/06 REV 3 ADD 1 – ADD 7 JUSTCIV 65.

5.1.2. If the claim is for periodical payments
5.1.2.1. Amount of each instalment:
5.1.2.2. Due date of first instalment:
5.1.2.3. Due dates of following instalments
   weekly () monthly () other (explain) ()
5.1.2.4. Period of the claim
5.1.2.4.1. Currently indefinite n or
5.1.2.4.2. Due date of last instalment:
5.2. Interest
5.2.1. Interest rate
5.2.1.1. ... % or
5.2.1.2. ... % above the base rate of the ECB (1)
5.2.1.3. Other (explain)
5.2.2. Interest to be collected as from:
5.3. Amount of reimbursable costs if specified in the judgment:

These minor amendments would considerably improve the effectiveness of the exequatur proceedings under Article 38 JR.

4.1.3

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

While the answers received from the courts did not report specific difficulties, the reporters found several published decisions on this issue. This case law demonstrates that there are still disputes on the meaning of Article 32 JR. However, the disputes mainly relate to the qualification of national titles. German courts follow the definition of a “judgment” as provided for by the ECJ and interpret Article 32 JR broadly. Accordingly, German Courts respect the Denilauler-doctrine\(^{31}\) which excludes ex parte court orders from Article 32.

The reporters found the following decisions:

In a judgment of 09/22/2005, the Bundesgerichtshof (IX ZB 7/04) stated that the term “judgment” was construed rather broadly and had to be interpreted autonomously. It also held that a decision fixing costs fell under the concept of “decision” in the terms of Article 32 JR.

The Oberlandesgericht Zweibrücken (01/25/2006 – 3 W 239/05) held that a provisionally enforceable payment order also constituted a “judgment” in terms of Article 32. However, as the same court points out in its decision from 09/22/2005 - 3 W 175/05, an Italian provisionally enforceable payment order (decreto ingiuntivo) does not constitute a “judgment” in terms of Article 32 if it has been rendered as an ex-parte decision, i.e. without the defendant being heard. However, a decreto ingiuntivo, which has been issued in a normal contentious procedure (i.e. no ex-parte) was therefore classified as a decision in terms of Articles 32, 38: Oberlandesgericht Köln, 11/17/2004 – 16 W 31/04). The Landgericht Düsseldorf also qualified a decreto ingiuntivo as a decision in the terms of Article 32 (8. 08. 2006, I-3 W 118/06).\(^{32}\)

---


\(^{32}\) Same opinion: Oberlandesgericht Frankfurt/Main, 12/07/2004 - 2 W 67/04.
According to the Oberlandesgericht Köln (08/08/2006 - 16 W 13/06) an Italian “atto di precetto” is not a decision in terms of Article 32. The Oberlandesgericht Hamm (12/19/2003 - 29 W 18/03) held that a French Décision du Bâtonnier and the Expédient Executoire of the President of the French Higher Regional Court are decisions in terms of the Regulation. The court explicitly referred to the autonomous and broad interpretation of Article 32.

4.1.4

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

Despite a recent reform of the ZPO generally allowing the access by electronic means, the accessibility of German Civil Courts by electronic means has not become a reality. Only the Bundesgerichtshof is currently undertaking a test project on the electronic delivery of pleadings with the (few) lawyers who are admitted at this court.\(^{33}\)

According to sec. 130 (a) ZPO, the Federal States “shall determine (…) the point in time from which electronic documents may be submitted to the courts and the form suitable for dealing with such documents.” It seems that several projects are currently in preparation, but no comprehensive act has been adopted by the Federal States so far.

4.1.5

Are the reasons for objections 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?

There is a consensus among the courts that the reasons for objections laid down in Articles 34 and 35 JR are appropriate. In practice, the most important objection to the recognition is found in Article 34 (2) JR. However, due to the amendment of this provision in 2001, its practical importance has been reduced considerably. German case law shows that the former defence of a defendant that the document instituting the proceedings was not properly and timely served is not longer successful. This can be demonstrated by the following two decisions of the Oberlandesgericht Köln (06/25/2004 – 16 W 21/04) and the Oberlandesgericht Zweibrücken (09/19/2005 – 3 W 132/05). In these decisions both courts emphasised that defects in service do not lead – in contrast to Article 27 (2) JC under which irregularities in the service were sufficient to refuse recognition – to the non-recognition of the judgment if the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.

