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Elizabeth Freeman

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The EEC Convention on Jurisdiction and Enforcement of Civil and Commercial Judgments

*Elizabeth Freeman**

As the result of a Protocol to the EEC Convention on Jurisdiction and Enforcement of Civil and Commercial Judgments, the European Court of Justice was expressly given jurisdiction to interpret the Convention's provisions. The European Court, in interpreting the Convention, has adopted Community solutions and common Community law definitions. In addition, the European Court has narrowly construed exceptions to the Convention's basic principles. The Court has also attempted to guarantee equality of treatment. In this article, Mrs. Freeman examines the European Court's application of these principles in light of the Convention's purpose and structure.

INTRODUCTION

In 1968 the original six Member States of the European Economic Community entered into the Convention on Jurisdiction and Enforcement of Civil and Commercial Judgments¹ in pursuance of their obligations under Article 220 of the EEC Treaty.² Although Article 220 does not expressly require that treaties are necessary to implement its obligations, it has always been assumed that the reference to "negotia-

* M.A., LL.B., Cantab; LL.M., Harvard University; Lic. Sp. en Dr. Eur., Brussels. Fellow, Clare College, Cambridge.

¹ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 15 J.O. COMM. EUR. (No. L 299) 32 (1972) (*entered into force* Feb. 1, 1973) [hereinafter cited as Convention]. For subsequent amendments and adjustments, see notes 11-14 and accompanying text *infra*. The official English version of the Convention was prepared at the time of the accession of Denmark, Ireland and the United Kingdom, 21 O.J. EUR. COMM. (No. L 304) 36 (1978).

² Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (*entered into force* Jan. 1, 1958) [hereinafter cited as EEC Treaty].

tions" carries the necessary implication that treaties, rather than regulations or directives, are the appropriate form of implementation. Consequently, the implementing treaties do not automatically form part of the legislative framework of the EEC, and thus do not benefit from the doctrine of direct applicability under Article 189.³

The Judgment Convention's form as a parallel convention to the EEC Treaty raised some doubt concerning whether the European Court of Justice had jurisdiction to interpret its provisions. A separate protocol was therefore thought necessary to confer this jurisdiction on the European Court; it was added to the Convention in 1971, and came into force in 1975.⁴ The procedure laid down is similar to that in Article 177 of the EEC Treaty,⁵ although not identical. In particular, the power of referral is largely restricted to national appellate courts.⁶ Problems may arise where an appeal does not take place, thus increasing the risk of contradictory first instance decisions. Another issue stemming from this form of implementation concerns the supremacy of Community law in this context.⁷ As it seems to regard this Convention as part of the entire corpus of Community law, the Court would arguably also apply the doctrine of supremacy to it, thus giving the Convention precedence over any later national law. However, it is questionable whether all national courts would agree.⁸ This article will focus on the European Court's exercise of jurisdiction in interpreting the Judgments Convention.⁹

In the twenty-six preliminary rulings¹⁰ now rendered on the Convention, the Court has applied three basic principles in its interpretation: first, that concepts in the Convention be given a common

³ *Id.* at art. 189.

⁴ Protocol on the Interpretation by the Court of Justice of the Convention of Sept. 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, June 3, 1971, 21 O.J. EUR. COMM. (No. L 304) 50 (1978) [hereinafter cited as Protocol].

⁵ EEC Treaty, *supra* note 2, at art. 177.

⁶ Protocol, *supra* note 4, at art. 2.

⁷ *See, e.g.,* McLellan, *The Convention of Brussels of Sept. 27, 1968 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, 15 COMM. MKT. L. REV. 228 (1978).

⁸ *See, e.g.,* McLellan's discussion of the Pretore of Brescia decision of Oct. 25, 1975. *Id.* at 229.

⁹ The extensive case law on the Convention resulting from decisions of national courts in the original six Member States, however, will not be examined.

¹⁰ Five recent decisions, not examined in this article, are *Blanckaert and Willems v. Trost*, [1981] E. Comm. Ct. J. Rep. 819 (preliminary ruling); *Re Siegfried Edwald Rinkau*, Case 157/80, May 26, 1981 (not yet reported); *Peter Klomps v. Karl Michel*, Case 166/80, June 16, 1981 (not yet reported); *Elefanten Schuh GmbH v. Jacquain*, Case 150/80, June 24, 1981 (not yet reported); *S.A. Ets. Rohr v. Ossberger*, Oct. 22, 1981 (not yet reported).

Community law definition; second, that exceptions to the basic rules of the Convention be construed strictly; and third, that equality of treatment be guaranteed.

Before examining these principles in detail, a word must be said about the developments resulting from the Accession of the new Member States to the Community in 1973.¹¹ Article 3 of the Act Concerning the Conditions of Accession¹² provided that the new Member States would accede to this Convention; however, dissatisfaction with certain aspects of the 1968 Convention itself led to lengthy negotiations. The revised Convention was annexed to the Convention of Accession, which was signed by the nine Member States in October, 1978.¹³ At present, however, only the original six Member States have ratified it, and therefore, it is not yet in force.¹⁴ Ratification in the United Kingdom will first require the appropriate legislation; the Civil Jurisdiction and Judgments Bill¹⁵ was introduced into Parliament in November, 1981, and is expected to become law by the summer of 1982.

As its name indicates, the Judgments Convention deals with the twin topics of jurisdiction and recognition of foreign judgments. Arti-

¹¹ Treaty Concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway, and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community, Jan. 22, 1972, 15 J.O. COMM. EUR. (No. L 73) 5 (1972), translated in [1972] 2 COMM. MKT. REP. (CCH) ¶ 7011 (entered into force Jan. 1, 1973) [hereinafter cited as Accession Treaty]. Norway failed to ratify the agreement following a negative referendum on the issue of becoming a member of the Community. As a result, only Denmark, Ireland and the United Kingdom became new Member States in 1973.

¹² Act Concerning the Conditions of Accession and the Adjustments to the Treaties, 15 J. O. COMM. EUR. (No. L 73) 14 (1972), translated in [1972] 2 COMM. MKT. REP. (CCH) ¶ 7031 [hereinafter cited as Act of Accession]. Article 3 of the Act of Accession provides that:

[t]he new Member States undertake to accede to the conventions provided for in Article 220 of the EEC Treaty, and to the protocols on the interpretation of those conventions by the Court of Justice, signed by the original Member States, and to this end they undertake to enter into negotiations with the original Member States in order to make the necessary adjustments thereto.

