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List of Abbreviations

O.J. P.  - Official Journal of the Republic of Poland
O.J. EU (EC) - Official Journal of the European Union (European Community)
EPS  - Europejski Przegląd Sądowy
ECJ  - European Court of Justice
CPC  - Code of Civil Procedure
KPP  - Kwartalnik Prawa Prywatnego
MoP  - Monitor Prawniczy
OSNC  - Orzecznictwo Sądu Najwyższego Izba Cywilna
OSP  - Orzecznictwo Sądów Polskich
PS  - Przegląd Sądowy
I. Introduction. Methodology of the analysis

The following national report includes some data and information regarding practical application of the European Civil Procedure on the field of jurisdiction, *lis pendens*, recognition and enforcement of judgments, authentic instruments and court settlements, by Polish courts of general jurisdiction.

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter ‘the Regulation 44/01’) is in force since May 1, 2004, this means since the Polish accession to the European Union. Before the Regulation 44/01, Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988 (88/592/EEC) came into force since February 1, 2000 (hereinafter ‘the Lugano Convention’). Considering the fact that, this report concerns years 2003-2004, it is quite short period of application of the Regulation 44/01 in Poland. Consequently, it was necessary – looking from our point of view – to take into consideration in this report also case law reached under the Lugano Convention. This remark relates especially to the statistical part of the report (Questionnaire No 1), but is also significant for issues touched in the empirical part (Questionnaire No 2) as well as for the legal questions (Questionnaire No 3).

Any statistical or empirical research on practical application of provisions of the Regulation 44/01 and the Lugano Convention has not been conducted in Poland until now. Thus, there is not any official statistical data referring to application above-mentioned legislative instruments and any practical problems in this sphere have never been analyzed.

It is important to observe that only judgments of the Supreme Court and exceptionally also some judgments of the appellate courts are announced. The judgments of district and regional courts are not announced almost at all. However, we used not only judgments of the Supreme Court (including judgments which were not announced) but also,
principal decisions of district, regional and appellate courts preparing this report. The study was conducted with cooperation of Department of International Cooperation and European Law in the Polish Ministry of Justice by network of courts of general jurisdiction. The data was collected principally by system of inquiry forms distributed among all-level courts of general jurisdiction. The additional information was gathered by interviews with practicing lawyers specialized in European civil procedure especially from the biggest polish law firms and judges who are involved in cross-border proceedings.

There are no special regulations in Poland implementing or even referring to provisions of the Regulation 44/01 and the Lugano Convention. Therefore, it is necessary to use, *mutatis mutandis*, Polish internal regulations designed mainly for national litigations, applying above provisions of the European civil procedure. It makes many troubles with practical application of the Regulation 44/01 and the Lugano Convention. This is the result of incoherence between the Polish national regulations and those, which were established by European Law.\(^5\)

The authors of this report have decided to translate into English only main thesis of judgments, which appear in the text as footnotes. However the complete versions of given judgments are attached to this report exclusively in Polish language.\(^6\) If the provisions of Polish statutes are quoted in the text, English translation will be also given in the footnotes.

For the sake of quite short period of application the Regulation 44/01 and the Lugano Convention in Poland, the issues of the European civil procedure, especially concerning jurisdiction, *lis pendens*, recognition and enforcement judgments, authentic instruments and court settlements has not appeared very frequently and has not given rise to a profound discussion in the Polish legal literature. A lot of problems, which were undertaken earlier in the literature of different member countries has not been considered yet in the Polish jurisprudence. Thus, very few of Polish studies and papers on given questions might be used for preparing this report.

\(^5\) In the course of work on new regulations referring to international civil procedure (contained in Part IV of the Code of Civil Procedure – ‘the CCP’) the experts decided that separate provisions aimed implementation or completion of the European civil procedure would not be created. But this new regulations will be harmonized with European provisions, primarily with the Regulation 44/01 to serve as supplement, if necessary. The draft at present is being reviewed and discussed by the ministerial committee in The Council of Ministers.

\(^6\) The translation into English all presented judgments was impossible due to the very short period fixed to prepare this report.
II. Questionnaire No 1: Collection of Statistical Data

As mentioned previously any official and statistical data on practical application of the Regulation 44/01 and the Lugano Convention is not collecting. Thus, there are not any official data bases, which might be helpful to answer on the questions of Questionnaire No 1. Trying to collect this data we have turned to all regional and appellate courts through the Department of International Cooperation and European Law in Polish Ministry of Justice - with the questionnaires concerning the application of the Regulation 44/01 and the Lugano Convention by courts of general jurisdiction within the time from 2003 to 2004. On this basis we have received the information, but its quality was very diverse, because part of the courts could not collect any valuable data on application of the Regulation 44/01 and the Lugano Convention in such restricted period of time. Moreover, we used official data bases with judgments of the Supreme Court and some judgments of appellate courts.

It should be noted, that it was not possible to evaluate the accurate number of decisions rendered under the Regulation 44/01 and the Lugano Convention. For this reason all data given below constitutes exclusively the estimation based on the accessible data and created by some necessary generalizations.

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

According to the information given by the Ministry of Justice of the Republic of Poland the courts of general jurisdiction handled totally near 7.305.000 civil cases in the year 2003, and near 7.621.000 civil cases in the year 2004.

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7 The regional courts have also turned with these questions to the district courts. In this way we have received the information coming from all levels of the jurisdiction.
8 As a result of our inquiries we have received also partial data from year 2005.
9 The Polish data bases of legal information are represented by ‘LEX’ (edited by Wolters Kluwer Polska) and ‘Maxima Polonica’ (edited by Lexis Nexis Polska Sp. z o.o.). We have also got an access to the internal data base of the Supreme Court– called ‘Supremus’.
10 As mentioned above the short period of application of the Regulation 44/01 caused that presented numbers included the decisions rendered under the Regulation 44/01 as well as those under the Lugano Convention.
11 All this statistical data is accessible on the website: http://www.ms.gov.pl/statystyki.
12 This number includes civil cases stricto sensu, family cases, cases arising under labor and social security law and commercial cases. Civil cases stricto sensu – 4.870.000 (including 2.417.000 cases concerning mortgage
Within the years 2003 to 2004, we estimate that the Polish courts handled each year near 3,500 cases under the Regulation 44/01 and the Lugano Convention at the very most. Probably it was approximately 2,500 cases per year. Because it concerns the period from 2003 to 2004 we assume that the majority of judgments were rendered under the Lugano Convention. However, we may suppose that in 2004 the judgments concerning the Regulation 44/01 represented already near 50 percent of this number. This percentage rose radically in 2005.

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:

We estimate that in the given period (years 2003 to 2004) there were near 4000 to 4500 decisions where Polish courts retained jurisdiction on the basis of the rules of the Regulation 44/01 or the Lugano Convention. The application of the provisions of the Regulation 44/01 has visibly predominated since May 1 2004. The number of the cases in which Polish courts retain jurisdiction on the basis of this Regulation is growing continuously. Among the provisions of the Regulation 44/01 in the sphere of the jurisdiction, the most commonly applied by Polish courts were the following:

- Art. 2 par. 1 (general jurisdiction based on the domicile),
- Art. 5 No. 1 (jurisdiction in matters relating to a contract; especially Art. 5 No. 1 lit. b was used very frequently by the courts),
- Art. 5 No. 2 (jurisdiction in the matters relating to maintenance),
- Art. 5 No. 3 (jurisdiction in matters relating to tort, delict or quasi – delict),
- Art. 6 No. 1 (jurisdiction with number of defendants),
- Art. 22 (exclusive jurisdiction, especially Art. 22 No. 1 – rights in rem in immovable property or tenancies of immovable property, Art. 22 No. 5 - proceedings concerned with the enforcement of judgments),

13 This number includes civil cases stricto sensu family cases, cases arising under labor and social security law and commercial cases. Civil cases stricto sensu – 5,155.000, including 2,533.000 cases concerning mortgage registers, family cases (including maintenance cases) – 1,009.000, labor and social security cases – 357.000 i commercial cases – 1.100.000, (including 517.000 registry cases).
3. **Evaluation of the approximate number of applications for a declaration of enforceability on the basis of Regulation 44/2001/EC on 2003/2004:**

It is extremely difficult to estimate the exact number of applications for a declaration of enforceability on the basis of Regulation 44/2001/EC on 2003/2004. Basing on the data coming from the regional courts\(^{14}\) we presume that this number is variable and it represents between 500 to 1,000 applications on 2003/2004 under the both legislative instruments. This is only estimated number due to the fact, that some courts could not verify if such applications were deposed during this period. Among the applications for a declaration of enforceability, those concerning the Lugano Convention have constituted significant majority. Since 2005 participation of the applications regarding the Regulation 44/01 has probably risen.

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

During the examined period (years 2003-2004) the Polish first instance courts were examining majority of applications favourably and usually were granting the declarations of enforceability on the basis of the Regulations 44/01. It was the same with the Lugano Convention provided the latter instrument required that already the first instance court had to examine the conditions of enforceability. The information obtained from the regional courts and analysis of the case law of these courts confirm above statements. On this basis, we may estimate near 90 to 95 percent of total number of the applications for a declaration of enforceability under the Regulation 44/01 or the Lugano Convention was successful. In the result of this, we estimate the Polish courts in the first instance have granted near 450 to 900 declarations of enforceability from 2003 to 2004.

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\(^{14}\) The applications for a declaration of enforceability, under both the Regulation 44/01 and the Lugano Convention, are examined by the regional courts at the first instance.
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 been asked for:

Cases where declarations of enforceability have been refused already in the first instance did not appear very frequently. We estimate that such negative decisions constituted merely 5 to 10 percent of all applications for a declaration of enforceability on the basis of the Regulation 44/01 and the Lugano Convention. In our opinion it would be between 50 and 100 decisions from 2003 to 2004.\(^{15}\)

According to the information obtained from regional courts and basing on copies of decisions of these courts we may find, that principal reasons for refusal were following: decisions were not enforceable in the Member State where they were given (Art. 38 par. 1 of the Regulation 44/01), or applications did not concern a judgment (Art. 32 of the Regulation 44/01) or the decisions were given before May 1, 2004 (Art. 66 par. 2 of the Regulation 44/01).\(^{16}\)

Furthermore, we have noted two cases in which Polish courts refused of declaration of enforceability because of the contrariety with Polish public policy (Art. 34 No. 1 and Art. 45 par. 1 of the Regulation 44/01), however these decisions violated Art. 41 of the Regulation 44/01.

