CIVIL JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN EUROPE*

by P. Vlas, M. Zilinsky and F. Ibili**

1. INTRODUCTION

Since 1 March 2002 the EC Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as the 'Brussels I' Regulation) operates in legal practice. On 1 May 2004 the new EU Member States had to accept the 'Brussels I' Regulation as *acquis communautaire*.[1] The Regulation is now in force in all EU Member States, with the exception of Denmark. As mentioned in the previous survey, it is the intention to conclude eventually a convention with Denmark in which the solutions reached under the 'Brussels I' Regulation will be laid down. Then the necessary unity in the application of the rules of jurisdiction and of recognition and enforcement will be restored again. According to Article 68 EC the EC Court of Justice can give preliminary rulings on the interpretation of the 'Brussels I' Regulation. Although the first questions are put before the ECJ,[2] there is no decision as yet in which the 'Brussels I' Regulation has been interpreted. In one decision regarding the interpretation of Article 5(3) Brussels Convention concerning the *forum delicti*, the ECJ referred to the solutions reached under the same provision in the 'Brussels I' Regulation. The Court decided that Article 5(3) Brussels Convention could also be used in case the harmful event might occur.[3]

The recognition and enforcement of foreign judgments within the European Union is simplified by the introduction of the European Enforcement Order for uncontested claims (Regulation No. 805/2004), which will be applicable as from 21 October 2005. This Regulation abolishes the exequatur for judgments

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* Last survey in this Review: (2002) pp. 105 et seq.

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1. On 1 May 2004 the following States became member of the EU: Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Czech Republic, Malta and (Greek) Cyprus.

2. See Case 234/04, *OJ* C 251/1, 9 October 2004 (*Kapferer* v. *Schlanck Schick*) regarding the interpretation of Arts. 15 and 24 'Brussels I'.

3. See Case C-167/00, [2002] *ECR* I-8111 (*VKI* v. *Henkel*), see *infra* para. 5.

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on uncontested claims, which have been certified as a European Enforcement Order in the Member State of origin. Such a certified judgment will be recognised and enforced in the other Member States without exequatur proceedings necessary. The European Enforcement Order certificate can only be issued if certain minimum standards for uncontested claims procedures have been met (Arts. 12 to 19 of the Regulation). The European Enforcement Order is not compulsory, the creditor may choose recognition and enforcement by using the procedures according to the 'Brussels I' Regulation.[4]

Finally mention is to be made of the Lugano Convention, which was concluded on 16 September 1988 between the Member States of the European Community at that time and the Member States of the European Free Trade Association. The Lugano Convention is still of interest in the relationships between the former 15 Member States and Iceland, Norway and Switzerland. Plans are made for a new convention in which the solutions reached under the 'Brussels I' Regulation will be laid down. Negotiations for this new instrument have not started yet, due to the fact that the European Council asked the ECJ for a decision regarding the question whether or not the Community has exclusive competence in this respect.

2. ARTICLE 1 BRUSSELS CONVENTION: MATERIAL SCOPE

Article 1 Brussels Convention deals with the Convention's material scope. Article 1 of the 'Brussels I' Regulation deals with the same matter and does not give any material changes. Both instruments shall apply in civil and commercial matters and shall not extend to revenue, customs or administrative matters. Furthermore, some topics are explicitly excluded from the scope of the Brussels Convention as well as from the scope of the 'Brussels I' Regulation. These matters relate to family law issues, insolvency, social security and arbitration. The notion 'civil and commercial matters' has to be interpreted in an autonomous way. The ECJ decided in one of its first preliminary rulings on the interpretation of the Brussels Convention that this notion 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. According to the Court a judgment given in an action between a public authority and a person governed by private law, in which the public authority has acted in the exercise of its powers, is excluded from the area of application of the Convention (Case 29/76, *LTU Lufttransportunternehmen GmbH & Co KG* v. *Eurocontrol*, [1976] *ECR* 1541, *NILR* 1978 80). This is settled case-law, as can be learned from two other preliminary rulings discussed below: Case C-271/00, *Steenbergen* v. *Baten*,

4. See on this subject M. Zilinsky, *De Europese Executoriale Titel* [The European Enforcement Order], PhD-thesis *Vrije Universiteit* Amsterdam (Deventer, Kluwer 2005).