Id.

¹³ As a result of the negotiations between the original and new Member States, a number of adjustments were made to the 1968 Judgments Convention, note 1 *supra*, by the Convention of Accession of Oct. 9, 1978, 21 O.J. EUR. COMM. (No. L 304) 1 (1978) [hereinafter cited as Convention of Accession]. The text of the Judgments Convention of 1968, as amended by the Convention of Accession, can be found at 21 O.J. EUR. COMM. (No. L 304) 77 (1978) [hereinafter, the 1968 Judgment Convention as amended by the Convention of Accession will be cited as Judgments Convention].

¹⁴ Article 39 of the Convention of Accession, note 13 *supra*, provides that the Convention of Accession "shall enter into force, as between the States which shall have ratified it . . . following . . . ratification by the original Member States of the Community and one new Member State." Since none of the new Member States has yet ratified the Convention of Accession, it is not yet in force.

¹⁵ Published on Nov. 10, 1981.

cle 2, containing the basic principle regarding jurisdiction states that persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.¹⁶ Although the concept of domicile is not defined in the Convention, Article 52¹⁷ provides that in determining whether a party is domiciled in a particular State, the law of that State shall apply. This creates problems in relation to the U.K., since "domicile" has a restrictive technical meaning in English law. The Bill therefore provides¹⁸ that an individual is domiciled in the United Kingdom for the purposes of the Convention if and only if (i) he is resident in the United Kingdom and (ii) the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom. As has been pointed out,¹⁹ the Convention is far-reaching, and differs from other Conventions on mutual recognition and enforcement of judgments. It differs in that it first introduces uniform rules on jurisdiction, and then demands automatic recognition by courts in other Member States. The basic rule on recognition requires the courts in the recognizing state to accept judgments given by the courts of other states without the former being entitled to consider whether the court granting the judgment had jurisdiction.

SCOPE OF THE CONVENTION

The Judgments Convention is generally applicable to civil and commercial matters. Article 1,²⁰ however, expressly exempts a number of matters from the provisions of the Convention. The boundaries of Article 1 have led to problems of interpretation, with a number of cases having already come before the European Court.

In *LTU v. Eurocontrol*,²¹ the European Court of Justice was called

¹⁶ Judgments Convention, *supra* note 13, at art. 2.

¹⁷ *Id.* at art. 52.

¹⁸ Civil Jurisdiction and Judgments Bill, *supra* note 15, at cl. 38.

¹⁹ See, Bartlett, *Full Faith and Credit Comes to the Common Market: An Analysis of the Provisions of the Convention on Jurisdiction and Enforcement of Judgment in Civil and Commercial Matters*, 24 INT'L & COMP. L.Q. 44 (1975).

²⁰ Article 1 of the Judgments Convention, note 13 *supra*, provides that it:

. . . shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters. The Convention shall not apply to:

1. The status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
2. bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
3. social security;
4. arbitration.

²¹ *LTU Lufttransportunternehmen v. Eurocontrol*, [1976] E. Comm. Ct. J. Rep. 1541, [1977] 1 Comm. Mkt. L.R. 88.

upon to interpret the concept of "civil and commercial matters" within the meaning of Article 1. LTU, a German air transport firm, disputed the validity of certain charges imposed by Eurocontrol, an international organization providing various air safety services. Eurocontrol successfully brought proceedings before a Belgian Court, with the latter finding the claims commercial in nature: Eurocontrol then sought to enforce the judgment in Germany. The German Court referred to the European Court the interpretation of "civil and commercial matters" and, in particular, the question of which law should apply when deciding this question. The European Court's ruling largely concerned whether the concept should have a Community law meaning, or whether it should be governed by national law. It then held that where the public authority was acting in the exercise of its powers, as was Eurocontrol, such a case would lie outside the scope of the Convention.²² If, on the other hand, the authority had been acting as a private citizen, the Convention would apply.²³ This ruling rendered the judgment against LTU unenforceable on the basis of the Convention. This unfavorable decision prompted Eurocontrol to pursue a different method of enforcement. In *Bavaria Fluggesellschaft v. Eurocontrol*,²⁴ Eurocontrol had obtained judgments in Belgium against two other air transport companies in the same circumstances as in the *LTU* case. However, it sought to enforce them not on the basis of the Judgments Convention but on the basis of a bilateral convention between Germany and Belgium,²⁵ also limited in scope to civil and commercial matters. The parties to this bilateral convention, however, had agreed that classification of the judgment would turn upon the law of the judgment-granting country. The Bundesgerichtshof referred to the European Court the question of whether the Judgments Convention precluded the application of the bilateral Convention, and the Court held that it did not. Although Article 55 of the Judgments Convention²⁶ stated that it superseded the Convention between Germany and

²² *Id.* at 1552, [1977] 1 Comm. Mkt. L. R. at 101.

²³ *Id.*

²⁴ [1977] E. Comm. Ct. J. Rep. 1517, [1980] 1 Comm. Mkt. L.R. 566.

²⁵ Convention between the Federal Republic of Germany and the Kingdom of Belgium on the Mutual Recognition and Enforcement of Judgments, Arbitration Awards and Authentic Instruments in Civil and Commercial Matters, June 30, 1958, 387 U.N.T.S. 245.

²⁶ Article 55 of the Judgments Convention, note 13 *supra*, specifically provides that the Judgments Convention supersedes the Convention between the Federal Republic of Germany and the Kingdom of Belgium on the Mutual Recognition and Enforcement of Judgments, Arbitration Awards and Authentic Instruments in Civil and Commercial Matters signed at Bonn on June 30, 1958.

Belgium, Article 56²⁷ confines this to only those matters to which the Judgments Convention applies. Since the European Court had already held in the *LTU* case that the Judgments Convention did not apply to such a case, it was clear, therefore, that the bilateral Convention could apply. The European Court correctly noted that it had no jurisdiction to interpret the bilateral Convention, and thus could not rule the case as being outside it. These cases demonstrate that the concept of "civil and commercial matters" can have different meanings under the two Conventions.