In the case of the Lugano Convention the mainly reasons for refusal were following: contrariety with Polish public policy (art. 27 No. 1 and Art. 34 par. 2 of the Lugano Convention), violation of the exclusive jurisdiction of the Polish courts (Art. 28 par. 1, Art. 16 No. 1, and Art. 34 par. 2 of the Lugano Convention), inappropriate delivery to defendant in the proper time of the document instituting the proceedings (Art. 27 No. 2 and Art. 34 par. 2 of the Lugano Convention) or the lack of required documents (Art. 46 or 47 of the Lugano Convention; it concerned especially documents indicated in Art. 46 No. 2 or in Art. 47 No. 1 of the Lugano Convention). The refusal of the declaration of enforceability had taken also place for the sake of non belonging judgment to the temporary range of the Lugano Convention (Art. 54 par. 2 of the Lugano Convention).

\(^{15}\) No casualty of the refusal of declaration of enforceability at first instance under the Regulation 44/01 was noted down in some judicial districts (e.g. in the Regional Court in Plock and in the Regional Court in Budgosczz).

\(^{16}\) In such situations the Lugano Convention could be eventually applied.
On the basis of gathered information we can not quote even estimated number of the matters at whose court ordered supplying of applications. We can ascertain only, that such situations had place.

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 revocations:**

The information got from the appellate courts\(^\text{17}\) does not allow to give even the approximate number of judgments in which the courts revoked or changed decisions about declaration of enforceability rendered by the first instance courts. Probably they rendered on the basis of the Regulation 44/2001 and the Lugano Convention together tens of such judgments.

The repealing or changing of the first instance courts’ decisions about declaration of enforceability by appellate courts resulted circumstances indicated in the Regulation 44/2001 or the Lugano Convention or the provisions of Polish civil procedural law.

If it concerns reasons connected with applying the Regulation 44/2001 and the Lugano Convention, then the most often cause of the change of decisions about declaration of enforceability was inappropriate delivery to defendant of the document instituting the proceedings, where the judgment was given in default of appearance (art. 34 No. 2 and Art. 45 ust. 1 of the Regulation 44/2001 or Art. 27 No. 2 and art. 34 par. 2 and art. 37 par. 1 of the Lugano Convention).

The appellate court changed decision sometimes and refuse granting declaration of enforceability, because the first instance court had applied the Regulation 44/2001 or the Lugano Convention to declare enforcement of judgments beyond of the scope of these both legal instruments.

However, the reasons of repealing decision by the appellate court resident in the national law, then they were cases qualified violations commit by the first instance courts, which cause the invalidity of the proceedings according to the Polish rules. Then the revocatory court is obliged to repeal this judgment and deliver the matter to renewed recognition by the first instance court. They came forward in the practice the situations, when appellate courts they had to repeal decisions of first instance courts granting *exequatur*,

\(^{17}\) Appellate measures filled against decisions about declaration of enforcement rendered at first instance in the Poland are recognized by the appellate courts.
because of the inappropriate composition of first instances' jury or because of the lack of appropriate authorisation of the party's proxy. It concerned only these violations of proceedings which had place during the declaration of enforceability's proceeding and it was not related to the lack of conditions of declaring of enforcement under the Regulation 44/01 or the Lugano Convention. The Polish courts do not introduce so any additional bases of the refusal of declaration of enforceability, because they apply only national rules about the invalidity of the proceeding.

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

The amount of time required for obtaining of the decision containing a declaration of enforceability is very diverse depending on each court. According to the gathered information 14 days was the shortest period necessary for obtaining of declaration of enforceability at first instance since the moment of the deposition of the complete and correct application.\(^\text{18}\) However, the situations of examination of the application for declaration of enforceability by 12 months took also place at the first instance court.\(^\text{19}\) One can suppose, that the regional courts at first instance examine the application on the basis of the Regulation 44/2001 on average during 1-4 months. The situation appears similarly on the basis of the Lugano Convention. The period of examination of the application at first instance rarely achieves or exceeds 6 months. The period of the examination of the applications is prolonged if they are incomplete and the court has to order to the replenishment of the application (e.g. by the delivery of documents).

We did not get the suitable quantity of information in the theme of the appellate measures, to be able to estimate the average time of proceeding at second instance by the appellate courts. On the basis of the fragmentary data we can admit that appellate courts examine appellate measures for 1-3 months, this period is seldom longer than 3 months.\(^\text{20}\) The time of examination of appellate measures depends on many things, e.g. if it is not touched by any formal failures and if the court does not have to order to supplement of the appellate measure.

\(^{18}\) It was a case of Regional Court in Gdansk and Regional Court in Bialystok.

\(^{19}\) We have got such information from the Regional Court in Slupsk and the Regional Court in Zielona Gora. We may suppose that in this cases courts had to require production of necessary documents.

\(^{20}\) We got such information from the Appellate Court in Warsaw and the Appellate Court in Gdansk.
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:**

The most often applied provisions of the Regulation 44/2001 concerning national jurisdiction, they were indicated answering on question no. 2. This also relates to the provisions of the Lugano Convention concerning national jurisdiction.

Besides this, the most often applied provisions of the Regulation 44/01 by Polish courts were following:

a) provisions regulating recognition of judgments, including Art. 33 par. 1 (automatic recognition), Art. 34-35 - conditions of the refusal of recognition (it concerns Art. 34 point 2 the most often), art. 36;

b) provisions regulating declaration of enforcement's proceeding, especially art. 38 par. 1, Art. 39-42, Art. 43 and Art. 45 par. 1, Art. 51;

c) common provisions for recognition and declaration of enforcement's proceeding - Art. 53-56;

d) transitional provisions, especially art. 66 par. 2.

The equivalents of above mentioned provisions are also applied the most often if the Lugano Convention is employed.
III. Questionnaire No 2: Collection of Empirical Data

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?

Polish law does not establish any additional conditions of recognition and enforcement of judgments, authentic instruments and court settlements, which are beyond those permitted under Regulation 44/01. The provisions of Regulation are applied by Polish court directly and take precedence over national statutes.\(^{21}\) Therefore our courts do not apply national provisions concerning recognition and enforcement of foreign judgments. Such provisions are contained in Book III Part IV of the Code of Civil Procedure (Art. 1145-1153).\(^{22}\) Actually they are applied exclusively against judgments and settlements coming from States non-belonging to the EU. These regulations establish number of conditions of recognition and enforcement, thus we may say that application of the Lugano Convention or the Regulation 44/01 make proceedings for recognition and enforceability more efficient. These both instruments significantly have facilitated cooperation and coordination in the sphere of circulation of judgments within the Member States.

Moreover, our jurisprudence accepts that the system created by the Regulation 44/01 and the Lugano Convention is complete regarding to the conditions of recognition and declaration of enforceability, and the Polish rules can not be applied subsidiary in this area.\(^{23}\) However it is possible to apply exclusively Polish procedural provisions included in Book III Part IV of the CPC if some issues are not regulated by the Lugano Convention or the Regulation 44/01.

\(^{21}\) The Lugano Convention as international treaty is also applied directly and has also have precedence over national statutes. Art. 91 par 1 of the Constitution of the Republic of Poland stipulates: „After promulgation thereof in the Journal of Laws of the Republic of Poland (Dziennik Ustaw), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute” and par. 2 „An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.”

\(^{22}\) These provisions are also applied for declaration of enforceability settlements concluded before foreign courts. The CPC does not regulate declaration of enforceability of authentic instruments.

\(^{23}\) See decision of the Supreme Court of May 19, 2005 (V CK 783/04), OSNC 2006, No. 4, Item. 72. In this judgment the court accept that decision which is not final can also be recognized under Art. 26 of the Lugano Convention (under Polish law only final decisions can be recognized).
2.2. Are the local focal points, i.e. do cross border litigations accumulate in border regions?

According to obtained data, the cross border litigations under the Regulation 44/01 are accumulated especially in the border court districts and those containing some bigger cities. The most important are following: district of Warsaw\textsuperscript{24}, district of Gdansk, district of Poznan, district of Katowice, district of Gliwice, district of Zielona Gora, district of Bialystok, district of Legnica and district of Wroclaw. Unfortunately this data is incomplete, because it comes from all appellate and regional courts, and only from chosen district courts. In the result more exact analysis was impossible.

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

We may appreciate that majority of applications for declaration of enforceability concern titles coming from Germany. We estimate even that those applications constitute more than 50 percent of all application deposed in Polish courts. There are also presented more frequently application concerning titles coming from Austria, France, Belgium and Netherlands.

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?

We have not obtained any information about any problems with handling of the standard forms under Art. 54 of the Regulation 44/01. We suppose this is the result of quite short period of application the Regulation 44/01 in Poland and narrow number of examined application.

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

\textsuperscript{24} On May 1, 2005 the Regional Court in Warsaw was divided into 2 smaller entities: the Regina Court in Warsaw and the Regional Court in Warsaw-Praga, Our data presented in this report concerns the Regional Court in Warsaw before May 1, 2005.
In the light of gathered data the possibility provided for in Article 55 to dispense with the certificate’s production was not used frequently in practice. This certificate was usually produced by the interested party. However, the courts examining the most number of applications for declaration of enforceability have sometimes used this possibility, but it was very sporadic cases. In the following courts such cases occurred: the Regional Court in Katowice – 6 cases, the Regional Court in Bydgoszcz – 4 cases, the Regional Court in Danzig – 2 cases, the Regional Court in Elblag – 1 case and the Regional Court in Kalisz – 1 case. Moreover the Regional Court in Legnica has accepted an equivalent document in one case because of not producing of appropriate certificate.

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

Any language problems with handling of the standard form concerning Art. 54 of the Regulation 44/01 have not been noticed in the judicial practice.

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

Polish courts generally order producing of appropriate translation if the party does not produce such translation at once with the application. However there were very few such decisions because majority of applicants has produced this translation.

We have noticed following decisions concerning production of translations: the Regional Court in Zielona Góra – 4 cases, the Regional Court in Katowice – 4 cases, the Regional Court in Danzig – 4 cases, the Regional Court in Gliwice – 3 cases, the Regional Court in Kalisz – 3 cases.