[2002] *ECR* I-10489[5] and Case C-266/01, *Préservatrice foncière TIARD SA* v. *Staat der Nederlanden*, [2003] *ECR* I-4867.[6]

In *Steenbergen* v. *Baten* the Dutch municipality of Steenbergen sought recovery from Mr Baten (living in Belgium) for the social assistance under the Dutch *Algemene Bijstandswet* (Law on General Assistance) paid to the former wife of Mr Baten and her child. The marriage between Mr Baten and his wife was dissolved by a divorce decree by a Belgian court. In an agreement prior to the divorce the spouses agreed that no maintenance would be payable as between themselves and that Mr Baten would pay BF 3000 per month by way of contribution to the maintenance of the infant child of the marriage. The Dutch District Court of Breda ordered Mr Baten to pay to the municipality of Steenbergen the amounts granted to his former wife and her child by way of social assistance. In Belgium the question arose whether this judgment falls outside the material scope of the Convention. The Court of Appeal of Antwerp decided to ask the ECJ for a preliminary ruling whether the legal action of the municipality is a civil matter within the meaning of Article 1 Brussels Convention, and if so, whether this legal action is a case relating to social security and, therefore, falls outside the Convention's scope.

The ECJ reiterated its settled case-law, that there is no civil and commercial matter within the meaning of Article 1 Brussels Convention, if a public authority is acting in the exercise of its public powers. In the present case the Court distinguished between a legal action for the recovery of sums paid by the municipality by way of social assistance to the former spouse and her child and a legal action by a Dutch public body for payment of amounts of social assistance, disregarding an agreement between the spouses or former spouses in which they agreed that no maintenance would be payable between themselves. In the first situation, the public body acts on the basis of rules of civil law (see consideration 32) and therefore this action falls within the Convention's scope, where in the second case the public body is placed in a situation which derogates from the ordinary law. The Court *held:*

> '1. The first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that the concept of civil matters encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations. Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in civil matters.
> 2. Point 3 of the second paragraph of Article 1 of the Brussels Convention must

5. *NJ* 2003 598 note Vlas.
6. See also *IPRax* 2003 512 note Geimer, *Clunet* 2004 646 note Bischoff, *NJ* 2005 65 note Vlas.

be interpreted as meaning that the concept of social security does not encompass the action under a right of recourse by which a public body seeks from a person governed by private law recovery in accordance with the rules of the ordinary law of sums paid by it by way of social assistance to the divorced spouse and the child of that person.'

It follows from this decision, that the legal action of the municipality for recovery of the amounts of social assistance paid for the child falls within the Convention's scope, but the legal action for recovery of the amounts paid to the former wife does not. Regarding the latter, enforcement should take place under the national rules of the State sought. With respect to the former claim, the question arises on what ground the Dutch court could have based its jurisdiction. In the present case Article 2 of the Brussels Convention gives jurisdiction to the Belgian courts, because Mr Baten had his domicile (within the meaning of Art. 52 of the Brussels Convention) in Belgium. Could Article 5(2) then be applied? In this Article jurisdiction is given in matters of maintenance to the courts for the place where the maintenance creditor is domiciled or habitually resident. The question is whether the Dutch municipality can be regarded as maintenance creditor. In another decision the ECJ ruled that Article 5(2) 'cannot be relied on by a public body which seeks, in an action for recovery, reimbursement of sums paid under public law by way of an education grant to a maintenance creditor, to whose rights it is subrogated against the maintenance creditor' (Case C-433/01, *Freistaat Bayern* v. *Jan Blijdenstein,* not yet published in *ECR*).[7] Hence, a legal action of a municipality for the recovery of amounts of legal assistance cannot be based on Article 5(2) of the Brussels Convention.

In the decision *Préservatrice foncière TIARD* v. *Staat der Nederlanden* the question arose whether the notion 'civil and commercial matters' covers a claim by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that State. The Netherlands State claimed payment by a French insurance company on the basis of the guarantee commitments *vis-à-vis* the State of import and export duties owed by the authorised Netherlands associations under the Customs Convention on international transport of goods under cover of TIR-carnets of 14 November 1975. Again the ECJ reiterated its case-law regarding the interpretation of the notion 'civil and commercial matters'. Is the Netherlands State in the present case exercising its public powers? The Court considered that it is necessary to identify the legal relationship between the parties to the dispute and to examine the basis and the detailed rules governing the bringing of the action. It is interesting that the Court gives some sort of autonomous definition of a guarantee contract (consideration 27), derived from the general principles which stem from the legal systems of the contracting States. The Court defines