However, several inconsistencies exist in the context of Articles 34 and 35 JR. Just to start with Article 35 JR: The jurisdictional review provided for by the first paragraph refers to sections 3, 4 and 6 of the Chapter II, but not to contracts of employment nor to jurisdictional clauses, although the latter also provides for exclusive heads of jurisdiction. In this context, it seems appropriate to reduce the judicial review further and to remove this provision completely: It is not in line with the general principle of mutual trust and its practical importance seems limited as the examination by the recognising court is bound by the findings of fact of the court of the Member State of origin. In addition to this, there are inconsistencies in relation to Article 34 (3) and (4) JR: According to Article 34 (3) JR, a judgment shall not be recognised when it is irreconcilable with a judgment in the Member State where the recognition is sought. This objection is not in line with Articles 27 and 28 JR, as it gives preference to a judgment which was given in violation of the pendency regime. Moreover, Article 34 (3) should at least be aligned to Article 21 of the Regulation on the Enforcement Order (Regulation (EC) No. 805/2004) which gives preference only to an earlier judgment. However, it seems advisable not to refer to the moment when the judgment was

\(^{33}\) http://www.bundesgerichtshof.de/presse/elek_rechtsverkehr.php
rendered, but to the moment of pendency (Articles 27 and 30 JR). Finally, Article 34 (4) JR which gives preference to prior judgments of a third State should also be amended and refer to the moment of the pendency (Article 30 JR).

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?

Most courts answered that Article 38 JR worked efficiently and that they were not confronted with substantial problems. According to the Oberlandesgericht Stuttgart most titles are titles for payment which regularly do not cause any problems. The Oberlandesgericht Nürnberg states that the finality of foreign titles is one criterion for the enforceability which has to be verified in the course of the enforcement proceedings.

These answers must be evaluated against the following background: German courts generally apply the strict standards of the domestic law on enforcement. Accordingly, the title must precisely determine the content, the nature and the scope the enforcement measures. In addition to this, the title must also clearly indicate the parties. However, the title can be interpreted and substantiated by the court in the exequatur proceedings. In practice, German judges often adapt the foreign titles to the requirements of the domestic law on enforcement. This adaptation is handled in different ways: some judges order the production of the necessary information (i.e. foreign laws on interest) from the parties while experienced judges (especially in border regions) often dispose of the text of the foreign provisions on interest and calculate the interest on their own motion. However, the Oberlandesgericht Köln held that the interpretation of a judgment of a French Commercial Court on “legal interest” was impossible since the judgment did not indicate the applicable law; judgment of 09/15/2004 - 16 W 27/04.

According to the Oberlandesgericht Hamm, only severe lacks of certainty lead to a refusal of the declaration of enforceability (Article 34 (1) JR). German public policy prohibits the recognition and enforcement of a judgment, which does not clearly describe the authorisation of the enforcement authority (BGH, decision of 03/04/1993 - IX ZB 55/92, BGHZ 122, 16).

4.1.7

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

According to the information given by law firms and judges, Article 34 (1) JR is relatively often referred to, but seldom applied. Generally, German courts follow a restrictive approach with regard to public policy. However, German courts do not fully adopt the approach of the ECJ in the Krombach and Renault cases: While the ECJ refers to the general principles of Community law (especially the guarantee of a fair trial, Article 6 ECHR), German courts

34 BGH, decision of 04/05/1990 – IX ZB 68/89, NJW 1990, 3084.
35 In practice, the adaptation of the foreign title to the standards of the domestic law on enforcement is the most important task of judges in the exequatur proceedings. Many published decisions on Article s 32 et seq. address this question, example: OLG Zweibrücken, 12/15/2004 -3 W 207/04: Recognition of an Italian judgment on “legal interests and VAT”, the Oberlandesgericht applied Article 1284 of the Italian Codice Civile.
36 This seems to be the usual practice at the Landgericht Freiburg.
37 This information was given by the presiding judge of the Landgericht Kleve.
mainly rely on the fundamental rights and principles of the German Constitution. However, as the European and domestic constitutional principles are very similar, the results normally do not diverge.

In a judgment of 06/23/2005 (IX ZB 64/05) the Bundesgerichtshof refused to apply Article 34 (1) JR to an Italian default judgment which had been rendered in a procedure which differs from mandatory rules of German civil procedure law. The Bundesgerichtshof held that only severe infringements on the rule of law (Article 20 (3) German Constitution) would amount to a violation of public policy. In that case, the debtor claimed that the Italian court had neglected the procedural duty to inform him about the fact that the lawsuit would proceed even if his lawyer resigned from his office and was not replaced by another lawyer. This reasoning was rejected by the Bundesgerichtshof since the Italian court acted in accordance with Italian civil procedure law.