A public authority was also involved in the recent case of *Netherlands State v. Rüffer*.²⁸ The European Court decided that an action brought by the agent responsible for administering public waterways in Holland was not covered by the Convention. A Dutch and a German vessel had collided on a public waterway. The Dutch authority removed the wreck of the sunken vessel and demanded reimbursement from the German vessel's owner. The Court held that the case involved the exercise of public authority, and therefore did not fall within the scope of "civil and commercial matters."²⁹

The European Court has also had the opportunity to consider the interpretation of matters specifically excluded from the Convention's scope. In *Gourdain v. Nadler*,³⁰ it pronounced on "the winding-up of insolvent companies," and in *De Cavel v. De Cavel (No. 1)*,³¹ on the "status or legal capacity of natural persons" and "rights in property arising out of a matrimonial relationship." *Gourdain*, concerned the liquidation in France of a German company's French subsidiary. The assets of the French company were insufficient to meet its liabilities, and pursuant to the French law of 1967,³² the liquidator brought an action before a French court against the German managing director of the parent company. The proceedings were successful in France, and enforcement in Germany was sought under the Convention. The European Court then had to determine whether the judgment of the French court was outside the scope of the Convention. It analyzed the action closely, and found that the judgment was indeed linked with the

²⁷ Article 56 of the Judgments Convention, note 13 *supra*, provides that the "Treaty and the conventions referred to in Article 55 shall continue to have effect in relation to matters to which this Convention does not apply."

²⁸ *Netherlands State v. Rüffer*, [1980] E. Comm. Ct. J. Rep. 3807, [1981] 3 Comm. Mkt. L.R. 293.

²⁹ *Id.*

³⁰ [1979] E. Comm. Ct. J. Rep. 733, [1979] 3 Comm. Mkt. L.R. 180.

³¹ [1979] E. Comm. Ct. J. Rep. 1055, [1979] 2 Comm. Mkt. L.R. 547.

³² 2 C. COMM. LAW No. 67-563 (July 13, 1967), [1967] J.O. 7059, [1967] B.L.D. 572.

liquidation, and therefore excluded from the scope of the Convention.³³

De Cavet (No. 1) concerned protective measures granted by a court during divorce proceedings in France. The couple had apartments in both Frankfurt and Cannes, and the interim order of the French court prohibited the wife's removal of property from both homes. The husband then applied to the German courts for enforcement of the order. In deciding whether such a case fell outside the scope of the Convention, the European Court's ruling was rather ambiguous, except in its finding that interim measures must be treated in the same manner as final measures. The Court held that orders for provisional protective measures did not fall within the Convention if they concerned or were closely connected with either questions of the status of persons involved in the divorce proceedings, or of proprietary legal relations resulting directly from the matrimonial relationship or its dissolution.³⁴ Although not expressly stated, the implication therefore was that the *De Cavet (No. 1)* case fell outside the scope of the Convention. The Court also indicated that such measures could fall within the Convention if they concerned property rights unconnected with the marriage.³⁵ The abstract nature of the Court's ruling in this case is, of course, the result of the reference procedure, under which the Court is not asked to decide the case, but merely to interpret the provisions of Community law at issue. It is well known in other areas of Community law that this rule tends to lead to ambiguity in the Court's reply. In further litigation, the *De Cavet (No. 1)* divorce afforded the European Court an opportunity to determine the scope of the Convention, this time in relation to maintenance payments. In *De Cavet v. De Cavet (No. 2)*,³⁶ Mrs. De Cavet argued that maintenance was a civil matter within Article 1, and did not fall within the express exclusions. She said that this view was confirmed by the express reference to maintenance in Article 5(2),³⁷ by the text of the Convention of Accession,³⁸ by the Jenard Re-

³³ *Gourdain v. Nadler*, [1979] E. Comm. Ct. J. Rep. 733, [1979] 3 Comm. Mkt. L.R. 180. The holding in *Gourdain* was based upon subpara. 2 of the second para. of Article 1 of the Convention which provides that the Convention shall not apply to "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings." Judgments Convention, *supra* note 13, at art. 1.

³⁴ *De Cavet v. De Cavet*, [1979] E. Comm. Ct. J. Rep. 1055, [1979] 2 Comm. Mkt. L.R. 180.

³⁵ Disputes relating to the assets of spouses in the course of divorce proceedings that involve proprietary legal relations having no connection with the marriage may fall within the scope of the Convention. *De Cavet v. De Cavet*, [1979] E. Comm. Ct. J. Rep. at 1066, [1979] 2 Comm. Mkt. L.R. at 559.

³⁶ [1980] E. Comm. Ct. J. Rep. 731, [1980] 3 Comm. Mkt. L.R. 1.

³⁷ Article 5(2) establishes the jurisdiction for suits:

port,³⁹ by the Schlosser Report,⁴⁰ and by various national decisions, notably those of the Oberlandesgericht, Karlsruhe on June 4, 1976⁴¹ and of the Cour d'Appel, Brussels, on April 1, 1977.⁴² Mr. De Cavel, on the other hand, relied on the generality of the answer in *De Cavel (No. 1)*, which he said also covered claims for a maintenance allowance. The European Court rejected the view that ancillary proceedings are infected by the nature of the principal claim, and in finding for Mrs. De Cavel ruled that the Convention applies to the enforcement of a maintenance order as well as to monthly compensation payments under Article 270 Code Civile,⁴³ which the European Court thought to be in the nature of maintenance. The Court found that such payments fell within the concept of civil matters, and, therefore, were not excluded.⁴⁴

The case law analysis above clearly demonstrates the European Court's broad interpretation of "civil and commercial matters." This is quite justifiable, for it is the Convention's aim to provide as wide a basis as possible for the harmonization of jurisdictional rules and the enforcement of foreign judgments. The exclusions contained in Article 1 will, on the other hand, be construed narrowly, as *De Cavel (No. 2)* illustrates. This policy is consistent with other rulings of the European Court on the exceptions to the general principles of the Convention, discussed below.

. . . in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties. . . .

Judgments Convention, *supra* note 13, at art. 5(2).

³⁸ Convention of Accession, note 13 *supra*.