7. See also *Rev. Crit.* 2004 165 note Pataut, *Clunet* 2004 635 note Huet.

a guarantee contract as a contract which 'represents a triangular process, by which the guarantor gives an undertaking to the creditor that he will fulfil the obligations assumed by the principle debtor if the debtor fails to fulfil them himself'. According to the Court it is necessary to examine whether the legal relationship between the Netherlands State and the French insurance company, under the guarantee contract, is characterised by an exercise of public powers on the part of the State to which the debt is owed, in that it entails the exercise of powers going beyond those exercising under the rules applicable to relations between private individuals (consideration 30). Although it is for the national court to make that assessment, the ECJ provides some guidelines as to the factors which could be taken into consideration. Firstly, the TIR Convention does not govern the relationship between the Netherlands State and the French insurance company. Secondly, the undertaking of the French company *vis-à-vis* the Netherlands State was freely given and, finally, regard is to be had to the terms of the guarantee contract. In our opinion it is obvious that these factors will lead to the conclusion that the action of the State relates to a private-law guarantee contract, that falls within the Convention's material scope. In order to determine whether an action falls within that scope, only the subject-matter of the action must be taken into account. If the action of the Netherlands State falls within the Convention's scope, the fact that the guarantee may raise pleas in defence relating to whether the guaranteed debt is owed, based on matters excluded from the scope of the Brussels Convention, has no bearing on whether the action itself is included in the Convention's scope. The decision is in conformity with previous case-law (Case C-190/89, *Rich* v. *Impianti*, [1991] *ECR* I-3855, *NILR* 1992 385 note Vlas) and with a decision on the interpretation of Article 21 of the Brussels Convention (Case C-111/01, *Gantner* v. *Basch*, [2003] *ECR* I-4207, see *infra* para. 6).

3. ARTICLE 5(1) BRUSSELS CONVENTION: *FORUM CONTRACTUS*

With the transformation of the Brussels Convention into the 'Brussels I' Regulation, significant amendments have been brought in Article 5 with regard to the jurisdiction in matters relating to contracts *(forum contractus)*. Derogating from the principal rule of Article 2, Article 5(1) gives a special ground for jurisdiction. A person domiciled in a Member State may, in another Member State, be sued, in matters relating to a contract in the courts for the place of performance of the obligation in question. This *forum contractus* is justified because of the close connection between the dispute and the court seised. The court of the place of performance will generally be the most appropriate court for settling the case, in particular on the grounds of proximity and ease of taking evidence. The *forum contractus* provided in Article 5(1)(a) of the 'Brussels I' Regulation corresponds to Article 5(1) of the Brussels Convention, so the case-law of the

ECJ with regard to the latter – including the decisions discussed below – therefore will remain relevant under the 'Brussels I' Regulation. Generally speaking, the place of performance shall, if the obligation in question is not performed and by absence of an agreement by the parties about the place of performance, be determined by the law which governs the obligation in question according to the conflict of laws of the court before which the matter is brought (Case 12/76, *Tessili* v. *Dunlop*, [1976] *ECR* 1473, *NILR* 1976 349, confirmed in Case C-440/97, *Groupe Concorde* v. *The Master of the vessel Suhadiwarno Panjan*, [1999] *ECR* 6307, *NILR* 2002 109 note Zilinsky).

On the interpretation of the place of performance of the obligation in question in the meaning of Article 5(1) of the Brussels Convention, two important preliminary rulings of the EC Court were rendered since the last survey in this Review. Firstly, Case C-256/00, *Besix SA* v. *Wasserreinigungsbau Alfred Kretzschmar GmBH & Co. KG/Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzschmar GmbH & Co. KG*, [2002] *ECR* I-1699 must be noted.[8] The main question in this case is how to determine the place of performance within the meaning of Article 5(1) in case of a negative obligation, i.e., an obligation not to do something. This question raised after a dispute in reference to a claim for damages from Besix (Belgium) against WABAG/Plafog (Germany). Besix alleged that WABAG/Plafog breached an exclusivity clause in their contract. WABAG and Besix contractually agreed to submit a joint tender in response to a public invitation to render for a project of the Ministry of Mines and Energy of Cameroon and, as it would come so far, to perform the contract together. The two parties agreed to act exclusively and not to commit themselves to other partners (exclusivity and non-competition). However, it turned out that Plafog – WABAG and Plafog are both part of the Deutsche Babcock group – had also undertaken in this tender. Hereupon Besix brought an action in damages against WABAG and Plafog before the Belgian courts, alleging the Belgian courts to be the *forum contractus*. In appeal the Court of Appeal in Brussels referred the following question to the ECJ for a preliminary ruling:

> 'Must Article 5(1) of the Brussels Convention be interpreted as meaning that a defendant domiciled in a Contracting State may, in another Contracting State, be sued, in matters relating to a contract, in the courts for any of the places of performance of the obligation in question, in particular where, consisting in an obligation not to do something – such as, in the present case, an undertaking to act exclusively with another party to a contract with a view to submitting a joint bid for a public contract and not to enter into a commitment with another partner – that obligation is to be performed in any place whatever in the world?
> If not, may that defendant be sued specifically in the courts for one of the places of performance of the obligation and, if so, by reference to what criterion must that place be determined?'