In the published case law of German appellate courts, there are several decisions addressing public policy. In most of the cases, the application of Article 34 (1) was rejected, see: Oberlandesgericht Düsseldorf, 02/14/2006 -3 W 188/05, Oberlandesgericht Zweibrücken, 01/20/2006 - 3 W 244/05; Oberlandesgericht Frankfurt/Main, 06/21/2005 - 20 W 463/04; Oberlandesgericht Köln, 03/19/2004 - 16 W 39/03; Oberlandesgericht Köln, 03/17/2004- 16 W 2/04; Oberlandesgericht Oldenburg, 07/22/2003 – 8 W 64/03; Oberlandesgericht Köln, 03/19/2004 – 16 W 39/03 and Oberlandesgericht Frankfurt/Main, 12/16/2004 – 20 W 507/04; Oberlandesgericht Hamm, 12/19/2003 - 29 W 18/03. Article 34 (1) was addressed broadly in the following decisions: The Oberlandesgericht Köln, 06/28/2006 - 16 W 15/06 held that the obligation to pay a compensation for the procedure according to Article 240 of the Luxembourgian NCPC did not contradict German public policy. Further, the application of Article 34 (1) JR was also rejected in a case where abuse of procedure (fraud) had been claimed, but the applicant was not able to prove it (Oberlandesgericht Zweibrücken, 09/19/2005 – 3 W 132/05). The Oberlandesgericht Frankfurt a.M. (06/30/2005 – 20 W 485/04) held that the requirements of Article 34 (1) were not satisfied in a case where the defendant did not have a possibility to object to an Italian payment order. The Oberlandesgericht Frankfurt/Main (03/30/2005 – 1 W 93/04) held that an obligation to pay maintenance to a spouse based on the principle of fault, did not violate German public policy. Therefore, Article 34 (1) did not bar the recognition of the foreign judgment. Oberlandesgericht Köln, 11/17/2004 – 16 W 31/04 held that a violation of German public policy according to Article 34 (1) could not be assumed only due to the fact that there were higher requirements for an objection in Italy than in Germany.

Only in one case, the Oberlandesgericht Zweibrücken, 05/10/2005 - 3 W 165/04, held that public policy had been infringed (Article 34 (1)). In this case, a Belgian commercial court initiated the service of the document instituting the proceedings under Articles 4 et seq. Service Regulation. The German receiving authorities, however, did not serve the document on the German defendant, because the address of the German party was incorrectly designated. The document was sent back to the Belgian Court (Article 7 (2) Service Regulation). The Belgian Court did not apply Article 19 (2) of the Service Regulation and rendered a default judgment. The Oberlandesgericht applied Article 34 (2) JR and declared the judgment non-enforceable. In addition to this, the Court held that the recognition would also infringe Article 34 (1) JR, because the Belgian judgment would infringe the procedural public policy.

40 The most prominent decision in this respect was the judgment of the Bundesgerichtshof in the Krombach case, BGH, 29.6.2000, BGHZ 144, 390: While the ECJ held that the French judgment could not be recognised, because it violated the fundamental principles of Article 6 ECHR (as general principles of EU-law), the Bundesgerichtshof applied Article 34 (1) JR by referring to Articles 20 and 103 of the German Constitution. The European standards were not mentioned.

41 According to German procedural law, either the former lawyer is obliged to represent his client until his replacement or the proceedings are interrupted.

42 n a case a Landgericht referred erroneously (see Article 41) to Article 34 (1) (Landgericht Aurich, 05/14/2003 - 2 O 339/03).
guarantees of Article 103 (1) of the German Constitution and Article 6 ECHR. However, Article 34 (1) JR was not directly applied but mentioned in an obiter dictum.

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?

We are not aware of any change of the German procedural law with respect to the non-recognition of German judgments in other Member States.

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?