³⁹ Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 22 O. J. EUR. COMM. (No. C 59) 1 (1979) (Report published by a committee of experts responsible for drafting the original Convention. Its rapporteur, Mr. P. Jenard, was Director d'Administration in the Belgium Ministry for Foreign Affairs and External Trade) [hereinafter cited as Jenard Report].

⁴⁰ Report on the Convention of Accession, 22 O.J. EUR. COMM. (No. C 59) 71 (1979) (Report published by committee of experts responsible for drafting the Convention of Accession. Its rapporteur, Dr. Peter Schlosser, was Professor of Law at the University of Munich) [hereinafter cited as Schlosser Report].

⁴¹ DOCUMENTATION BRANCH OF THE COURT OF JUSTICE OF THE EUROPEAN COMMISSION, SYNOPSIS OF CASELAW, Part 2, No. 54 (1978).

⁴² JOURNAL DES TRIBUNAUX 119 (1978).

⁴³ C. CIV., art. 270.

⁴⁴ *De Cavel v. De Cavel* (No. 2), [1980] E. Comm. Ct. J. Rep. 731, [1980] 3 Comm. Mkt. L.R.

1.

THE THREE PRINCIPLES

A. *Community Concepts*

In *Tessili v. Dunlop*,⁴⁵ the first case decided by the European Court under the Convention, the Court was cautious about imposing a Community solution for every problem of interpretation that could arise. The Court was perhaps influenced by the approach in the Convention itself, wherein Articles 52 and 53 refer questions of domicile and the seat of a company back to national law. According to some commentators, there is therefore no need for the Court to produce Community solutions to problems of interpretation, but instead, merely to indicate which national law applies. This is precisely what the Court did in this first case.

The case involved the sale of goods. Dunlop, a German company, bought ski suits from the Italian company Tessili, and later found they were defective. Dunlop thereafter brought an action in Germany seeking to annul the contract, and Tessili contested jurisdiction. Dunlop relied on Article 5(1) of the Convention.⁴⁶ Tessili argued that the "place of performance of the obligation" must always be the seller's domicile or registered place of business. Dunlop, on the other hand, argued that since domicile is an independent ground for jurisdiction under Article 2, Article 5(1) would be meaningless if Tessili's view were adopted. Dunlop thought that the place of the obligation's performance should be determined by the proper law of the contract under the conflict rules of the forum. The European Court adopted the plaintiff's view. Furthermore, the Court added that it was unnecessary to adopt an independent uniform meaning for every concept in the Convention,⁴⁷ stating instead that such decision depends on which method best fulfills the objective laid down in Article 220.

Since *Tessili v. Dunlop*, however, the Court has in a number of cases favored the approach of adopting a Community solution. This was first apparent in *LTU v. Eurocontrol*, already discussed above.⁴⁸ In *LTU*, the Advocate General had rejected a Community law meaning for the phrase "civil and commercial matters" on the grounds of uncertainty. He thought it would lead to endless references to the European

⁴⁵ [1976] E. Comm. Ct. J. Rep. 1473, [1977] 1 Comm. Mkt. L.R. 26.

⁴⁶ Article 5(1) of the Convention provides that:

[a] person domiciled in a contracting State may, in another contracting State, be sued:

1. in matters relating to a contract, in the courts of the place of performance of the obligation in question. . . .

Judgments Convention, *supra* note 13, at art. 5(1).

⁴⁷ *Tessili v. Dunlop*, [1976] E. Comm. Ct. J. Rep. 1473, [1977] 1 Comm. Mkt. L.R. 26.

⁴⁸ See notes 21-24 and accompanying text *supra*.

Court, thus frustrating the purpose of the Convention, since it would interfere with the enforcement of judgments. The European Court, nevertheless, held that the concept must have a Community law meaning, and that its meaning could not depend upon national law, because if it did the obligations would not be uniform for all Contracting States.⁴⁹ It found this view to be supported by the disregard in Article I for the nature of the court or tribunal. The Court went on to say that:

[t]he concept in question must be regarded as independent and must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems.⁵⁰

The Court has been criticized for introducing uncertainty and for relying on general principles of law, notoriously difficult to establish. The Court is going no further here, however, than it does in other areas of Community law, and its approach can be justified by its deep-seated desire to impose a uniform solution. Uniformity, of course, is difficult enough to achieve in the context of the reference procedure, especially when as curtailed as it is under the Protocol.⁵¹ Indeed part of the reason for adopting a Community solution may be that it serves to encourage references by the national courts, since they cannot really decide on the Community solution for themselves. However, if the European Court consistently adopted the solution of referring points back to national law, the national courts would be more reluctant to refer, and would probably decide the cases themselves without a reference.

The European Court has in fact used the principle of legal certainty in order to justify the adoption of Community solutions. In *Somafer v. Saar-Ferogas*, the Court emphasized that:

the need to ensure legal certainty and equality of rights and obligations for the parties as regards the power to derogate from the general jurisdiction of Article 2 requires an independent interpretation, common to all the Contracting States, . . .⁵²

In this case, *Ferogas* brought an action in Germany against *Somafer*, a French company with its registered office and principal place of business in France. The suit concerned certain demolition work undertaken by *Somafer* in Germany. *Ferogas* relied on Article 5(5) of the Convention, which gives jurisdiction in a dispute arising out of the operations of a branch, agency or other establishment, to the courts where

⁴⁹ *LTU Lufttransportunternehmen v. Eurocontrol*, [1976] E. Comm. Ct. J. Rep. 1541, [1977] 1 Comm. Mkt. L.R. 88.

⁵⁰ *Id.* at 1551, [1977] 1 Comm. Mkt. L.R. at 100.

⁵¹ Protocol, note 4 *supra*.

⁵² [1978] E. Comm. Ct. J. Rep. 2183, 2193, [1979] 1 Comm. Mkt. L.R. 490, 504.

the branch, agency or other establishment is situated. Somafer's notepaper gave an address in Germany, and Ferngas argued that this was enough to give the German courts jurisdiction on the grounds that Somafer had held itself out as having an establishment in Germany. Although the European Court adopted a Community solution, and rejected the argument that Article 5(5) should be interpreted according to the *lex fori* or the *lex causae*, it indicated that strict criteria still had to be met for Article 5(5) to apply.⁵³ When the Court said that the local entity must have a place of business and a management, and must be "materially equipped" to negotiate with third parties, it was impliedly rejecting the view that mere holding out would be sufficient.