8. See also *Rev. Crit.* 2002 588 note Gaudemet-Tallon, *NJ* 2004 159 note Vlas.

In this case the obligation in question within the meaning of Article 5(1) is one not to do something, i.e., the obligation of parties to act exclusively and not to commit themselves to other partners. The parties intended to give no geographical limit to this negative obligation, so it should be performed all over the world. Does this mean that Article 5(1) confers jurisdiction on all the courts of the Member States where the obligation has to be performed? The ECJ emphasized that the principle of legal certainty is one of the objectives of the Brussels Convention. This principle requires that the jurisdictional rules which derogates from the principal rule of Article 2, like the *forum contractus* of Article 5(1), must be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, others than those of the State in which he is domiciled, he may be sued. As multiplicity of places of performance results in multiple competent *fora contractus*, it decreases the predictability of the competent court and therefore conflicts with the principle of legal certainty. Furthermore, it is essential to avoid a situation in which multiple courts have jurisdiction with regard to one and the same contract in order to prevent inconsistent decisions. For these reasons, if the relevant obligation has been or is to be performed in a multitude of places, jurisdiction can not be conferred on each court of the Member State where the place of performance can be located. Otherwise the claimant would find itself in the position to bring the case before the court of the place of performance in which he expects a favourable decision, while the defendant find itself in no position to reasonably foresee in which courts – besides the court of his domicile – he may be sued. Therefore the ECJ *held*:

> 'Article 5(1) of the Brussels Convention is not applicable where, as in the present case, the place of performance of the obligation in question can not be determined because it consists in an undertaking not to do something which is not subject to any geographical limit and is therefore characterised by a multiplicity of places for its performance. In such case, jurisdiction can be determined only by application of the general criterion laid down in the first paragraph of Article 2 of the Convention.'

Another interesting preliminary ruling of the EC Court, relevant to the present discussion, is Case C-334/00, *Fonderie Officine Meccaniche Tacconi SpA* v. *Heinrich Wagner Sinto Maschinenfabrik GmbH*, [2002] *ECR* I-7357.[9] This preliminary ruling relates to the question whether an action as a result of pre-contractual liability falls within the scope of Article 5(1) or Article 5(3). The extensive opinion of Advocate-General Geelhoed before this preliminary ruling shows that in the substantive law of the Contracting States pre-contractual liability can be qualified both as (quasi-)contract or as tort or (quasi-)tort. With this ruling the long-standing question whether an action founded on pre-

9. See also *IPRax* 2003 127 note Mankowski, *Clunet* 2003 668 note Huet, *NJ* 2003 46 note Vlas.

contractual liability as result of the unlawfully breaking off of negotiations falls within the scope of the *forum contractus* (Art. 5(1)) or the *forum delicti* (Art. 5(3)) finally seems to been settled. What was the case? Tacconi (Italy) sued WHS (Germany) before the Italian courts seeking to establish pre-contractual liability in reference to the unlawfully breaking off of negotiations for the sale of a moulding plant. The Italian Supreme Court (*Corte suprema di cassazione*) referred the following questions to the EC Court for a preliminary ruling:

> '1. Does an action against a defendant seeking to establish pre-contractual liability fall within the scope of matters relating to tort, delict or quasi-delict (Article 5(3) of the Brussels Convention)?
> 2. If not, does it fall within the scope of matters relating to a contract (Article 5(1) of the Brussels Convention), and if it does, what is the obligation in question?
> 3. If not, is the general criterion of the domicile of the defendant the only criterion applicable?'

The EC Court repeated that the expressions 'matters relating to a contract' and 'matters relating to tort, delict or quasi-delict' in Articles 5(1) and 5(3) have to be interpreted autonomously and do not imply a simple reference to the national laws of the Contracting States. In earlier preliminary rulings the EC Court held that 'matters relating to tort, delict or quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of Article 5(1) (see Case 51/97, *Réunion Européenne SA* v. *Spliethoff's Bevrachtingskantoor BV*, [1998] *ECR* I-6511, *NILR* 2002 115 note Vlas). In the present case the EC Court stressed that the expression 'matters relating to a contract' is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.[10] There was clearly no obligation freely assumed by HWS towards Tacconi, so the obligation to compensate the damage caused by the unlawfully breaking off of negotiations can derive only from breach of rules of law (in particular the rule which requires the parties to act in good faith in negotiations with a view to the formation of a contract). The ECJ *held*:

> 'In the light of all the foregoing, the answer to the first question must be that, in circumstances such as those of the main proceedings, characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good

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10. However, consideration 22 of the preliminary ruling states: 'Moreover, while Article 5(1) of the Brussels Convention does not require a contract to have been concluded, it is nevertheless essential, for that provision to apply, to identify an obligation, since the jurisdiction of the national court is determined, in matters relating to a contract, by the place of performance of the obligation in question.' This shows that the conclusion of a contract is not necessary for the application of Art. 5(1), but only an *obligation* is required. At this, one could possibly think of a 'letter of intent'.

> faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention.'[11]

As mentioned before, Article 5(1)(a) of the 'Brussels I' Regulation corresponds to Article 5(1) of the Brussels Convention, so both preliminary decisions maintain relevant for the interpretation of Article 5(1)(a) 'Brussels I' Regulation. However, there is one important difference between both provisions. Article 5(1)(b) 'Brussels I' Regulation autonomously defines the place of performance of the obligation in question as mentioned in Article 5(1)(a) for contracts concerning the sale of goods and the provision of services. Article 5(1)(b) reads as follows:

> 'for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
> – in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
> – in the case of the provision of services, the place in a Member State where, under the contract the services were provided or should have been provided …'[12]

An advantage of this provision is the *concentration of all disputes* before one court. All disputes arising from the sale of goods, irrespective whether the dispute concerns the delivery of the goods or the payment, shall be brought for the courts in a Member State where the goods were delivered or should have been delivered. So, when the goods are actually delivered in a Member State, the courts of that State have jurisdiction in matters concerning both the delivery and payment.[13] If Article 5(1)(b) 'Brussels I' Regulation points to the court of a non-Member State, this provision does not apply. In this case paragraph (c) refers to Article 5(1)(a) 'Brussels I' Regulation. When the goods are not delivered, but parties have concluded an agreement on the place of delivery, the courts of that particular Member State have jurisdiction in matters concerning both the delivery and payment. When the dispute concerns payment and parties contractually agreed on the place of payment, regularly payment at a bank account, Article 5(1)(b) confers jurisdiction on the court of the Member State of the agreed place of payment. Any dispute concerning the delivery shall be

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11. See for the application of this preliminary ruling in Dutch courts, e.g., District Court Rotterdam 24 September 2003, *NIPR* 2004 159.

12. See for Dutch case law on this article, e.g., District Court Utrecht 15 October 2003, *NIPR* 2003 297, President District Court Alkmaar 7 August 2003, *NIPR* 2003, 281 and District Court Arnhem 5 September 2002, *NIPR* 2003 49.

13. Cf., the incorrect decision of District Court Almelo 4 June 2003, *NIPR* 2003 206. According to this Dutch court Art. 5(1)(b) 'Brussels I' Regulation does not regulate the situation that delivery actually has been made but parties did not contractually agree on a place of delivery. The court applied Art. 5(1)(a) and, considered the place where the actual delivery has been made as essential for the *forum contractus*-based jurisdiction.

brought before the courts in a Member State where the goods were delivered or should have been delivered. The foregoing also applies *mutatis mutandis* for the provision of services.

Complications arise when parties did not agree on neither the place of performance nor the place of payment and no delivery has been made. In which way should the phrase 'the place in a Member State where, under the contract, the goods … should have been delivered' be interpreted? There are two possible solutions. Firstly, the phrase 'under the contract' means the place of delivery on which parties agreed. If parties have not made an agreement on the place of delivery, Article 5(1)(b) does not apply and Article 5(1)(a) applies by virtue of paragraph (c).[14] The place of performance shall then be determined by the law governing the obligation in question according to the conflict of laws of the court seised. There is no concentration of disputes under Article 5(1)(a) 'Brussels I' Regulation and thus the competent court with regard to the delivery and the payment should be determined separately.[15] Second, the phrase 'under the contract' is interpreted in such a way that in case of lack of any agreement on delivery, the place where the goods should have been delivered should be determined according to the *Tessili*-method, i.e., by the law governing the obligation in question according to the conflict of laws of the court seised.[16] The advantage of this view is the occurrence of concentration of disputes.

At this stage of the case-law of the ECJ it cannot be said that the *forum contractus* of Article 5(1) 'Brussels I' Regulation satisfies the requirement of the principle of legal certainty: it is hard to imagine that this provision enables a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued. Let us hope that the ECJ shall, within a reasonable time, bring clarity in this respect.

4. ARTICLE 5(1) BRUSSELS CONVENTION: *FORUM LABORIS*

According to Article 5(1) Brussels Convention, in matters relating to individual contracts of employment, the place of performance of the obligation in question is that where the employee habitually carries out his work. If the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated. The *forum laboris* is justified because of the existence of a close relationship between the dispute and the court, and

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14. See accordingly District Court Arnhem 14 May 2003, *NIPR* 2003 289.

15. In favour of this interpretation J.J. van Haersholte-van Hof, *NTER* 2001, p. 246 and probably also L. Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht* [Introduction to Netherlands Private International Law], 7th edn. (Deventer, Kluwer 2002) no. 237.