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?

We can not pose any general conclusion in this matter; however in the majority of cases it was necessary to translate whole judgments including the grounds for the decision.
2.7.2. Do the costs for translations lead to less efficiency?

We did not obtain any information about eventual influence of costs of translation for efficiency of proceedings.

2.8. Which costs result from the recognition of judgements, authentic instruments and court settlements?

Costs of proceedings for declaration of enforceability include court costs and eventually costs of actions undertaken by representative. For the sake of formal character of such proceedings there are not any necessity to pay another expenses e.g. costs paid experts etc.

2.8.1. How is Article 52 implemented?

Polish national provisions do not regulate in the special way costs relating to proceedings for declaration of enforceability of judgments, settlements and authentic instruments under the Regulation 44/01. For that reason general regulations concerning costs and fees in civil cases are applied. Under these regulations, fixed charge of PLN 300 (near EUR 75) is collected of every application for declaration of enforceability of judgment, settlement or authentic instruments as well as an application for a decision that the judgment be recognized. This charge should be paid in advance at the moment of deposing appropriate application in the court. Because of not calculating this charge by reference to the value of the matter it is compatible with art. 52 of the Regulation.

2.8.2. How are solicitor’s charge calculated?

The solicitor’s charge can not exceed PLN 1,200 (near EUR 300) in the proceedings concerning declaration for enforceability. However, the final charge depends on the decision of judicial authority which takes into consideration kind of

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actions undertaken by legal representative, theirs necessity and usefulness, contribution of representative to the outcome of the case and character of the case. In the view of uncomplicated character of cases concerning declaration of enforceability, the real charge rather exceptionally will achieve maximal quota. It depends however of the circumstances of the case.

2.8.3. Are these costs reimbursable?

If the declaration of enforceability is granted by court, all theses charges of proceedings should be paid by loosing debtor. The court takes into consideration usefulness and indispensability of costs in the light of character of the case. If the application is overruled these costs are not reimbursable for an applicant.

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

The costs are calculates by the court declaring enforceability or by the court clerk (Rechtspfleger). In the latter situation the court must define in the judgment the principles of repartition of costs between parties of the case and court clerk only calculates and verifies this amount.

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

The costs of proceedings are executed in the general way of enforcement proceedings. There are not any special provisions concerning cost resulting from proceedings for declaration of enforceability under the Regulation 44/01.

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27 Art. 109 § 2 CPC
28 Art. 108 § 1 CPC
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?

We have not obtained any information about delays in time due to the issue of calculation and verification of the costs.

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?

The requirement to serve the party against whom enforcement is sought with the declaration of enforceability under Art. 42 of the Regulation 44/01 may in reality impair surprise effect of enforcement. It concerns especially these situations where an applicant lives abroad and the declaration of enforceability should be serviced abroad. Therefore, it is possible that debtor would obtain this decision earlier than applicant, and it may make difficult of enforcement of foreign judgments. However, such problems did not arise in practice because the applicants did not exercise the provisional measures very often.

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

The obtained information shows that Polish courts preserve legal aid according to Article 50 of the Regulation 44/01.

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)?

According to gathered data we may only declare that any application for declaration of enforceability concerning authentic instruments or appealable judgments has not been
deposed yet in Polish courts. Besides of this we have noticed only more then ten decisions for declaration enforceability concerning court settlements granted in whole country.

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

We have not noticed any problems regarding the references to national procedural laws that included in Annex I to IV of the Regulation 44/01. Some problems arise under Art. 43 par. 2 of the Regulation 44/01 and the appendix III (see remarks under point 1.7 in the Questionnaire No.3).

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

We have not noticed any problems in this area.

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 transnational of completed form is dispensable?

According to results of the interviews conducted with judges, they have no problems with obtaining the printed forms concerning Article 54 of the Regulation 44/01. These forms in Polish language are accessible in the data bases of legal information as ‘LEX’ or ‘Maxima Polonica’.

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?

We did not find during our survey any possibilities to improve the implementation of the Regulation 44/01 within the EU. Our experiences with coordination and cooperation at all given levels are too narrow yet for indicating any improvements in this field.
2.16. How much time does it take usually until the first enforcement measure (at least seizure of assets) is carried out – i.e. not only until the judgment – after an application for declaration of enforceability has been submitted? How much time does it take usually after a judgment has been given in Member State to collect all documents which are necessary to pursue the application for a declaration of enforceability in another Member State?

We may suppose that the first enforcement measure is carried out form 2 to 6 months after deposition of application for declaration of enforceability. This time depends also on the time of recognizing of such application by the court, and is very differentiated.\(^{29}\)

We have not disposed any data concerning amount of time necessary to collect all documents to pursue the application for a declaration of enforceability in another Member State. However, we suppose that copy of judgment and standard form under Art. 54 of the Regulation 44/01 should be issued by Polish courts in one month.

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

In the light of Polish jurisprudence and literature\(^{30}\) any pleas as to the merits are not admissible in the proceeding for declaration of enforceability under the Regulation 44/01. This is the result of formal character of these proceedings and narrow competence of court restricted only to examination conditions for declaration of enforceability.\(^{31}\)

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\(^{29}\) See question 7 in the Questionnaire No. 3.

\(^{30}\) K. Weitz, Europejskie ...(European ...), p. 619.

\(^{31}\) See the judgments rendered under the Lugano Convention: the Appellate Court in Warsaw decision of February 28, 2005 (VI ACz 1678/04), not announced.; the Appellate Court in Warsaw decision of August 16, 2005 (I ACz 826/05), not announced.; the Appellate Court in Warsaw decision of December 30, 2003 (I ACz 685/03), not announced.; the Regional Court in Bydgoszcz decision of April 30, 2003 (I Co 10/03), not announced.; the Appellate Court in Warsaw decision of January 8, 2003 (I ACz 2163/02), not announced.
IV. Questionnaire No 3: Legal Questions

The observation of judicial practice of the Polish courts and the practice of the Polish enforcement authorities, as well as information got from professional lawyers dealing with problems of the national jurisdiction, *litis pendetis* and recognition and enforcement of judgments, authentic instruments and court settlements on the basis of the Regulation 44/2001 and the Lugano Convention shows that only few legal questions connected with applying these instruments were considered so far.

Certain problems relating to national jurisdiction, conditions of recognition or enforcement and the course of proceedings for recognition or declaration of enforceability have appeared just in few judgments. In the Polish legal literature only some problematical questions were presented until now. We may appreciate that the largest practical and theoretical meaning had problems concerning subsidiary application of national regulations within the proceedings for declaration of enforceability.

We should underline that the essential questions which were touched in the Questionnaire No 3 did not appear so far in the practice of the Polish courts and professionals involved in cross-border litigation. Besides, the legal literature pays generally attention on the problems which were noticed considerably earlier in the foreign literature.

On that reasons, the following remarks are mostly fragmentary, because they present only the hitherto existing modest practice in applying and analyzing of the Regulation 44/2001 and the Lugano Convention in Poland.

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)) practiced by the European Court of Justice (ECJ)?

Conducted survey did not show any problems with practical applying the autonomous interpretation of “civil and commercial matters” created by the European Court of Justice (‘the ECJ’) (art. 1 par. 1 of the Regulation 44/01 and the Lugano Convention). This is the consequence of the fact that the Polish courts examined mostly cases which had undoubtedly
civil character. However, the approach of the Polish courts is differentiated in the sphere of the methods of evaluation of the matter. There are often in practice simple presumption, that the examining matter is the civil matter, and the Polish courts accept it as obvious without clear reference to the case law of the ECJ.\(^{32}\) However, Polish courts sometimes clearly refer to the jurisprudence of the ECJ quoting these judgments as ground of their evaluation of the character of matter according to the principles of the autonomic interpretation.\(^{33}\)

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

We have noticed some cases where public entities had used the provisions of the Lugano Convention. The example is the case in whose Federal Republic of Germany represented by the Ministry of Foreign Affairs and acting by the Presidium Protection of Borders Ost-Berlin applied for declaration of enforceability. This case concerned a German judgment awarding from the debtor a compensation of damage suffered by Republic of Germany. The German entity had to pay remuneration and costs of the treatment of the officers of the border service which were injured by the debtor crossing by the border.\(^{34}\)

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

We have not found within our survey any problems with delineation of the scope of application of the Regulation 44/01 (or the Lugano Convention) and other instruments concerning the judicial cooperation in civil matters. These questions were only marginally presented in the legal literature.

In particular:

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\(^{32}\) See judgment of the footnote No 34.

\(^{33}\) See e.g. decision of the Regional Court in Gdansk of January 1, 2004, IX GCo 247/03 (not announced), under the Lugano Convention in which the court ruled that case concerning the obligation between entrepreneurs was also civil case. In the grounds of its decision the court referred to the decision of the ECJ of December 16, 1980, 814/79, *Niederlande v. Rüffer*.

\(^{34}\) Decision of the Regional Court in Gorzow Wielkopolski of June 6, 2002 r., I Co 93/01 (not announced) rendered under the Lugano Convention. The court did not refer to the ECJ case law and did not quote *Niederlande v. Rüffer* case. We can not appreciate correctness of application of the Lugano Convention because of narrow grounds of this decision.
1.3.1 the delineation to Regulation 2201/2003/EC (concerning Article 1 (2) lit. a) Regulation 44/01/EC) ? Are there any problems with the assertion of claims concerning maintenance/living costs ?

There are not any practical problems with delineation of the scope of application of the Regulation 44/01 (or the Lugano Convention) and the Regulation 2201/2003. However we have noticed that the claims concerning maintenance/living costs had been applied the most frequently among provisions of the Regulation 44/2001.

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 ?

We have not noticed any practical problems with delineation of the scope of application of the Regulation 44/01 (or the Lugano Convention) and the Regulation 1346/2000. The problem of individual actions connected or resulting of the bankruptcy law (e.g. taking legal proceedings by official receiver against the action of bankrupt , matters relating to the official receiver’s responsibility) was touched by the literature under the Lugano Convention, before the Regulation 44/01 and the Regulation 1348/2000 came into force. It was considered then that the Lugano Convention should be not applied e.g. in the cases concerning taking legal proceedings by official receiver against the action of bankrupt or relating to the official receiver’s responsibility. This view was also maintained under the Regulation 44/2001 and the Regulation 1346/2000. It is necessary to underline that the cases concerning taking legal proceedings by official receiver against the action of bankrupt or relating to the official receiver’s responsibility are not examined by bankruptcy court (special court occupying bankruptcy proceedings), but by ordinary civil court.