As shown above, the European Court in both *Gourdain* and *De Cavel* favored a Community solution in relation to the interpretation of the Article 1 exceptions. The Court made a similar decision in *Société Bertrand v. Ott*,⁵⁴ in relation to Articles 13-15, and in *Industrial Diamond Supplies v. Riva*,⁵⁵ in relation to Article 38. The latter decision, however, is unsatisfactory and could lead to uncertainty. The specific question in the case was whether or not an appeal to the Italian Court of Cassation was an ordinary appeal under Article 38. That Article provides that a court hearing an appeal against an order for enforcement may stay the proceedings "if an ordinary appeal has been lodged against the judgment in the State in which that judgment was given or if the time for such an appeal has not yet expired."⁵⁶ Views differ as between the various Member States on the nature of appeals in cassation, and strong arguments were put forward in favor of classifying such an appeal according to the law of the judgment-granting state.

The European Court, however, was unconvinced by such arguments, and held firmly to the belief that the concept must have a Community law meaning. Otherwise, the Court noted, the same kind of appeal could be classed differently, depending upon the country in question. Perhaps the search for uniformity was taken too far here, since classification according to national law would have produced quite satisfactory results. The European Court, however, thought that a broad interpretation of the concept must be given to provide the judgment-recognizing court the ability to grant a stay whenever reasonable doubt arises about the decision's fate in the state in which it was rendered. The main characteristic of an ordinary appeal, according to the

⁵³ *Id.*

⁵⁴ [1978] E. Comm. Ct. J. Rep. 1431, [1978] 3 Comm. Mkt. L.R. 499.

⁵⁵ [1977] E. Comm. Ct. J. Rep. 2175, [1978] 1 Comm. Mkt. L.R. 349.

⁵⁶ Judgments Convention, *supra* note 13, at art. 38.

Court, is that it must result in either the annulment or amendment of the judgment.

B. Strict Construction

The European Court's general approach towards exceptions to Community law principles has been to construe them strictly in order to promote the "effet utile" of the EEC Treaty. This approach is evidenced in the Court's interpretation of Article 36 of the Treaty, and also in the decisions on the public policy exception to the free movement of persons, contained in Directive 64/221.⁵⁷ The European Court follows the same approach under the Convention.

The Convention contains a number of exceptions to the general principles. If the principles were to be given a very wide interpretation, they would tend to undermine the uniformity that the Convention is designed to achieve. The first set of exceptions is in Article 5, which provides bases of jurisdiction in addition to the general rule specified in Article 2. As the European Court observed in *Somafer v. Saar-Ferngas*,

[m]ultiplication of the bases of jurisdiction in one and the same case is not likely to encourage legal certainty and the effectiveness of legal protection throughout the territory of the Community and therefore it is in accord with the objective of the Convention to avoid a wide and multifarious interpretation of the exceptions to the general rule of jurisdiction contained in Article 2.⁵⁸

In *De Bloos v. Bouyer*,⁵⁹ a case concerning the breach of a distribution agreement, the European Court ruled on the meaning of "obligation" in Article 5(1)⁶⁰ and "branch, agency or other establishment" in Article 5(5).⁶¹ As noted above, Article 5(1) of the Judgments Convention gives jurisdiction, in contract cases, to the courts of the place of performance of the obligation. The Court in its interpretation of Article 5(1) referred to the general principle that the number of courts hav-

⁵⁷ O.J. EUR. COMM. 117 (Spec. Ed. 1963-64).

⁵⁸ *Somafer v. Saar-Ferngas*, [1978] E. Comm. Ct. J. Rep. at 2191, [1979] 1 Comm. Mkt. L.R. at 502.

⁵⁹ [1976] E. Comm. Ct. J. Rep. 1497, [1977] 1 Comm. Mkt. L.R. 60.

⁶⁰ Judgments Convention, *supra* note 13, at art. 5(1). For the text of Article 5(1), see note 46 *supra*.

⁶¹ Article 5(5) of the Judgments Convention provides that:

[a] person domiciled in a contracting State may, in another contracting State, be sued:

...

(5) as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency, or other establishment is situated;

Judgments Convention, *supra* note 13, at art. 5(5).

ing jurisdiction should be strictly limited. It then decided that the "obligation" under Article 5(1) is that part of the agreement allegedly violated which forms the basis of the legal proceedings.

The Court also seemed to have strict construction in mind when it examined Article 5(5). It found that the holder of an exclusive sales concession could not be regarded as a "branch, agency or other establishment" for purposes of the Article.⁶² It supported its view by saying that an essential characteristic of a branch, agency or other establishment is it be subject to the grantor's direction and control.⁶³ Although perhaps true for branches and agencies, it is unclear why the grantor's direction and control is essential for "other establishments" as well.

The European Court will, however, avoid interpreting exceptions to Community law principles so strictly as to deprive such exceptions of any useful effect. In *Bier v. Mines de Potasse*,⁶⁴ the Court was called upon to interpret the exception in Article 5(3) of the Convention which provides that tort actions may be brought "in the courts for the place where the harmful event occurred."⁶⁵ The case involved the sensitive subject of the pollution of the Rhine. A Dutch nursery owner, relying on water from the Rhine for irrigation, brought suit against a French company that discharged large quantities of chloride daily into the Rhine. The action originally brought before the Dutch court raised questions as to the basis of its jurisdiction. The European Court, however, ruled that Article 5(3) gives jurisdiction both to the court of the place where the defendant acted and to the court of the place where the harm occurred.⁶⁶ The Court rejected the interpretation that jurisdiction should be given only to the court of the place where the defendant acted on the grounds that the place of the defendant's act will often be the same as that of his domicile. It noted that since domicile is an independent basis of jurisdiction under Article 2, Article 5(3) would be deprived of any effect if interpreted to give jurisdiction only to the court of the place of the defendant's act. It should again be noted that the European Court adopted a Community solution, and did not refer the question back to the national court, as in *Tessili v. Dunlop*.⁶⁷

In addition to the extra bases of jurisdiction set out in Article 5, the

⁶² *De Bloos v. Bouyer*, [1976] E. Comm. Ct. J. Rep. at 1510, [1977] 1 Comm. Mkt. L.R. at 82.