According to well-settled case law and legal opinion, procedural abuse entails the application of the public policy objection.\(^{43}\) German courts are generous in permitting this objection. According to the case law of the Bundesgerichtshof, a party does not have to challenge the judgment in the Member State of origin (as it is stated in Article 34 (2)), but may raise this objection in the exequatur proceedings, judgment of 04/29/1999). Obviously, the Bundesgerichtshof does not distinguish between judgments from Member States and third states. Recently, the Bundesgerichtshof rejected the recognition of a Danish default judgment. The German debtor maintained that the Danish claimant, his former lawyer, had calculated his fees improperly. In a first decision, the Bundesgerichtshof held that the debtor had to specify the allegations on the abusive behaviour of the adversary and that the foreign judgment was not reviewed (the Bundesgerichtshof explicitly referred to Article 29 JC), judgment of 05/06/2004. The case was referred to the Oberlandesgericht Düsseldorf. Again, the Oberlandesgericht held that the debtor had not sufficiently established any misbehaviour of the defendant. The Bundesgerichtshof allowed a second appeal and reversed again: The IXth Senate held that the allegations of the debtor met the criteria of procedural abuse (decision of 12/15/2005). Finally, the Bundesgerichtshof referred the case to another Senate of the Oberlandesgericht Düsseldorf.

In a similar case, the Oberlandesgericht Zweibrücken (decision of 09/19/2005) held that the prerequisites of procedural fraud had not been established. In this case, the defendant alleged that the Italian plaintiff, his former lawyer, had concealed a fee arrangement to the Italian court when seeking a default judgment. The Oberlandesgericht stated that the alleged procedural fraud would amount to a violation of German public even if the defendant had not defended himself in the foreign court. However, as the defendant failed to substantiate his allegations, the Court rejected the appeal.

In summary, it can be stated that procedural abuse is the most important field of application of the public policy reservation (Article 34 (1) JR) in German practice.

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?

Obviously, there is not much case-law on the application of Article 49. The English wording of the provisions seems unclear as the provision refers to "periodic payments". This seems to

be a misunderstanding and should be deleted. In the German practice, we only found two decisions addressing Article 49 JR:

The Oberlandesgericht Köln held in a patent case that penalties imposed by injunction of the Regional Court of The Hague could not be recognised under Article 49, as the decision of the Dutch Court did not specify the amount of the penalty to be paid, Oberlandesgericht Köln, 03/17/2004, InVo 2004, 473.

The Oberlandesgericht Oldenburg held (decision of 07/22/2003 – 8 W 64/03) that a Dutch dwangsom could be recognised and enforced under Article 49 JR. Like Article 32, Article 49 does not presuppose that the foreign decision fixing the penalty has become res judicata.

4.1.11

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

4.1.12

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

According to the opinion of the Oberlandesgericht Nürnberg, the inadmissibility of anti-suit injunctions does not impair the effectiveness of legal protection. On the contrary: Anti-suit injunctions violate the right of the addressee to have recourse to a court (Justizgewährungsanspruch). Accordingly, the decision of the ECJ in Turner v. Grovit has been welcomed by the German doctrine.

No case law under the Regulation has been reported. However, the Oberlandesgericht Düsseldorf refused a request for serving an anti-suit injunction of an English Court against a German party under the Hague Service Convention. The Court relied on Article 13 of the Hague Convention (public policy) and stated that the anti-suit injunction would deprive the addressee from his or her day in court and interfere in the German proceedings - judgment of 01/10/1996, EuZW 1996, 351.

4.1.13

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

The appellate procedure according to Article 43 JR in connection with secs. 11–14 AVAG starts with the filing of an appeal. The application has to be in written form or has to be recorded at the court’s office. A representation by a lawyer is not required. Representation is only mandatory when the appellate court schedules an oral hearing (sec. 13 (2) AVAG). Oral hearings, however, rarely take place. The most important case is that the parties bring

44 Schlosser, Article 49 JR, para. 1.
45 Rauscher/Mankowski, Preliminary Remarks to Article 2 JR, para. 20 – 20f.
46 See supra at 1.7.
47 Representation by a lawyer is not mandatory since the appeal is decided without a hearing (see sec. 13 (2) AVAG, sec. 78 (5) ZPO), Oberlandesgericht Zweibrücken, 08/25/2005 – 3 W 96/05.
48 The details of the proceedings are explained in the 2nd questionnaire.
up admissible objections in terms of sec. 12 AVAG respectively Article 45 JR.49 Appellate proceedings usually last approximately 4 weeks. Necessary further inquiries of foreign parties or explanations to the appealing debtor concerning the limited examination competence of the appellate court lead to a delay. The losing party has to bear the costs of the appellate proceeding (sec. 91 ZPO). These are consist of the court fee (300 Euro) and the lawyer’s costs which depend on the value of the claim according to W 3200 to the Rechtsanwaltsvergütungsgesetz (“RVG”) (i.e.: For a claim of 100.000 Euro the cost for (every) lawyer is 2.500 Euro (without a hearing in court).