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

We have not noticed any case in Polish case law where court would refer to the
Regulation No 1408/71 of 14 June 1971 on the application of social security schemes to
employed persons and their families moving within the Community\(^{37}\) for qualification of
social security matters.

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

Question of the extension of the scope of application of the Regulation 44/2001 was
not posed in the Polish literature so far. It seems that the including of the mediation would be
very attractive because of the possibility of enforcement of settlements reached within such
proceedings.

On the one hand recognition and enforcement of the foreign arbitral awards are
guaranteed by international treaties\(^{38}\), on the other hand recognition and enforcement of
settlements negotiated within foreign mediatory proceedings could be very problematical in
practice.\(^{39}\)

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

The analysis of the jurisprudence of the Polish courts and the opinions of the Polish
document allows assume, that guarantees for the rights of defense provided by the Regulation


\(^{38}\) It concerns first of all the Convention on the Recognition and Enforcement of Foreign Arbitral Awards made

\(^{39}\) Art. 58 of the Regulation 44/2001 concerns only settlements negotiated before foreign court. The settlements
negotiated before mediator will be excluded of the scope of this article even if this settlement is negotiated in the
course the judicial proceedings. Under Polish law the settlement negotiated before mediator is approved by the
court and is treated as settlement negotiated before the court (Art. 183\(^{14}\) and art. 183\(^{15}\) § 1 CPC). However this
settlement is beyond of the scope of Art. 58 of the Regulation 44/01. Problematical is also question of treating
the settlements negotiated before mediator and approved by court as authentic instrument under Art. 57 par. 1 of
the Regulation 44/01. It may be considered enforcement of those settlements under Regulation 805/2004 creating
a European Enforcement Order for uncontested claims.
44/2001 concerning jurisdiction on the one hand and recognition and enforcement on the other hand operate correctly and quite efficiently.

Provisions relating to examination of jurisdiction by the courts of Member States (Art. 25 and 26 par. 1 of the Regulation 44/2001) have got primordial meaning. The important is also the rule that this examination follows *ex officio*. Moreover, decisions relating examination of admissibility of proceedings, when the defendant does not enter an appearance (Art. 26 par. 2-4 of the Regulation 44/2001) are the essential supplement of this protection. The fact that reasons indicated in Art. 34 and 35 of the Regulation 44/2001 are examined just at second instance can not be considered as excessive restriction of the debtor rights. The possibility of lodging by debtor an appeal with the simultaneous restrictive application of protective measures (Art. 47 par. 3 of the Regulation 44/2001) seems sufficient for the protection of the debtor rights.

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

We can not consider, that the Art. 38-52 of the Regulation 44/2001 are perfectly „compatible” with provisions of the Polish CCP. The Polish legislator did not decide on establishment of special rules in the CCP to complete the provisions of the Regulation 44/2001 or to adapt the national provisions to those included in the Regulation 44/01. Thus, the subsidiary application of the general CCP provisions is necessary. Polish courts applied especially provisions concerning declaration of enforceability of judgments coming from third states (Art. 1150-1153 CPC) as well as general provisions about the process (on the basis of Art. 13 § 2 CPC). A lot of essential problems arise in this field. Following belong to the most important:

1) Art. 41 phrase 2 of the Regulation 44/01 stipulates that ‘the party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.’ That means debtor can not take part at this stage of proceedings. However Art. 1151 § 2 phrase 1 CPC requires that ‘courts pronounces in the matter of enforceability exclusively after conducting public debate’. This regulation is not conformed with Art. 41 phrase 2 of the Regulation 44/2001. As a result of this Art. 1151 § 2 phrase 1 CPC can not be applied in the course of proceedings of declaration of enforceability under the Regulation 44/01. However, in
that situation Art. 148 § 1 of the CPC should be applied, accordingly to whose every judicial session is public and the secret session can be proceeded only in the situation provided for the statue. Comparison of Art. 148 § 1 CPC and Art 41 phrase 2 of the Regulation 44/01 indicates that first instance court should examine an application of enforcement on the public session, but only the applicant should be notified about it (public session which is not a debate)\(^{40}\). The judicial practice in this matter is highly diversified. The courts examine the application upon the secret session the most frequently. This practice permits realize art. 41 phrase 2 of the Regulation 44/2001, but violates Art. 148 § 1 CPC at the same time. On the other hand regional courts assign sometimes a debate, but this practice is not compatible with the Art. 41 the Regulation 44/2001.

2) Art. 43 par. 2 of the Regulation 44/01 stipulates that ‘the appeal (appellate measure) is to be lodged with the court indicated in the list in Annex III’. Poland indicated appellate court as competent to examination of the appellate measure. Therefore, this appellate measure should be lodged directly with a competent court. However accordingly to Art. 396 § 1, Art. 397 § 2 phrase 1 and art. 13 § 2 CPC the interlocutory appeal\(^{41}\) should be lodged with court rendering contested judgment. Then this court transfers the appellate measure together with the case file to competent court. In the judicial practice the question, if Art. 43 of the Regulation 44/01 had modified the rules of the CPC in this matter, has appeared. The Supreme Court has accepted in the judgment rendered under the Lugano Convention\(^{42}\) that the appellate measure indicated in Art. 37 par. 1 and Art. 40 (of the Convention, but it concerns also Art. 43 of the Regulation 44/01) had to be lodged directly to the competent appellate court, and not to the regional court rendering decisions at the first instance. This question is very problematical in the Polish legal literature.\(^{43}\)


\(^{41}\) The Polish interlocutory appeal constitutes an appropriate appellate measure under Art. 43 of the Regulation 44/01.

\(^{42}\) Decision of the Supreme Court of July 14, 2004, IV CK 495/03, OSNC 2005, No. 4, Item 73. Thesis as follow: ‘The interlocutory appeal under Art. 40 of the Lugano Convention should be lodged directly to appellate court’.

\(^{43}\) See the same opinion: K. Weitz, *Europejskie …[European …]*, p. 615; *Ibidem, Konwencja …[The Lugano Convention …]*, s. 251-254; T. Ereciński, *Komentarz …[Commentary …]*, s. 338. Contrary to this opinion, see: M. Lemkowski, *Glosa do postanowienia SN z 14.07.2004, IV CK 495/03 [Comment to the decision of the
3) Problematical is also, if under 1) mentioned rules should be applied to case reviewing by the first instance court after repealing of the decision by the second instance court. Such cases happen rarely, but they have place in practice. \(^4^4\) There appeared two main problems. Firstly, does the party against whom enforcement is sought at this stage of proceeding (reexamination of case by the court of first instance) shall not be entitled to make any submissions on the application? Secondly, can the first instance court examine in such proceedings the reasons under Art. 34 and 35 of the Regulation 44/01?

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

We can notice that the practical meaning of international conventions, especially bilateral agreements, has radically reduced by the application of the Lugano Convention and the Regulation 44/01. However, international agreements, particularly those relating special matters, are still crucial in the matters excluded of the scope of the Regulation 44/2001 (or the Lugano Convention).

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

2.1 General Issues

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

It seems, that in the considerable number of cases, in whose jurisdiction was established on the basis of the Regulation 44/01, the aim of predictability of the jurisdiction and legal certainty was achieved. As usual a debtor can foresee, in which Member State an action against him can be brought. It is a result of the principle that debtor can be sued only in a Member State where he is domiciled and in the courts of another Member State only by virtue of the rules set out in the Regulation. However,
the predictability of the jurisdiction might be appreciate as inferior in the cases arising under more complex actual states, especially on the basis of certain provisions of the special jurisdiction (especially Art. 5 No. 1 and 3 and Art. 6 No. 1 of the Regulation 44/01), in matters relating to insurances and in matters over consumer contracts and individual contracts of employment (Art. 8-21 of the Regulation 44/001).

2.1.2 Do the provisions on jurisdiction deal satisfactory 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?

Any situations in which national courts would establish the jurisdiction on another ground, than those set out in the Regulation 44/01 has not appeared in the Polish jurisprudence. Closely observed by Polish courts is rule according to exclusively claims indicated in Art. 5 of the Regulation 44/01 establish the jurisdiction of the Member State courts, unless there are special provisions. Such opinion is also unanimously presented in the Polish literature.

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

On the basis of Polish experience we can assume that the catalogue of fact-specific ground of jurisdiction included in the Regulation 44/01 is quite sufficient. There have not appeared any situations, in which new fact-specific ground would be necessary. The Polish literature has not undertaken this problem yet.

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

This problem has not appeared in practice. We should underline, that Polish law - in the matters of the scope of the Regulation 44/01 - does not constitute Polish citizenship of party, as an independent ground of the jurisdiction of the Polish courts. Thus, there is no discrimination in this area and persons domiciled in the Poland have exactly the same rights as persons having Polish citizenship, so the principle expressed in the Regulation 44/01 (art. 4 par. 2 of the Regulation 44/01) is superfluous. The
grounds of jurisdictions provided for with Polish law can be used by every plaintiff domiciled in Poland as well as in third State.

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

The analyzed jurisprudence indicates, that applying Art. 25 and 26 of the Regulation 44/01 does not generate any serious practical problems. The examination of the jurisdiction follows in that way that the court considers always the factual circumstances introduced by parties for establishing jurisdiction of Polish courts. However, the court does not conduct ex officio any inquiry aimed verification of these facts. Only when some factual allegations of parties are questionable the court can demand of them supplying their allegations or presenting some necessary proofs. If actual circumstances essential for the examination of the jurisdiction have also meaning for the substantial decision of the matter (e.g. the fact of the conclusion of contract or commission of delict), the court bases exclusively on allegations introduced by plaintiff and these allegations are not the object of hearing of evidence. According to Art. 25 of the Regulation, the examination of jurisdiction ex officio concerns only exclusive jurisdiction indicated in Art. 22 of the Regulation. Moreover, if a defendant is domiciled in another Member State (and if he does not enter in appearance), it is necessary to service previously a writ to defendant that he could enter in appearance. In such case the court could have a jurisdiction derived from Art. 24 of the Regulation 44/01.45 When the defendant is domiciled in Poland or in third state, provisions of the national law concerning the examination ex officio are also applied (art. 1099 CPC). There are no temporary restrictions in the examination of the national jurisdiction according to the Polish law, because the court has to always consider lack of the jurisdiction.