⁶³ *Id.*

⁶⁴ [1976] E. Comm. Ct. J. Rep. 1735, [1977] 1 Comm. Mkt. L.R. 284.

⁶⁵ Judgments Convention, *supra* note 13, at art. 5(3).

⁶⁶ *Bier v. Mines de Potasse*, [1976] E. Comm. Ct. J. Rep. at 1748, [1977] 1 Comm. Mkt. L.R. at 301.

⁶⁷ *Tessili v. Dunlop*, [1976] E. Comm. Ct. J. Rep. 1473, [1977] 1 Comm. Mkt. L.R. 26.

Convention also provides special rules on insurance contracts⁶⁸ and installment sales and loans, or "consumer contracts"⁶⁹ as they are known under the revised Convention. In relation to the latter, *Société Bertrand v. Ott*⁷⁰ provides an interesting example of the European Court's policy of strict construction. Article 14 provides that the seller/lender may be sued either in the Member State in which he is domiciled, or in the Member State in which the buyer/borrower is domiciled, but that the buyer/borrower may be sued only in the Member State in which he is domiciled. These rules can be ousted by a choice of jurisdiction clause, that (1) is entered into after the dispute arises, (2) allows the buyer/borrower to bring proceedings in other courts, or (3) confers jurisdiction on a Member State where both parties are habitually resident. It should also be noted that, contrary to the general principle of the Convention that judgments given in one Contracting State shall be automatically recognized in another, a court may refuse to recognize a judgment if the above rules have not been complied with.⁷¹ This also applies to the rules on insurance contracts, and to Article 16,⁷² which provides for exclusive jurisdiction. In *Bertrand v. Ott*, Ott made an installment sale of machinery to Bertrand. After Bertrand defaulted, Ott obtained judgment in the German courts and then sought to enforce it in France. The Cour de Cassation referred the question of whether this was an installment credit sale to the European Court.

The European Court ruled that the term "installment credit sale" must be given a narrow definition, since Articles 13-15 constitute an exception to the general principles of the Convention. It believed a Community law definition was necessary, since the concept varies from State to State. Additionally, the Court thought that any other solution might lead to particular difficulties in light of the possibility of reviewing judgments in the course of the recognition procedure. The objective pursued by these provisions, according to the Court, is to protect the economically weaker party, and therefore it concluded that only consumer transactions were envisaged.⁷³ It is interesting to note that this solution is expressly adopted in the revised Convention.⁷⁴

⁶⁸ Judgments Convention, *supra* note 13, at arts. 7-12.

⁶⁹ *Id.* at arts. 13-15.

⁷⁰ [1978] E. Comm. Ct. J. Rep. 1431, [1978] 3 Comm. Mkt. L.R. 499.

⁷¹ Judgments Convention, *supra* note 13, at art. 27.

⁷² *Id.* at art. 16.

⁷³ *Bertrand v. Ott*, [1978] E. Comm. Ct. J. Rep. at 1446, [1978] 3 Comm. Mkt. L.R. at 510.

⁷⁴ Judgments Convention, *supra* note 13, at art. 13. Article 13 provides that:

[i]n proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called the consumer, jurisdiction shall be determined, by this section. . . .

As noted, the Convention provides for exclusive jurisdiction in certain cases falling within Article 16.⁷⁵ Unlike the preceding articles on special jurisdiction, Article 16 supercedes the general principle of Article 2, which gives jurisdiction to the courts of the defendant's domicile. Paragraph 1 of Article 16 covers "proceedings which have as their object rights in rem in, or tenancies of, immovable property," and provides that the courts of the Contracting States where the property is situated shall have exclusive jurisdiction.⁷⁶ Following its general policy of strict construction, the European Court has held that these provisions granting exclusive jurisdiction ought not be given a wider interpretation than is required by their objective, since the provisions deprive the parties of any choice of forum.

In *Sanders v. Van der Putte*,⁷⁷ Article 16(1) was at issue. The case involved an agreement between two Dutchmen, under which Sanders would take over Van der Putte's flower shop business in Germany. The shop was on rented premises, and the agreement provided that Sanders should pay the main rent to the landlord together with some additional rent to Van der Putte. When Sanders later disputed the agreement, Van der Putte brought an action in Holland for specific performance. Sanders contested the jurisdiction of the Dutch courts on the grounds that the case concerned a tenancy of immovable property in Germany. However, contrary to the view taken by the Advocate General, the Court found that Article 16(1) did not cover the matter at issue, and therefore held that the Dutch courts had jurisdiction.⁷⁸ The Court ruled that Article 16(1) applied only to such matters as disputes between lessors and tenants over either the interpretation or existence of a lease, compensation for damage caused by the tenant, or the giving up of possession, but that it did not extend to an agreement for the operation of a business on leased premises.⁷⁹

The trend towards strict construction has been mitigated somewhat by the European Court's decisions on Article 17. That Article provides an exception to the basic principle of Article 2 by conferring exclusive jurisdiction where there is a valid choice of jurisdiction clause. Article 17 provides that it shall apply:

if the Parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an agreement evidenced in writing,

⁷⁵ Judgments Convention, *supra* note 13, at art. 16.

⁷⁶ *Id.*

⁷⁷ [1977] E. Comm. Ct. J. Rep. 2383, [1978] 1 Comm. Mkt. L.R. 331.