Practical research carried out in the Oberlandesgerichte Karlsruhe, Koblenz, München and Stuttgart shows that the appeal proceedings are carried out efficiently. The 25th Senate of the Oberlandesgericht München handles appeals under Article 42 in an accelerated way. Applications obviously without a chance of success are immediately refused – without any notification to the other party. These proceedings are closed within a period of 1 or 2 weeks. From February 2005 to October 2006 the Senate decided on 28 appeals, 22 of them were rejected, 6 appeals were successful. The average duration was about 2.5 months.50

According to information obtained from the courts the average duration of the appeal procedures is about 2 or 3 months. Costs: 300 € as well as the lawyers’ costs. As a rule, the courts do not schedule an oral hearing. A taking of evidence is the rare exception, since most courts do not permit the presentation of substantive objections against the claim.

4.2

Provisional Measures according to Article 47

4.2.1

How does Article 47 work?

Article 47 applies to different situations: Para 1 permits the creditor to secure the debtor’s assets even before applying for a declaration of enforceability. Para 2 applies to the situation when the exequatur decision was obtained, but is still appealable. Para 3 states that enforcement measures are limited to protective measures until the declaration of enforceability has become res judicata.

The provisional measures available under this Article are those provided by national law. In Germany the following measures can be obtained: Sec. 845 ZPO (provisionally arresting debt in the hands of the debtor), sec. 720a ZPO (enforcement by way of security) and an arrest under secs. 917 et seq. ZPO51.

Article 47 (1) is derived from Belgian law. However, this provision is rarely used in practice. The Landgericht Bonn held that the provisional measures available under Article 47 (2) did not presuppose prior service of the declaration of enforceability on the debtor. The Court stated correctly that this provision was aimed at preserving a “surprise effect” for the creditor. Accordingly, the latter may immediately seize the accounts of the debtor (decision of 4 March 2003, RIW 2003, 388.

The difficulties of applying Article 47 (1) JR shall be demonstrated by the following example: An Austrian creditor presents to the land register in Munich the copy of an Austrian judgment which was certified as final. The debtor sought the registration of a mortgage in the register to secure the judgment’s claim (secs. 720a and 867 ZPO). The land register denied the application because the judgment had not been served on the German debtor. This

49 See supra 1.7 on the question whether this practice is in line with Article 45 JR.

50 Practical research conducted by Prof. Schlosser and Dr. Vollkommer.

51 The details of this provision are explained by Hess/Hub IPRax 2003, 93, and by Schlosser, RIW 2002, 809.
corresponds to the general prerequisite of German enforcement proceedings (sec. 750 ZPO). Accordingly, the Austrian creditor could not use the “surprise effect” of Article 47 (1) JR. However, after the judgment had been served on the debtor, the mortgage was registered.

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?

As Article 47 JR implements the principle of mutual recognition, any application of Articles 34 and 35 JR is prohibited. However, this interpretation is not generally accepted. According to the Oberlandesgericht Nürnberg, the scope of the examination competence within the limits of Article 47 is still unsettled. Particularly with regard to the relationship between Article 47 and Article 41 (is the competence more comprehensive in Article 47?) contradictory statements are made among legal writers and case-law does not exist.

The new wording of the provision has not yet been comprehensively implemented. For instance, the official instructions for bailiffs (Geschäftsanweisung für Gerichtsvollzieher („GVGA“) only address enforcement measures after the declaration of enforceability (sec. 71 (6)). Therefore, it is doubtful whether the bailiff would comply with the request for provisional measures in accordance with Article 47 (1). It seems that legislation has not realised the new concept of Article 47.

No experience on this problem has been reported so far.

4.2.3

If yes, on the basis of which factual criteria?

4.2.4

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

It depends on measure sought by the creditor: The presiding judge of a Landgericht who is competent for the recognition of a judgment is normally not competent for ordering provisional measures. As far as enforcement measures are sought, the Amtsgerichte (and the bailiffs) are competent. However, should the creditor seek an arrest of the debtor’s assets, the competence of the judge deciding on the declaration of enforceability may be derived from secs. 919, 930 (1) ZPO. The court competent for the declaration of enforceability may be considered as the court competent for the main proceedings in the sense of sec. 919 ZPO.

4.3

Cross-border Enforcement of Court Settlements and Notarial Deeds

4.3.1

How do Articles 57 and 58 work?