45 This way of proceeding was adopted by the District Court in Gdansk – decision of April 5, 2004, IX GC 913/03/B (not announced). This judgment was rendered under the Lugano Convention.
Certainly, the Polish court will consider *ex officio* under the Regulation 44/01\(^{46}\) an existence of agreement on jurisdiction, if he knows about conclusion of such agreement.\(^{47}\) However, the court does not conduct any inquiry but examines only the documents presented by the plaintiff. The court will take into consideration only the agreement on jurisdiction included in the case file and it does not demand any special statement of the plaintiff in this question. Nevertheless, if a plaintiff presents only part of agreement, the court will require of production of the complete agreement to verify if there are not any clause excluding jurisdiction of Polish courts.

### 2.1.6 Is the examination of the issues 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 the courts do not decide the issues of jurisdiction separately, but only in connection with the main proceedings? In reverse, are there complaints that a separate decision on jurisdiction results in an unbearable delay of the decision in the main proceedings?

The examination of the issues of jurisdiction can be time-consuming in practice, but these proceedings are not relating to any additional costs, because all fees are paid at the beginning of main proceedings (when you lodge your action in the court). There are not any special fees relating exclusively to examination of jurisdiction. It is the same with the fees of attorneys. However additional costs can appear if the first instance court overrules plea of the jurisdiction raised by the party or the court declares that it has not jurisdiction and subsequently this decision is contested by party. Then, it is necessary to pay some costs concerning the appellate measure in this case. In the Polish law, the court does not render any separate decision concerning its jurisdiction. This question is only mentioned in the grounds for the substantive decision. But if one of the parties raises plea of the jurisdiction, the court will has to render autonomous decision concerning this question. The interlocutory

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\(^{46}\) This situation is regulated differently by the CPC. Art. 1105 § 3 CPC stipulates that if the jurisdiction of court is excluded by an agreement on jurisdiction, the court will take into consideration this agreement only when an appropriate motion will be deposed by parties.

\(^{47}\) This opinion was formulated in the literature under Art. 20 par.1 of the Lugano Convention: J. Ciszewski, *Comment to the decision of The Supreme Court of August 23, 2001, III CZP 43/01*, OSP 2002, No. 2, Item 50.
appeal can be used to challenge this decisions in the matter of jurisdiction (Art. 222 phrase 1 CCP ). On the other hand, if the court declares that it has not jurisdiction in the case, this decision can also be challenged by an appropriate appellate measure (interlocutory appeal or cassation complaint). This system of examination of the issues of jurisdiction is not criticized in the legal literature.

The amount of time necessary for obtaining the final decision in the matter of jurisdiction depend on the character of the case and is very diverse in practice. On the basis of gathered information under the Regulation 44/01 we may suppose that only in cases where the judgment of the Supreme Court is needed, the time of examination of jurisdiction may achieve even 2 or 3 years. Usually it takes from 3 to 6 months.

2.2 Questions regarding the various grounds of jurisdiction

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

The application Art. 2 and Art. 59 of the Regulation 44/2001 (Art. 2 and 52 of the Lugano Convention) do not cause any problems in practice. The Polish courts apply Polish regulations to define the term „domicile”. According to the Polish law the domicile is understood as a specific locality where an individual intends to stay (art. 25 of Civil Code and Art. 27 § 2 of the CPC). There are not any cases where the courts held that the defendant had several domiciles.

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

In the Polish practice Art. 60 of the Regulation, has concerned so far only statutory seat of company or other legal person or association of natural or legal persons (Art. 60 par. 1 li. a). It is, thus, extremely difficult to evaluate applicability of whole this regulation (Art. 60 par. 1 lit. a)-c) of the Regulation 44/01). This provision with its alternative factors should be however very useful.

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 fulfillment 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 appeared in practice some cases in which the Polish courts were obliged to find the place of performance of the obligation when the goods were delivered or should have been delivered according to Art. 5 No 1 lit. b 1st indent. Primarily, the courts take into account provisions of the contract of the sale goods if the place of delivery is contained. If the parties of this contract agree that the moment of delivery is the same that the moment of the handing over to the carrier at seat or factory of the seller, then the place of delivery will be seat or factory of the seller.\(^48\) We do not dispose any information about practice in determination of a place of delivery under Art. 5 No. 1 lit.1 of the Regulation, without agreement.

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

There are many practical difficulties to determine the place where a service was provided or should have been provided (art. 5 No. 1 lit. b 2 indent of the Regulation 44/2001). The main problems arise under transnational contracts of transport. Especially, determination of the place where transport service was provided is very difficult. In the one of judgment, the court ruled that the place of providing service of river transport was in this state where goods were unloaded.\(^49\) When transport is provided through many different states this problem is more complex. Judges and professionals underline that in such situation we may treat or every of these state as the place of providing service or only the state of destination. Our jurisprudence and literature did not propose any solution in that question.

In the Polish literature, question of services provided via internet has been also undertaken. Some authors propose that the place of providing of services via internet should be a place of activity of the provider (e.g. the place where the data was

\(^{48}\) See the Regional Court in Danzig decision of June 6, 2004, IX GC 1380/02 (not announced.).

\(^{49}\) See the Regional Court in Wroclaw decision of December 12, 2005, X 6z 614/05 (not announced). In the thesis of this judgment the court rules ‘The place where goods are unloaded should be known as place of delivery regarding contracts of river transport’
introduced on the server) and not a place where data are obtained by receiver because it could be wherever (e.g. it is possible to pass through many countries with laptop connecting with internet by modem).\textsuperscript{50}

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?**

Under Art. 5 No. 1 lit a), the Polish courts determine the place of performance in accordance with the jurisprudence of the ECJ, that means this place is determined under appropriate law indicated by the collision rules (*lex causae*). Such interpretation of Art. 5 No. 1 lit a) predominates among the Polish authors, but in our opinion it can be useful to create an autonomous interpretation of ‘the place of performance’, like it is under Article 5 No. 1 lit b) of the Regulation 44/01

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

We have not noticed any problems with defining of term “provision of services” under Art. 5 pkt 1 lit. b of the Regulation 44/2001 in the jurisprudence. Moreover, the term of ‘services’ is defined extremely widely in our literature with referring to art. 50 of the Treaty. Therefore this term include: transport contracts, contracts of agency, freelance occupation contracts, contracts making under banking law\textsuperscript{51} (e.g. electronic banking services\textsuperscript{52}). The problem of contracts of service based on patent license has also appeared in the literature.\textsuperscript{53} See also No. 2.2.4 above in the case of place of service providing.

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


\textsuperscript{51} K. Weitz, *Europejskie …*[European …], p. 505.

\textsuperscript{52} M. Świerczyński, *Jurysdykcja krajowa a prawo właściwe w Internecie …*[Jurisdiction and the applicable law in the Internet …], p. 120.

\textsuperscript{53} P. Grzegorczyk, *Jurysdykcja krajowa w sprawach dotyczących patentów europejskich* [Jurisdiction in matters relating to the European Patents], KPP 2005, No. 4, p. 1130.
The scope of Article 5 No. 1 lit. c) is not an objective of interesting by Polish jurisprudence and legal literature. This regulation has not been applied yet according to the gathered judgments. The legal doctrine underlines that Article 5 No. 1 lit. c) should be applied to those contracts of selling goods and providing services which are beyond the scope of Art. 5 No. 1 lit. b of the Regulation 44/01, for example when the place of delivery of goods or providing of services is situated in the third state.\(^{54}\)

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

The analyzed jurisprudence does not contain any case in which the problem of delineation of art. 5 No. 1 and art. 5 No. 2 under the Regulation 44/01 would arise. Nevertheless this problem was undertaken by the Polish authors.\(^{55}\) On the basis of the jurisprudence of ECJ they adopted that Art. 5 No. 1 of the Regulation was applied when the demand arose under voluntary legal act. As a result, disputes concerning contracts as well as obligations arising under unilateral legal acts are both included in the scope of art. 5 No. 1. Art. 5 No. This provision should be also applied to the cases concerning internal (corporate) relations into juridical persons and cases arising on the bills of exchange and the checks.

Art. 5 No. 3 of the Regulation should be applied when the proceedings concern liability for damage (arising under tort, delict or quasi-delict) and the action is not based on the contractual provisions.

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 line between contractual and matters of offence in a way other than their own law?

The above mentioned problem has not been undertaken by Polish jurisprudence or literature. The latter quote only jurisprudence of the ECJ.\(^{56}\)

\(^{54}\) K. Weitz, Europejskie …[European …], p. 506.

\(^{55}\) Por. K. Sznajder, Pojęcie umowy i roszczenia wynikającego z umowy na tle regulacji europejskich dotyczących jurysdykcji, uznawania i wykonywania orzeczeń w sprawach cywilnych i handlowych [Notion of contract and matters relating to a contract pursuant to the European Regulation on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters], KPP 2005, No. 2, p. 493 et seq.

\(^{56}\) M. Świerczyński, Jurysdykcja krajowa w zakresie zobowiązań deliktowych [Jurisdiction in matters relating to torts], MoP 2002, No. 15, p. 695-696.
2.2.10 What falls within the scope of the term „matters relating to tort” under Article 5 No. 3?

On the basis of the jurisprudence of ECJ the Polish literature accept that Art. 5 No. 3 of the Regulation 44/01 should be applied when the proceedings concern liability for damage (arising under tort, delict or quasi-delict) and the action is not based on the contractual provisions. In this scope are included cases arising under: communication accidents, damages in the natural environment, responsibility for product, unfair competition, infringement of intellectual property rights or personal interests. The actions for renunciation of activity which may result damage are also included in the scope of this rule. There are also different kinds of ‘internet delicts’.

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 jurisdiction in the matter of delicts is regarded narrowly according to the case law of the ECJ. The Polish jurisprudence has not contained any case of distance and multistate offences so far. Professionals underline however that practical application of rules resulting from Shevill case would be very difficult. Especially the rule that jurisdiction of Member State is limited to the value of this part of damage which were injured by the publication only in the territory of this member state. This guideline may be not efficient in practice.