⁷⁸ *Id.*

⁷⁹ *Id.* at 2392, [1978] 1 Comm. Mkt. L.R. at 344.

agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes. . . .⁸⁰

The revised Convention states that Article 17 shall also apply in international trade or commerce when the agreement "accords with practices in that trade or commerce of which the parties are or ought to have been aware."⁸¹ The use of the singular in the phrase "a court or the courts of a Contracting State" has given rise to a European Court decision that, despite its wording, Article 17 does allow the parties to choose two or more courts in different Contracting States. Thus, in *Meeth v. Glacetal*,⁸² a choice of jurisdiction clause that permitted suit against the German party to the agreement only before the German courts, and suit against the French company only before the French authorities, was upheld. Sued in a German court, the German party claimed a set-off, but the court held this inadmissible because according to the choice of jurisdiction clause all claims against the French company had to be brought before the French courts. The European Court, however, found that Article 17 did not preclude the German court from considering a claim for a set-off in these circumstances, yet it is unclear whether this finding would extend to a counterclaim.⁸³ The Advocate General in the case, Mr. Capotorti, distinguished between set-offs and counterclaims on the grounds that the former are essentially defenses whereas the latter are independent; therefore he concluded that counterclaims should be governed by the choice of jurisdiction clause.⁸⁴

The European Court did not take a particularly strict approach in *Colzani v. RuWA*,⁸⁵ when ruling on the Article 17 requirement of a writing. The case involved a standard form contract for the sale of machinery from a German firm to an Italian company. The European Court held, quite rightly, that where the conditions of sale (including the choice of jurisdiction clause) are printed on the back of the documents, the contract must contain an express reference to those provisions.⁸⁶ The Court went on to say, however, that if the contract expressly refers to a prior offer in writing that referred to the general conditions of sale (including a choice of jurisdiction clause) and those

⁸⁰ Judgments Convention, *supra* note 13, at art. 17.

⁸¹ *Id.*

⁸² [1978] E. Comm. Ct. J. Rep. 2133, [1979] 1 Comm. Mkt. L.R. 520.

⁸³ *Id.*

⁸⁴ *Id.* at 2147, [1979] 1 Comm. Mkt. L.R. at 522 (opinion of Advocate General Capotorti).

⁸⁵ [1976] E. Comm. Ct. J. Rep. 1831, [1977] 1 Comm. Mkt. L.R. 345.

⁸⁶ *Id.* at 1842, [1977] 1 Comm. Mkt. L.R. at 356.

general conditions were in fact communicated,⁸⁷ then the requirement of a writing will be satisfied.

Colzani should be compared with *Segoura v. Bonakdarian*,⁸⁸ a case where an oral agreement preceded a written confirmation that had the conditions of sale endorsed on the back. The Court took a stricter view in this case, and held that even where an oral agreement stipulated that the general conditions are to apply, the transaction is unenforceable unless the written confirmation containing the choice of jurisdiction clause is signed or accepted in writing by the party to whom it is presented.⁸⁹ A strict approach to the formal requirements of Article 17 was also taken in *Porta-Leasing v. Prestige International*,⁹⁰ a case that concerned Article 1(2) of the Protocol annexed to the Convention.⁹¹ Article 1(2) sets out even more stringent conditions than Article 17 for persons domiciled in Luxembourg. It provides that such persons must "expressly and specifically" agree to a choice of jurisdiction clause.⁹² The European Court held that the signing of the entire contract was insufficient to bind the parties, unless the provision itself was signed and was specifically and exclusively devoted to the choice of jurisdiction.⁹³

The validity of a choice of jurisdiction clause arose in *Sanicentral v. Collin*.⁹⁴ In 1971 a contract was entered into between a Frenchman and a German company, containing a choice of jurisdiction clause in favor of the German courts. Such a clause is invalid under French law where incorporated into an employment contract. The question referred by the Cour de Cassation did not ask which law governed the validity of the choice of jurisdiction clause. Instead, it asked whether Article 17 could apply in proceedings brought after the Convention came into force to a contract entered into prior to that date. The European Court held that the Convention did apply, on the grounds that a choice of jurisdiction clause can have no legal application until proceedings are instituted and that, therefore, the French courts had no jurisdiction.⁹⁵ The European Court ignored the question of which law governs the validity of a choice of jurisdiction clause, but instead

⁸⁷ *Id.*

⁸⁸ [1976] E. Comm. Ct. J. Rep. 1851, [1977] 1 Comm. Mkt. L.R. 361.

⁸⁹ *Id.* at 1862, [1977] 1 Comm. Mkt. L.R. at 372.

⁹⁰ [1980] E. Comm. Ct. J. Rep. 1517, [1981] 1 Comm. Mkt. L.R. 135.

⁹¹ Protocol, *supra* note 4, at art. 1(2).

⁹² *Id.*

⁹³ *Porta-Leasing v. Prestige Int'l*, [1980] E. Comm. Ct. J. Rep. at 1524, [1981] 1 Comm. Mkt. L.R. at 142.

⁹⁴ [1979] E. Comm. Ct. J. Rep. 3423, [1980] 2 Comm. Mkt. L.R. 164.

⁹⁵ *Id.* at 3430, [1980] 2 Comm. Mkt. L.R. at 173.

seemed to assume its validity if it complied with the requirement of a writing contained in Article 17.

The policy of strict construction was not, however, followed in *Zelger v. Salinitri*,⁹⁶ a case that concerned the relationship between Article 5(1) and Article 17. In *Zelger*, a debt action brought by a German against an Italian before a German court, the plaintiff alleged an express oral agreement that specified Munich as the place to repay the loan. The question referred by the Bundesgerichtshof was alternatively, whether its jurisdiction failed due to the fact that the formal requirements of Article 17 had not been complied with or whether jurisdiction was sufficiently based upon Article 5(1) in that the informal agreement was effective under national law.⁹⁷ The European Court opted for the latter solution and held that compliance with Article 17 was not necessary.⁹⁸ This approach, of course, follows from the Court's decision in *Tessili v. Dunlop*,⁹⁹ where it held that the place of performance depends upon the governing law of the contract according to the conflict of law rules of the forum. It follows, therefore, that an agreement should be enforceable if it is valid without further formality according to the national law applicable to the contract.

C. Equality of Treatment

The Convention has the purpose of harmonizing jurisdictional rules, as well as that of imposing the duty to recognize judgments. Consequently, the equality of treatment principle is bound to be important in the interpretation of the Convention, since that principle is the foundation for the harmonization of laws within the EEC. The principle is enunciated in Article 7 of the EEC Treaty where it provides that "any discrimination on the grounds of nationality shall be prohibited."¹⁰⁰

The principle of non-discrimination within the EEC does not, under the Convention, extend coverage to persons not domiciled within the EEC. As mentioned above, the basic rule of jurisdiction expressed in Article 2 is that persons domiciled in the territory of a Contracting State shall, irrespective of their nationality, be sued in the courts of that State. So-called rules of "exorbitant jurisdiction," specified in Article

⁹⁶ [1980] E. Comm. Ct. J. Rep. 89, [1980] 2 Comm. Mkt. L.R. 635.