16. As expressed by G.E. Schmidt, *NIPR* 2001, p. 155 and P. Vlas, *WPNR* (2002) 6485, p. 302 (cf., *WPNR* (2000) 6421).

is inspired by the thought to afford proper protection to the employee as the weaker contracting party. The ECJ frequently gave preliminary rulings on the interpretation of Article 5(1) in cases in which the employee performed his work in more than one Contracting State. Recently this question occurred in Case C-37/00, *Herbert Weber* v. *Universal Ogden Services Ltd*, [2002] *ECR* I-2013.[17] Weber (Germany) worked for Universal Ogden Services (UK) as a cook on board of a floating crane in Danish territorial waters and on mining vessels or installations in the Netherlands continental shelf area. In a dispute arisen between the parties about the agreement of employment the Dutch Supreme Court (*Hoge Raad*) referred to the EC Court for a preliminary ruling. The first question is whether the work carried out by Weber on the Netherlands section of the Continental Shelf under the North Sea can be regarded as work carried out in the Netherlands, as a Contracting State, in the meaning of Article 5(1). The EC Court answered positively upon this by referring to the Convention on the Continental Shelf (Geneva, 29 April 1958). Consequently the second question arises in which of the two Contracting States Weber habitually carried out his work. In earlier case-law the EC Court stated that in such circumstances the place of performance is the place where or from which the employee principally discharges his obligation towards his employer (Case C-125/92, *Mulox IBC* v. *Hendrick Geels*, [1993] *ECR* I-4075, *NILR* 1994 344 note Vlas), or the place where he has established the effective centre of his working activities (Case C-383/95, *Petrus Wilhelmus Rutten* v. *Cross Medical*, [1997] *ECR* I-57, *NILR* 1999 94 note Vlas). Hereby one must take into account the fact that the employee has an office from which he works and organises his work and to which he returns after each business trip abroad. In the present case the EC Court finds in principal decisive the temporal criterion of the place where the employee spends most of his working time fulfilling his duties towards his employer. Because Weber continuously performed the same job as cook for the whole period of employment, any qualitative criteria relating to the nature and importance of the work in various Contracting States are irrelevant. The implication of this temporal criterion is that all of an employee's term of employment must be taken into account in determining the place where he carries out the most significant part of his work. Only if the subject matter of the dispute were more closely connected with a different place of work, the abovementioned principle would fail to apply. For example, weight will be given to the most recent period of work where the employee, after having worked for a certain time in one place, then works on a permanent basis in a different place, since the parties clearly intended the latter place to become a new habitual place of work. If these criteria does not enable the national court to determine the habitual place of work, because there are two or more places of work of equal importance or none of the places where the employee carries out his work has a sufficient permanent and close connection with the work done,

17. See also *IPRax* 2003 21 note Mankowski, *Clunet* 2003 661 note Huet.

then the employee may sue his employer before the courts for the place where the business which engaged him is situated (Art. 5(1)) or before the courts on whose territory the employer is domiciled (Art. 2).

In Case C-437/00, *Giulia Pugliese* v. *Finmeccanica SpA, Alenia Aerospazia Division*, [2003] *ECR* I-3573, another question arose concerning the localization of the place of performance with reference to an individual contract of employment. In a dispute between Pugliese and her in Italy established employer Finmeccanica, the German *Landesarbeitsgericht München* referred to the EC Court, among others, the following question for a preliminary ruling:

> 'In a dispute between an Italian national and a company established under Italian law having its registered office in Italy arising from a contract of employment concluded between them which designates Turin as the place of work, is Munich the place where the employee habitually carried out his work under the second part of Article 5(1) of the Brussels Convention where, from the outset, the contract of employment is temporarily placed on non-active status at the request of the employee and, during that period, the employee carries out work, with the consent of the Italian employer, but on the basis of a separate contract of employment, for a company established under German law at its registered office in Munich, for the duration of which the Italian employer assumes the obligation to provide accommodation in Munich or to bear the costs of such accommodation and to bear the costs of two journeys home each year?'

The question is whether in a dispute between an employee and a first employer the place where the employee performs his obligations to the second employer may be regarded as the place where he habitually carries out his work under the contract with the first employer in the meaning of Article 5(1)? The ECJ considered as follows. When an employee has two different employers, the first employer can be sued before the courts of the place where the employee carries out his work for the second employer only when, at the time of the conclusion of the second contract of employment, the first employer has an interest in the employees performance of the work for the second employer in a place decided by the latter. The existence of this interest must be determined by taking into consideration all facts of the case. The relevant factors may include the fact that the conclusion of the second contract was envisaged when the first was being concluded, the fact that the first contract was amended on account of the conclusion of the second contract, the fact that there is an organic or economic link between the two employers, the fact that there is an agreement between the two employers providing a framework for the coexistence of the two contracts, the fact that the first employer retains management powers in respect of the employee and the fact that the first employer is able to decide the duration of the employee's work for the second employer (consideration 24).