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

There have not been any doubts in practical application of Art. 6 No. 1 of the Regulation 44/01 until now and there has not been risen any doubts as to the

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57 M. Świerczyński, Jurysdykcja krajowa a prawo właściwe w Internecie ... [Jurisdiction and the applicable law in the Internet ...], p. 121-123.
compatibility of this provision with Art. 6 of the European Convention on Human Rights. There is considered however problem of admissibility of suing of number defendants in the court of place where one of them is domiciled when they infringe simultaneously the same European Patent in the many member states where they are domiciled. The author did not pose clear answer on this question.  

Art. 6 No. 2 of the Regulation 44/01 cannot be applied by the Polish courts, because an action on a warranty or guarantee does not exist in the Polish procedural law. Unfortunately, Poland was not taking into account in art. 65 par. 1 of the Regulation 44/01 after its accession to the EU, and this provision has not been actualized.

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

The Polish courts have not applied yet any provisions of the Regulation 44/01 concerning jurisdiction for consumer issues. This problem has not been undertaken by Polish literature. Thus, we can not appreciate how broad is the scope of the grounds of jurisdiction for consumer cases in Polish practice. We may only say that the Polish literature accept very restrictive interpretation of provisions adopted by the ECJ in the consumer matters.

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

See the remarks under 2.2.13 question.

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?

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58 P. Grzegorczyk, Jurysdykcja …[Jurisdiction …], p. 1103-1112.
2.2.16 Taking into consideration the case law of the ECJ, how is the term of „establishment” In the sense of Article 15 (2) interpreted?

See the remarks under 2.2.13 question.

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

Among the provisions on individual contracts of employment the very important in the light of Polish jurisprudence, is those concerning the place where the employee habitually carries out his work (Art. 19 No. 2 a of the Regulation 44/01). There are not, however, special problems with definition this term because usually the work was carried out only in the same Member State.

Because of the Rome Convention on the law applicable to contractual obligations is not applied in Poland yet, there are not any problems in practice relating these choice of law rules.

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

The term ‘rights in rem’ in the sense of Art. 22 of the Regulation 44/01 is construed on the basis of the ECJ case law. One underlines that it must be rights which are of an *erga omnes* nature. That means: ownership of immovable property, perpetual usufruct, limited property rights (usufruct, servitude, a real estate mortgage, and a cooperative member’s ownership right to residential and business quarters as well as to a single-family house in a housing cooperative). Possession is also included into the scope of Art. 22 the Regulation 44/01 although it is only certain factual status under Polish civil law. Only in proceedings which have as their main issue above mentioned rights *in rem* the art. 22 No. 1 is applied. The examples are following: proceedings arising under claim for restitution or negatory claims. We do not include into rights *in*
rem actions arising under contracts of sale of immovable or under damage to real estates.  

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?

It is accepted that art. 22 No. 2 of the Regulation 44/01 is applied mainly in matters of resolution of companies or juridical persons (e.g. action for resolution of limited liability company - Art. 271 of the Commercial Companies Code, hereinafter 'the CCC') or challenging of resolutions adopted by their governing bodies (e.g. challenging of the resolutions of capital companies - Art. 249, 252, 422 and 425 CCC). However, question of application of Art. 22 of the Regulation 44/01 in cases where registry court declares invalidity of company (Art. 21 of the CCC) is very doubtful. According to the Polish jurisprudence, the exclusive grounds of jurisdiction under Art. 22 No. 2 are not applied in cases arising under actions for exclusion of partner of the limited liability company. 

2.2.20 Are there any positive or negative conflict of competence?

There has not been any conflicts of competence under Art. 22 of the Regulation 44/01 in practice yet.

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

This problem was not posed in practice yet.

See under the Lugano Convention: K. Sznajder, Zasięg jurysdykcji wyłącznej sądu miejsca położenia nieruchomości w konwencji lugańskiej (art. 16 ust. 1) [Scope of exclusive jurisdiction of the court of place in which the immovable property is situated (Art. 16 par. 1) in the Lugano Convention], Rejent 2001, nr 11, p. 90-101.

61 See decision rendered under Art. 16 No. 2 of the Lugano Convention of the District Court In Danzig of April 5, 2004 r., IX GC 913/03/B (not announced): ‘The exclusive grounds of jurisdiction under Art. 22 No. 2 are not applied in cases arising under actions for exclusion of partner of limited liability company’ We have not obtained information if this case was recognized by a court of superior instance.
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?

This question has not appeared in the Polish jurisprudence. However the problem of infringement proceedings with the argument of patent invalidity was considered by the Polish authors. We should first notify that under Polish law, the exception of patent invalidity does not result an overruling of complaint. The court should suspend recognizing this action until taking decision about the validity of the patent by the Patents Office.\(^{62}\)

In the literature is considering problem of raising an exception of invalidity of patent before the court of place where infringement was committed, but in the state where the patent is not effective (that means before the court having jurisdiction under Art. 5 No. 3 of the Regulation 44/01). In such case this exception of invalidity of patent does not influence on the jurisdiction of this court. Moreover, this court is entitled even to appreciate validity of this patent for conducting proceedings without any influence on validity of this patent in the state where it is effective.\(^{63}\) However, the court may also suspend recognizing this action, if validity of the patent is the object of another proceeding in the country where this patent is effective.

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

We can not appreciate if any of the exclusive grounds of jurisdiction in the catalogue of Article 22 are too broad or too narrow under Polish practice. There are not any objections in our literature in this area.

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

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\(^{62}\) This resolution is very similar to those in German law. The Patents Office is an administrative authority in Poland.

\(^{63}\) P. Grzegorczyk, Jurysdykcja [...][Jurisdiction [...]], p. 1079-1086.
claim has changed since the judgments or title to enforce rendered outside courts does not base on a respective payment on the claim?

The Polish literature accept that national remedies against enforcement (especially adverse claim – Art. 840 CCP) are applied to every enforcement title which is executing or will be executed in Poland. The enforcement titles rendered under the Regulation 44/01 by declaration of enforceability and granting of a writ of execution by Polish court are also included. A debtor can use adverse claim saying that after rendering of judgment the real situation has changed (e.g. the debt was satisfied). This claim aims invalidation of enforcement title and is based on Art. 840 § 1 No. 2 CPC. According to this provision the debtor can demand declaring of invalidity of enforcement title, if the obligation became extinct or unenforceable after rendering of this title. Moreover if the enforcement title is judicial decision the debtor can raise all circumstances following after the trial. When it is extrajudicial enforcement tile this action may also aim non existence of obligation (Art. 840 § 1 No. 1 CPC).

2.2.25 Questions relating to the applicability of Article 23:

The question regarding agreements on jurisdiction has been considered in the jurisprudence and in the legal literature. These all opinions concern however Art. 17 of the Lugano Convention, but they should be also actual under Art. 23 of the Regulation 44/01.

In particular:

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

The Polish courts are generally applied case law reached by the ECJ about agreements on jurisdiction. Unfortunately this application is sometimes only restricted to the citation of judgments, without any profoundly
 Nevertheless the *aquis* of the ECJ is broadly employed by Polish courts. The most important is the Supreme Court decision of October 25, 2005, **IK 263/05**, rendered under Art. 17 par. 1 lit. a of the Lugano Convention. In this case the Polish Supreme Court has evaluated a validity of agreement on jurisdiction German courts. This jurisdiction clause was placed in the reverse of document of the sale contract among the other general terms. However, the sale contract expressly stipulated that the general terms placed in the reverse of document were included to this contract. In this situation the Supreme Court declared validity of agreement on jurisdiction construed in that way referring to the ECJ decision *Colzani vs. Rüwa* of December 14, 1976 24/76.

### 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*?

This question was also touched by the Polish Supreme Court in the above mentioned decision of October 25, 2005, **IK 263/05**. The Supreme Court analyzing case law of the ECJ has adopted that Art. 17 of the Lugano Convention (Art. 23 par. 1 of the Regulation 44/01) regulates also form and effectiveness of declaration of will expressed by the parties about jurisdiction. That means the form of agreement on jurisdiction decides about will of the parties. The Supreme Court also underlines that following circumstances as capacity to undertake legal actions, defects in declaration of will or validity of representation should be appreciated according to *legis causa* under Art. 17 of the Lugano Convention (Art. 23 of the Regulation 44/2001).

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

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64 See decision of the Appellate Court in Poznan of October 9, 2002, **VCZ 1704/02** (not announced). In the ground of this decision the court pointed out many decisions of the ECJ under Art. 17 of the Lugano Convention, without explanation of role of this case law.

65 Not announced.

66 See also in Polish literature P. Grzegorczyk, *Glosa do postanowienia Sądu Apelacyjnego w Poznaniu z 16 lutego 2004 r.*, **iacz 2601/03** [Comment to the decision of the Appellate Court Poznan dated 16 February 2004, **iacz 2601/03**], **OSP** 2005, nr 2, poz. 24, p. 97-98.
The analyzed jurisprudence does not contain any cases referring to judicial control of standard form contracts of the point of view abusive clauses. However choice-of-forum agreements included in consumer contracts are known for abusive clauses under Polish law (art. 385\(^3\) No. 23 of the CC).

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

We have not found any decisions in which Art. 23 par. 1 lit. 1 c of Regulation 44/01 have been applied (Art. 17 par. 1 lit. c of the Lugano Convention).

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

We have not found any decisions in which applicability of Art. 23 of Regulation 44/01 *vis-à-vis* third states have been considered. The Polish legal literature has not taken a stand on this question either.

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

We can appreciate under Polish judgments that Art. 26 of the Regulation 44/01 takes very important and positive place in the jurisdictional system of the whole Regulation. It concerns especially Art. 26 par. 1 of the Regulation 44/01 (examination of the jurisdiction *ex officio*, when a no entering an appearance defendant is domiciled in another Member State) as well as Art. 26 par. 2-4 of the Regulation 44/01 (examination of the admissibility of proceedings). We do not dispose any information about practical problems relating to applicability of Art. 26 of the Regulation 44/01 with Art. 19 of Regulation 1348/00.

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 fulfillment of the claim fall within the ambit of “provisional measures”?