⁹⁷ Judgments Convention, *supra* note 13, at art. 5(1). For the text of Article 5(1), see note 46 *supra*.

⁹⁸ *Zelger v. Salinitri*, [1980] E. Comm. Ct. J. Rep. at 97, [1980] 2 Comm. Mkt. L.R. at 643.

⁹⁹ See note 45 and accompanying text *supra*.

¹⁰⁰ EEC Treaty, *supra* note 2, at art. 7.

3, are not available against such persons. The converse of this situation is contained in the controversial Article 4, which provides that:

If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State.¹⁰¹

Persons not domiciled in the EEC, therefore, will still be subject to the rules of exorbitant jurisdiction. The rule of non-discrimination contained in Article 7 of the EEC Treaty is pushed to its logical conclusion in the second paragraph of Article 4 of the Convention, which actually extends the rules of exorbitant jurisdiction vis-a-vis non-domiciliaries.¹⁰² Thus, where the rules of exorbitant jurisdiction are based upon the nationality of the plaintiff, any person domiciled in the EEC will now be able to rely upon the same rules. This extraordinary result is justified by the principle of equality of treatment within the EEC.

The Convention does, however, allow a Contracting State to enter into conventions with third countries, containing an obligation "not to recognize judgments given in other Contracting States against defendants domiciled or habitually resident in the third state where, in cases provided for in Article 4, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3."¹⁰³ After the signing of the Convention of Accession it was proposed that the United Kingdom should conclude a Convention with the United States on Recognition and Enforcement of Judgments. These negotiations were terminated, however, since many believed such a convention might prove harmful in view of the very high damages awarded by American juries, especially in personal injury and product liability cases.

The European Court has made reference to the equality of treatment principle a number of times in its judgments on the Convention. In *LTU v. Eurocontrol*, the Court said that the meaning of the phrase "civil and commercial matters" could not depend upon national law, because that would prevent the obligations from being uniform for all Contracting States.¹⁰⁴ The same approach was adopted in *Somafer v.*

¹⁰¹ Judgments Convention, *supra* note 13, at art. 4.

¹⁰² The second para. of Article 4 provides that:

[a]s against such a defendant, any person domiciled in a contracting State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in the second paragraph of Article 3, in the same way as the nationals of that State.

Judgments Convention, *supra* note 13, at art. 4.

¹⁰³ *Id.* at art. 59.

¹⁰⁴ *LTU v. Eurocontrol*, [1976] E. Comm. Ct. J. Rep. 1541, 1551, [1977] 1 Comm. Mkt. L.R. 88, 100.

Ferngas, where the Court in providing a Community law interpretation to Article 5(5), directed attention to the need for equality between parties.¹⁰⁵

The equality of treatment principle also underlies two decisions on Title III of the Convention which sets out the rules on recognition and enforcement.¹⁰⁶ *De Wolf v. Cox*¹⁰⁷ addressed the question of whether a judgment may be enforced only through the procedure laid down in the Convention or by other methods as well. De Wolf, after obtaining judgment in a Belgian Court against Cox for 23 guilders, attempted to enforce it in the Netherlands. In view of the sum involved, he brought an independent action in a Dutch small claims court rather than follow the more costly procedure set out in the Convention. The European Court held that the only procedure permissible for enforcing judgments was that provided for under the Convention.¹⁰⁸ Although the Court did not base its opinion on the equality of treatment principle, but rather on the dubious grounds of infringement of Articles 21 and 29, it is clear that any other solution would have infringed the equality of treatment principle since the availability of alternative procedures differ from country to country. .

In *Denilauler v. SNC Couchet Freres*,¹⁰⁹ an attachment order had been made in France under the Code de Procedure Civile on the *ex parte* application of the creditor. In determining whether the order could be enforced in Germany without first having been served on the other party, the European Court held that rights of defense must be observed. The Court concluded that judicial decisions authorizing provisional or protective measures, if taken without summoning the party to whom they are addressed to appear and if intended to be enforced without giving advance notice, are not covered by Title III of the Convention. Once again the European Court read a general principle into the Convention in order to promote equality of treatment.

CONCLUSION

From the foregoing, it is apparent that the European Court pursues a definite policy in its interpretation of the Convention, a policy that is justified in so far as it is based upon a desire for uniformity in the application of the Convention. The present writer does not share

¹⁰⁵ *Somafer v. Saar-Ferngas*, [1978] E. Comm. Ct. J. Rep. 2183, [1979] 1 Comm. Mkt. L.R. 490.

¹⁰⁶ *Judgments Convention*, *supra* note 13, at arts. 25-49.

¹⁰⁷ [1976] E. Comm. Ct. J. Rep. 1759, [1977] 2 Comm. Mkt. L.R. 12.

¹⁰⁸ *Id.* at 1768, [1977] 2 Comm. Mkt. L.R. at 56.

¹⁰⁹ [1980] E. Comm. Ct. J. Rep. 1553, [1981] 1 Comm. Mkt. L.R. 62.

the view expressed by Giardina that the approach in *Tessili v. Dunlop* is preferable to adopting a Community solution.¹¹⁰ There is, however, no doubt that the Court's policy emphasizes its role under the reference procedure as the ultimate arbiter of the interpretation of the Convention. The authors of the Convention chose the bolder method of harmonizing the jurisdictional base and imposing the obligation to recognize, rather than the less ambitious method of a multilateral convention dealing with recognition alone. This policy of harmonization can best be served by the European Court of Justice's adoption of Community solutions to the problems of interpretation arising under the Convention. The solution proposed by Giardina would have the European Court merely indicate which national law was to apply in a given issue. Such a proposal, if adopted, would amount to an abdication of the Court's responsibility for the Convention. While the adoption of Community solutions may lead to initial uncertainty, this can be remedied by further references to the European Court. It can only be regretted that the Protocol conferring jurisdiction on the European Court imposes a limitation on the courts entitled to refer such questions.

¹¹⁰ Giardina, *The European Court and the Brussels Convention on Jurisdiction and Judgments*, 27 INT'L & COMP. L.Q. 263, 276 (1978).