Under the 'Brussels I' Regulation jurisdiction in matters relating to individual contracts of employment is no longer determined by Article 5(1), but by Articles 18 to 21. There is one major difference in comparison with the Brussels Convention. While under Article 5(1) of the Brussels Convention both

the employee and employer can bring a dispute before the courts of the place where the employee habitually carries out his work, Article 18(2)(1) of the 'Brussels I' Regulation explicitly restricts this possibility for the employee. The result of this is that under the Regulation an employer may bring proceedings – apart from any possible jurisdiction clause – only in the courts of the Member State in which his employer is domiciled (Article 20(1) 'Brussels I' Regulation). This modification has met much criticism, as appeared from the questions from the European Parliament[18] and a Dutch proposal to amend Article 20(1) EC Regulation.[19] The Commission reported that '[t]he provisions on the contract of employment have been amended with the specific purpose of protecting the weaker party by means of rules of jurisdiction which are more favourable to his interests than the general rules which would have tended to favour a tribunal closer to the employer', and that it is not intended to propose an amendment of Article 20(1) 'Brussels I' Regulation at this moment.[20]

5. CONSUMER CONTRACTS

Articles 13 to 15 Brussels Convention (Arts. 15 to 17 'Brussels I' Regulation) deal with matters of consumer contracts. Generally speaking, consumer protection is based on the idea of protecting the economically weaker party (the consumer) and on considerations of economic, monetary and savings policy. These are also the objectives of Articles 13 to 15 Brussels Convention. Jurisdiction in proceedings concerning a consumer contract is determined by these Articles, if the contract is a contract for sale of goods on instalment credit terms, or a contract for a loan repayable by instalments, or any other form of credit. Also any other contract for the supply of goods or a contract for the supply of services falls within the ambit of these provisions, if the conclusion of the contract was preceded by a specific invitation to the consumer or by advertising in the State of his domicile and the consumer took in the State of his domicile the steps necessary for the conclusion of the contract. It is to be mentioned that in accordance with Article 15 of the 'Brussels I' Regulation it is no longer necessary that the consumer takes all necessary steps for the conclusion of the

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18. Written question E-0785/02 by Bartho Pronk, Ria Oomen-Ruijten and Toine Manders, *OJ* C 309E/47, 12 December 2002. See for similar questions in Dutch Parliament *Aanhangsel Handelingen II* 2001/2002, no. 977.

19. The Dutch proposal (JUSTCIV 133, 12055/02, 19 September 2002) reads as follows: para. 2 of Art. 20 of the EC Regulation will be renumbered to para. 3, and a new paragraph will added, reading: 'The claim of the employee for the dissolution of the labour contract can also be brought in the court of the place in which the employer habitually carries out his work or, when the employee does not habitually carries out his work in one state, in the courts before the place where the business which engaged the employee is situated.'

20. Answer from Vitorino, on behalf of the Commission, *OJ* C 309E/47, 12 December 2002.

contract in the Member State where he or she is domiciled. However, the activities of the professional co-contractor are still to be directed to the Member State where the consumer is domiciled.

In the case-law of the ECJ the question has arisen if for the applicability of Article 13 Brussels Convention it is necessary that the consumer contract is already concluded. In the *Gabriel* ruling (Case C-96/00, [2002] *ECR* I-6367)[21] Mr Gabriel received on his private address in Austria a personalised letter from a mail-order company. This company is established under the German law and has its registered office in Germany. According to this letter Mr Gabriel won a certain prize of money. This promised prize were to be paid to him if he had placed an order for goods in the company's catalogue. After having placed an order and after having received the ordered goods the promised benefit was not send to him. Mr Gabriel decided to institute proceedings against the German mail-order company in Austria under Article 14 of the Brussels Convention. In a procedure to determine the territorial jurisdiction of the Austrian court, the question has arisen whether these proceedings were of a contractual nature or relating to tort, delict or quasi-delict, as there was no completed contract between parties on the promised benefit.