The Polish jurisprudence did not take a stand on meaning of the term ‘provisional measures’ under Art. 31 of the Regulation 44/01 (art. 24 of the Lugano Convention). The Polish procedural law knows such measures resulting in the provisional fulfillment of the claim (Art. 753, 753\(^1\) of the CPC). The jurisprudence of the ECJ underlines that the guarantee of reimbursement of fulfilling claim for defendant winning the case is the condition of ‘provisional measures’ under Art. 31 of the Regulation 44/01 (e.g. decisions van Uden and Mietz). The Polish authors accept this point of view and suggest that the plaintiff should pay some securing. They also admit that sole substantial claim to which the defendant may be entitled is not sufficient.\(^{67}\)

2.2.27.2 Territorial connection with the State where the measures was rendered

In the question of territorial connection with the State where the measures was rendered (Art. 31 of the Regulation 44/01 or Art. 24 of the Lugano Convention) we did not have any practical experiences. Polish legal literature touches this problem referring to decisions van Uden and Mietz. The problem of ‘real connection’ concerning imperative measures was even undertaken but any solution in this matter was not proposed.\(^{68}\)

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

\(^{67}\) K. Weitz, O jurysdykcji krajowej w postępowaniu zabezpieczającym w świetle konwencji ługaniskiej i prawa wspólnotowego [Jurisdiction in the provisional measures proceedings pursuant to the Lugano Convention and the Community Law], PS 2003, No. 10, p. 43.

\(^{68}\) K. Weitz, O jurysdykcji krajowej w postępowaniu zabezpieczającym ... [Jurisdiction in the provisional measures proceedings ...], p. 743.
Initially, Art. 24 of the Lugano Convention was applied incorrectly by the Polish courts. It was the result of decision of the Polish Supreme Court adopting Art. 24 of the Lugano Convention constituted independent ground of jurisdiction and any national provisions relating jurisdiction on provisional measures could not be applied. However, this view was criticized by the Polish authors. They have underlined on the basis of judgments of the ECJ, that Art. 24 of the Lugano Convention indicated national regulations concerning jurisdiction in the matters of provisional measures. The latter opinion predominates currently.

However Polish civil procedure does not contain any special provisions relating grounds of jurisdiction in the matter of provisional measures. Under Polish regulations the Polish court has a jurisdiction in the matter of provisional measures if it has also a jurisdiction in the main proceedings in which these measures are applied. Thus, we may say that Polish court will have a jurisdiction under Art. 31 of the Regulation 44/01, if it would have a jurisdiction in the main proceedings in the light of Polish provisions.

2.2.27.4 Relation between interim protective measures and main proceedings

Under Polish law protective measures can be applied before main proceeding as well as in the course of this proceeding. However, if court applies some protective measures before main proceedings, it will appoint simultaneously period (maximum 2 weeks) for bringing an action by the plaintiff (Art. 730 § 2 and Art. 733 of the CCP).

2.2.27.5 Enforcement of provisional measures under national law

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69 The Supreme Court decision of April 6, 2001, V CO 3/01, OSNC 2001, 12, Item. 175.
70 K. Weitz, O jurysdykcji krajowej w postępowaniu zabezpieczającym … [Jurisdiction in the provisional measures proceedings …], p. 22-32.
71 K. Weitz, O jurysdykcji krajowej w postępowaniu zabezpieczającym … [Jurisdiction in the provisional measures proceedings …], p. 33-38.
The judicial enforcement proceedings are applied *mutatis mutandis* to the enforcement of provisional measures which are suitable to effectuate under such proceedings (art. 743 § 1 of the CCP). Modes of enforcements unknown Polish procedure are inadmissible. We do not dispose however, any information about problems with enforcement provisional measures by the Polish authorities. Probably the enforcement of English *freezing order* could be very problematical, because there is not such mode of enforcement under Polish law. However this question has not considered by Polish legal literature yet.

### 2.2.28 Is there any case law relaying on Article 24 (jurisdiction by appearance)?

Question referring to jurisdiction by appearance is considered by Polish jurisprudence very frequently. In many cases Polish courts were examining only validity of jurisdiction by appearance and did not examine another grounds of jurisdiction in the case.

The term of ‘enter an appearance’ was also considered by the Polish courts. The Supreme Court was adopted in the decision of May 20, 2005., III CZP 25/05,\(^{72}\) that this term must be regarded as independent and contains every mean of defence taking by defendant, for example: raising objections as to the merits or formal expections (e.g. *res iudicata* exception or plea of the territorial incompetence). However, according to jurisprudence of the ECJ, the Supreme Court ruled that the jurisdiction could not be established when plea of jurisdiction was risen simultaneously with entering an appearance. In this case The Supreme Court established the jurisdiction of Polish court because the defendant have entered an appearance but have not risen plea of the jurisdiction. The Court did not accept the plea concerning the applicable law rose by the defendant as equivalent of the plea of the jurisdiction.

### 3. Lis Pendens and Similar Proceedings

\(^{72}\) Not announced.
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?

We have not noted down among analyzed judgments any cases in which Art. 27-30 of the Regulation 44/01 were applied. The procedural literature considers these issues more frequently but without any profound reflections, presenting main jurisprudence of the ECJ in this matter.

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

This problem has not appeared in practice. We think that of the theoretical point of view ‘race to the court room’ may really arise due to the principle of *lis pendens*. However these provisions seem to be very clear and should not provoke any problems in practice, especially after establishing rules concerning time of beginning of proceedings (Art. 30 of the Regulation 44/01). We propose that some strictly determined exceptions of the principle ‘first seized’ should be considered.

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

This problem has not appeared in practice or in legal literature.

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73 The problem of application Art. 21 par. 1 of the Lugano Convention (Art. 27 par. 1 of the Regulation 44/01) was undertaken marginally in the decision of the Regional Court in Gdansk of June 17, 2004, VII Pz 94/04 (not announced). In this decision the court ruled that the proceedings could be suspended for the sake of *lis pendens* only if the court secondly seized had jurisdiction in that case. If this court has not the jurisdiction possibility of suspension does not come into play and the court should declare that he has now jurisdiction (unless defendant enters an appearance - Art. 18 of the Lugano Convention and Art. 24 of the Regulation 44/2001).

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?**

We do not dispose any information about practical application of this rule in Poland. Polish literature has not analyzed this issue either. Thus, the question of positive differentiation by hard criteria has not been considered so far.

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?**

This issue was considered by Polish literature which refers to the case law of the ECJ. The authors underline that term of *lis pending* within the meaning of these articles requires comparison of objectives of actions bringing before courts of the both Member States. This comparison should concern also objectives of pending actions taking into consideration actual state as well as legal relations (decision of the ECJ *Gubisch Maschinenfabrik vs. Palumbo*).\(^{75}\) Thus, the identity of actions comes into play when for example one action contains a demand of discharge of obligation by debtor and the other action the debtor demands declaration of non-existence this obligation.

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

Such problems have not arisen in practice as well as in the legal literature.

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

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\(^{75}\) See K. Sznajder, *Stan zawisłości sprawy … [Lis alibi pendens …]*, p. 138-140.
We have not obtained any information about such negative actions in the Polish conduct civil law transactions. Our jurisprudence also has not provided any indicates in this question. However question of the ‘torpedos’ relating cases arising under infringement of intellectual property rights was undertaken by Polish literature where the methods of counteraction against such negative practices were considered.

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) ?

See the remarks under 3.7 question.

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 ?

This problem has not been arisen in the Polish jurisprudence so far. See also remarks under 2.2.22 question.

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 ?

This problem has not been undertaken in the Polish literature. See also remarks under 2.2.12 question.

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

4.1 Questions regarding the free movement of judgments

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

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76 P. Grzegorczyk, Zawisłość sprawy ...[Earlier case pending ...], s. 27 et seq.
This question is very general, however it seems that the procedure regarding the recognition and enforcement of judgments under the Regulation 44/01 (the Lugano Convention) works quite efficiently. The data concerning time of such proceedings are the best proof of this.77 There are as a matter of fact some problems with supplementary application of national provisions, but nevertheless judgments concerning declaration of enforceability at the first instance are getting quite fast and easy.

In the matter of recognition and enforcement we should take into consideration two differentes issues. On the one hand, Polish courts have not any serious problems within applying so called automatic recognition (Art. 33 par. 1 of the Regulation 44/01), because there are no any procedural difficulties.78 On the other hand, the proceedings concerning recognition might be problematical in practice (Art. 33 par. 2 of the Regulation 44/01), but we did not get any information from Polish courts in this matter. We suppose that these proceedings are quite rarely applied in practice.

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

The establishment of additional standard forms, especially for applications for a declaration of enforceability might be very successful solution. For the reason that every Member State established their own requirements concerning procedural writings (see Art. 40 par. 1 of the Regulation 44/01), it could provoke many troubles with its appropriate preparation. Thus, the introduction of uniform standard form could speed up whole proceedings of declaration of enforceability.

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

We have not noticed down any practical difficulties with the term ‘judgment’ under the Regulation 44/01 in Poland.

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77 See question 7 in the Questionnaire No. 1.
78 The Supreme Court has referred to the rule of automatic recognition in the decision of May 15, 2005, rendered under Art. 26 par. 1 of the Lugano Convention, V CK 783/04, OSNC 2006, No. 4, Item 72.
4.1.4 Please describe the status of the accessibility of courts by electronic means.

Procedural writings can be prepared and deposited by electronic means by virtue of Art. 125 § 2 CPC, unfortunately this provision is not applied yet, because the Ministry of Justice has not issued appropriate executive regulation concerning time of introduction electronic means in Polish courts. In the area of communication with courts on the electronic way there is not any common internal practice. It depends on the equipment of every specific court. Certainly you can communicate with every court by fax, but electronic mail is not so accessible.

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

In our opinion the reasons for objection indicated in Art. 34 and 35 of the Regulation 44/01 are appropriate. On the one hand its do not permit to oppose easily declaration of enforceability by the debtor and the other hand protect such debtor’s rights very efficiently. Moreover these provisions protect also interests of the Member State in which recognition (declaration of enforceability) is sought (public policy clause). Generally, we think that it is not necessary to increase number of these reasons. However, we propose that the judgment should not be recognized if it is irreconcilable with a judgment of arbitral court effective in the Member State in which recognition is sought.

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?