With one exception (see infra 4.3.1.2), no specific case law on the application of Articles 57 and 58 has been published or reported. In addition, the reporters were unable to get much information on the practical relevance of the cross-border enforcement of court settlements and notarial deeds. The investigation of the files of several Landgerichte (supra
questionnaire 1) showed that there is not much practice in this field. This result is supported by the reply we have received from the German Chamber of Notaries. Exact data was not available, the Chamber estimates the number of applications for declarations of enforceability of notarial deeds as well as granted declarations of enforceability (in total) at below 100. In general, it has been stated that German notaries have not had much experiences with Article 57 so far.

**In particular:**

4.3.1.1

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

No published case law has been found. The *Oberlandesgericht Nürnberg* assumes that the practice refers to the Report of Jenard and Moeller on the Lugano Convention, which provides for a definition of the term “authentic instrument”. According to this explanation, the recording of the enforceable instrument must be performed by a competent administrative public authority. In addition to this, the recording has to cover the content and not only the signature.

This definition was also been adopted by the European legislator in Article 4 (3) Regulation 805/2004/EC (European enforcement order for uncontested claims). Accordingly, it does not seem necessary to include the definition in the text or the recitals of the Judgment Regulation.

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 *Oberlandesgericht Koblenz* (04/05/2004 – 11 UF 43/04) decided on the recognition of an (Austrian) settlement which had been approved by a court. The debtor raised several objections against the jurisdiction of the Austrian court and maintained the payment of the debt etc. The Court correctly stated that the review of the foreign title under Article 57 was limited to the question whether the recognition of the settlement would manifestly violate German public policy. Accordingly, the jurisdiction of the Austrian Court was not reviewed. In addition to this, the Court did not hear the objection of the debtor that the debt had been paid.

Obviously, no difficulties have been reported. It seems, however, that there is not much practice in this filed. A comprehensive study on the free movement of court settlements in the European Judicial Area was given by Frische, Verfahrenswirkungen gerichtlicher Vergleiche (2006).

4.3.1.3

*Are the standardised forms sufficient?*

According to the *Oberlandesgericht Nürnberg* the introduction of a standard form for the application of a declaration of enforceability would be useful. This form would be helpful for applicants not represented by a lawyer.

Courts proposed to amend no. 4.4. of the standard form of annex V. The form indicates whether the judgment has been served and whether the title is *res judicata*. The latter indication is unnecessary, as settlements are by their very nature not capable of becoming *res judicata*. 
4.3.1.4

To which extent are Articles 34 and 35 applied?

The *Oberlandesgericht Nürnberg* explicitly states that the reference to the objections of Articles 34 (2) – (5) and 35 is - according to the plain wording of Article 57 - not allowed. This corresponds to the judgment of the *Oberlandesgericht Koblenz* of 04/05/2004 - 11 UF 43/04 (*supra* 4.3.1.2).

4.3.2

Please describe the practical significance of Article 57 and Article 58

The practical significance of these provisions seem very limited.

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?

We did not receive any information about such a situation.

(...)

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?

The *Oberlandesgericht Stuttgart* reports such cases (occasionally) in which a foreign judgment has been annulled. Moreover, secs. 18 et. seq. of the German Implementation Act ("AVAG") only provide for interim measures so that problems should not occur.

The situation is dealt with by secs. 27 et seq. AVAG (in connection with secs. 769 et seq. ZPO. According to the *Oberlandesgericht Nürnberg*, the debtor must apply for the setting aside of the admission to the court which has issued the declaration of enforceability.

5. Proposals for Improvements

Do you see, based on your experience with Regulation 44/2001/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.

- Amendments of Article 5 concerning unjust enrichment and quasi-contractual claims.
- Amendment of Article 27 concerning the elimination of “Torpedo”-actions.
- Linguistic amendments concerning Article 22 (4) ("in proceedings concerned with"). The wording should be the same as in Article 22 (2) and (3) ("proceedings which have as their object").
- According to the special meaning of Article 5 (3) in matters of industrial property, there should be no thoughts of making proposals for a Community Patent without such a rule.
- According to some of the contacted persons there is no use of changing the rules. A unification should be made by the judicial practice.
Courts: Amendments should be made with regard to Article 27 in order to avoid "Torpedo"-actions.
Furthermore amendments should be made concerning the forms and titles: The courts must be able to determine the precise amount of the claim without the need of interpreting the title. The forms must clearly indicate the address of the parties for a better determination of the identity of the defeated party/debtor and the creditor who has been granted a declaration of enforceability.
It would be of value if the Regulation would also be applicable in proceedings with relation to Denmark.