This question has not been appreciated as problematical in hitherto practice of polish courts and enforcement authorities. We have noticed that Polish courts had declared enforcement of foreign judgments adjudicating main payment and interest counting under method indicated in the judgment. This mode of establishing of payment is admissible by Polish law.
4.1.7 How often is the reservation of public policy (article 34 No. 1) referred to and with which result?

There are debtors, which refer to public policy clause the most frequently while proceedings of declaration of enforceability (Art. 34 No. 1 of the Regulation 44/01 or Art. 27 No. 1 of the Lugano Convention). Nevertheless Polish courts apply this provision extremely rarely. The public policy clause is treated by Polish courts as very exceptional circumstance for refusal of recognition or declaration of enforceability. As a result of this opinion The Polish Supreme Court in its decision of December 19, 2003, III CK 25/03, declared that public policy clause might be applied only in very exceptional situation as obvious violation of crucial and basic principles of national legal order. The Supreme Court has also added that incompatibility between national and foreign rules applied upon rendering of the judgments can not be regarded as violation of public policy clause.

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 have not noticed such a case when Polish legislator would have to modify of law to assure recognition of Polish judgments before foreign courts.

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

The issue of general objection of abuse of process is not appeared in Polish literature almost at all. Thus, this problem is not considered either in relation to the rule of public policy as one of the circumstances of refusal of recognition or declaration of enforceability. Nevertheless, recognition or declaration of enforcement of judgment obtained on the way of abuse of process in one of the Member State should be appreciated by Polish courts as manifestly contrary to public policy.

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?

The question of application art. 49 of the Regulation 44/01 regarding foreign decisions adjudicating administrative fine has not appeared in practice so far. We may suppose that practical meaning of this provision is only marginal because we have not noticed any judgments concerning this problem.

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?

There is not any practical experience or theoretical discussion in this matter.

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?

This problem has not been considered in Polish literature so far. We could not get any information from professional in this area because Anglo-Saxon anti-suit-injunctions are not known in Poland.

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

We appreciate that appeal proceedings under Art. 43 of the Regulation 44/01 work quite efficiently in practice. As mentioned above, the appellate measures are examined for 1 to 3 months on average. The costs relating to these procedures are low, because they primarily represent appellate fee PLN 60 (near EUR 15). If party is represented by a lawyer the costs contain also its remuneration and expenses.

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80See question 7 in the Questionnaire No. 1.
However, this remuneration can not exceed PLN 1000 (near EUR 250).\textsuperscript{81} We should underline that Polish law does not establish mandatory representation by lawyers in appellate proceedings.

4.2 Provisional Measures according to Article 47

4.2.1 How does Article 47 work?

We have not got any information about practical application Art. 47 of the Regulation 44/01 (Art. 39 of the Lugano Convention).\textsuperscript{82}

4.2.2 Do law enforcement authorities consider – within the scope of Article 47 No. 1 – the reasons to refuse recognition that are laid down in Articles 34 and 35?

See answer to the question 4.2.1. Our legal literature accepts that if the court applies protective measures before declaration of enforceability (Art. 47 par. 1 of the Regulation 44/01), then it should examine incidentally (Art. 33 par. 1 and 3 of the Regulation 44/01) reasons to refuse under Art. 34 and 35. In contrary the enforcement authority can not conduct such examination within executing of provisional measures.\textsuperscript{83}

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

See answer under question 4.2.2.

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

This question seems to be ambiguous.

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\textsuperscript{81} This is the maximal sum which can be reimbursable by the failing party. However the winning party may in reality pay more.

\textsuperscript{82} Art. 39 of the Lugano Convention was analyzed only partially by the literature, see K. Weitz, \textit{Konwencja … [The Lugano Convention …]}, p. 205-231.

\textsuperscript{83} K. Weitz, \textit{Europejskie … [European …]}, s. 610-611.
According to Art. 734 CPC the court which is examining application for declaration of enforceability (when the application was deposed) or the court which should be competent for declaration of enforceability (when the application was not deposed yet) are both competent court for applying provisional measures under Art. 47 par. 1 of the Regulation 44/01.

4.3 Cross-border Enforcement of Court Settlements and Notarial Deed

4.3.1 How do Articles 57 and 58 work?

We have obtained only fragmentary data concerning application Art. 57 and 58 of the Regulation 44/01. As a result we may suppose that these provisions are applied very rarely by Polish courts.

4.3.1.1 Is there any experience regarding the interpretation of the term „authentic instruments”?

There is not any experience regarding the interpretation of the term ‘authentic instruments’ in the Polish judicial practice. However this question is touched in Polish literature to interpret which of documents known Polish law could be classified under ‘authentic instruments’ in the meaning of Art. 57 of the Regulation 44/01. Obviously, there are not any doubts that such documents are notarial deeds in which debtor submits an execution (Art. 777 § 1 No. 4-6 and § 3 CPC). On the other hand, banking enforceable titles are not treated generally as ‘authentic instruments’ under Art. 57 of the Regulation. Those banking enforceable titles relating banking transactions are issued unilaterally by banks against debtors. The most important condition of issuing such enforceable title is previous voluntary debtor’s submission to execution concluded in the credit contract. The banking enforceable title under Polish law has a legal validity as

84 M. Szpunar, Pojęcie dokumentu urzędowego w rozumieniu artykułu 50 konwencji lugańskiej o jurysdykcji i wykonywaniu orzeczeń sądowych w sprawach cywilnych i handlowych [Notion of authentic instrument pursuant to Art. 50 of the Lugano Convention on jurisdiction and enforcement of judicial judgments in civil and commercial matters], Rejent 2000, No. 12, p. 96-97; K. Weitz, Europejskie …[European …], s. 574.
85 M. Szpunar, Pojęcie … [Notion …], p. 96-97; K. Weitz, Europejskie …[European …], p. 574, with referring to the ECJ decision Unibank A/S vs. Flemming G. Christiansen.
a official document and can constitute basis for enforcement proceedings (Art. 96-98 of the Banking Law).  

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?

There is not any experience regarding the interpretation of this term, because Polish version of this provision (Art. 58 of the Regulation 44/01) is the same as in the French version.

4.3.1.3 Are the standardized forms sufficient?

It is very difficult to appreciate this forms in the light of narrow Polish practice in this matter, but it seems that standardized form included in the annexes of the Regulation 44/01 are quite satisfactory.

4.3.1.4 To which extent are Articles 34 and 35 applied?

The Polish courts respect the principle that refusal of declaration of enforceability shall take place only if enforcement of the instrument or settlement is manifestly contrary to public policy. (Art. 57 par. 1 and Art. 58 phrase 1 of the Regulation 44/01). The other issue concerns the possibility of application public policy clause against the other reasons for refusal of declaration of enforcement provided for in Art. 34 No. 2-4 and Art. 35 of the Regulation 44/01. However, in our opinion majority of these reasons can not be applied to settlements and authentic instruments. This problem has not analyzed in our literature so far.

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

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

We did not dispose any information about practice in this matter, but we may suppose that such situations take place.

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

See answer under question 4.3.2.1

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

See answer under question 4.3.2.1

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

4.3.3.1 Are there known any 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?

We do not any information about cases in which a court of a higher instance has reversed a foreign judgment after enforcement measures had been carried out. Our literature accepts that the executory document consists two main elements: copy of foreign decision and copy of decision declaring enforcement (it is complex document). Thus, if foreign decision is reversed in the Member State of origin the executory document will became invalid. In such situation a debtor should lodge an adverse claim against this foreign

87 K. Piasecki, Skuteczność i wykonalność w Polsce zagranicznych cywilnych orzeczeń sądowych [Efficiency and enforceability in Poland of foreign civil judicial judgments], Warszawa 1990, p. 13 and 129.
enforcement title (Art. 840 § 1 No. 2 CPC). As a result of this action the execution should be discontinued (Art. 825 No. 2 CPC), and then all enforcement measures are automatically canceled (Art. 826 CPC).

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

We do not dispose any information about such problem in practice. The debtor is always entitled to lodge an adverse claim if he thinks that value established in the document (which enforceability was declared under Art. 57 of the Regulation 44/01) is incorrect (art. 840 § 1 No. 1 CPC). On this way, he may obtain a decision declaring invalidity of the foreign enforcement title (foreign authentic document).

5. Proposals for Improvements

We think that many proposals for improvements of the Regulation 44/01 could be considered. We point out following only those, which seem to be the most important from our point of view:

1) Art. 5 No. 1 lit. a – in the light of the jurisprudence of the ECJ it is necessary to establish in this provision one characteristic place of performance of the obligation for the contract (under the theory of characteristic performance) because Art. 5 No. 1 seems to be internally incoherent.

2) Art. 26 par. 1 – extension of the principle of examination of jurisdiction ex officio also for cases where defendant is domiciled in third state;

3) Art. 27 – introduction of two clear exceptions in the lis pendence rule – firstly, in the case when the court first seized does not render any decision during reasonable time and secondly, if previous negatory action was brought only for making impossible eventual sequent action for a performance;
4) Art. 33 par. 2 – introduction of clear provision admitting an application for declaration that judgment can not be recognized;

5) Art. 34 No. 3 and 4 – linguistic harmonization of these provisions is necessary (irreconcilability of judgments given in another Member State involving the same cause of action and between the same parties);

6) New Art. 34 No. 5 – irreconcilability of decision with arbitration award (see question 4.1.5);

7) Art. 43 – establishment of term for lodging an appellate measure against decision refusing declaration of enforceability; actually lack of such provision provokes many practical problems. The Polish courts apply national regulations in this area. However, it is only one week in Poland and it is less than term for the debtor under Art. 43 par. 5;

8) Art. 59 – introduction provision concerning law applicable for determination of place whether a party is domiciled in the third state;

9) Art. 65 par. 1, art. 6 No. 2 and art. 11 par. 1 – introduction similar provisions as those regarding Germany, Austria and Hungary about non-application of Art. 6 No. 2 and Art. 11 par. 1 before Polish court;

10) Arts. 68-70 – introduction special provisions stipulating that the Regulation 44/01 shall not affect any obligations of Member States against third states arising under treaties concluded between these Member States and third states before applying of the Regulation 44/01.

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88 See Decision of the Supreme Court of July 17, 2004, IV CK 495/0s, OSNC 2005, No. 4, Item 73.
89 It is a result of applying Art. 394 § 2 CPC with Art. 13 § 2 CPC.