The Brussels Convention uses in Article 13 the same wording as the EC Convention on the Law Applicable to Contractual Obligations 1980 (*OJ* C 27/34, 26 January 1998). According to the Giuliano and Lagarde Report on this Convention it is intended to cover the situations of mail-order and doorstep selling. In a case of a mail-order selling the advertisement is carried out by the mailing of an offer to a consumer. By accepting the offer and placing an order the consumer takes in the State of his domicile the steps necessary for the conclusion of a contract. Hence, the conditions of Article 13 of the Brussels Convention are fulfilled. Furthermore, this Article is applicable in the case as that of Mr Gabriel where he is seeking an order against a mail-order company established in another State to send him a prize that he had won. The prize is related to a contract that was concluded by the consumer. The mailing of the letter whereby the consumer is informed of the winning a prize, is send to him for the purpose of bringing him to place an order for goods. The EC Court *held*:

> 'The jurisdiction rules set out in the Brussels Convention are to be construed as meaning that judicial proceedings by which a consumer seeks an order, in the Contracting State in which he is domiciled and pursuant to that State's legislation, requiring a mail-order company established in another Contracting State to pay him a financial benefit in circumstances where that company had sent to that consumer in person a letter likely to create the impression that a prize would be awarded to him on condition that he ordered goods to a specified amount, and where that consumer actually placed such an order in the State of his domicile without, however,

21. See also *IPRax* 2003 23 note Leible, *Rev. Crit.* 2003 495 note Rémy-Corlay, *Clunet* 2003 651 note Huet, *NJ* 2004 169 note Vlas.

obtaining payment of that financial benefit, are contractual in nature in the sense contemplated in Article 13, first paragraph, point 3, of that Convention.'

Since in the present case the action is related to a consumer contract within the meaning of Article 13 of the Brussels Convention, the EC Court did not examine whether the action is of a contractual nature within the meaning of Article 5(1) of the Convention. The question arises whether the action would fall under Article 13 if the consumer would have required the payment of the prize he had won according to the offer, without having placed any order. This question has been answered by the Court of Justice in the *Engler*-ruling (C-27/02, not yet published in *ECR*). The Court ruled that Article 13 of the Brussels Convention is not applicable in the case where the consumer has not concluded the contract with the professional vendor yet. In the opinion of the Court legal proceedings by which a consumer seeks an order that a mail order company established in another Contracting State, awards a prize ostensibly won by him can be under circumstances of contractual nature for the purpose of Article 5(1) of the Convention, even though the consumer has not concluded a contract with the professional vendor. The Court sets out that Article 5(1) does not require the conclusion of a contract (see Case C-334/00, *Tacconi* v. *Wagner*, [2002] *ECR* I-7357, see *supra* para. 3).

Articles 13 to 15 of the Brussels Convention are inspired by the desire to protect only a certain group of persons. This means that the scope of application of these Articles is to be interpreted restrictively. These Articles are not applicable in a case of a consumer organisation bringing an action against a professional party which is using general terms and conditions which are to be considered contrary to provisions of a certain State. Despite the fact that the national law establishing this organisation gives to this organisation the power to suit anyone who lays down in commercial dealings with consumers general terms and conditions which are contrary to the national law, it does not follow that Articles 13 to 15 of the Brussels Convention are applicable. An organisation which acts as an assignee of the rights of the private consumers cannot be regarded as a consumer (Case C-89/91, *Shearson Lehmann Hutton* v. *TVB*, [1993] *ECR* 139, *NILR* 1993 501 note Vlas). Although the possibility of bringing an action by a consumer organisation is founded on the law, it cannot be said that the Convention is not applicable (Case C-167/00, *VKI* v. *Henkel*, [2002] *ECR* I-8111).[22] According to the settled case-law of the ECJ regarding the scope of the Convention, only the subject of the action in the main proceedings matters (see *supra* para. 2). If the organisation is acting as an assignee, it does not exercise the public power, but it brings an action which derogates from the rules applicable to the relations between private bodies.

It is also settled case-law of the ECJ that Article 5(3) of the Convention covers all actions which seek to establish the liability of a defendant and are not

22. See also *IPRax* 2003 223 note Michailidou, *Rev. Crit.* 2003 682 note Rémy-Corlay.

relating to a contractual liability in the meaning of Article 5(1) of the Convention (Case 189/87, *Kalfelis* v. *Schröder*, [1988] *ECR* 556, confirmed by *Tacconi* v. *Wagner*, see *supra* para. 3). As in the case where an organisation for the protection of the rights of the consumers brings an action against a professional party, there is no contract between this organisation and the defendant, the jurisdiction of the court seised can only be based on Article 5(3) of the Convention. The concept of the term 'place where the harmful event occurred' covers not only cases where damages exist but also cases where there is no damage yet, but there is a possibility of occurring of the damage. This means that this concept does not presuppose the existence of the damage. In the *VKI* v. *Henkel* case the Court pointed out that this interpretation of Article 5(3) is confirmed by the wording of Article 5(3) of the 'Brussels I' Regulation according to which jurisdiction can be founded at the place where the harmful event occurred or may occur.

6. *LIS PENDENS* AND RELATED ACTIONS

Under the Brussels Convention the possibilities of starting proceedings in the courts of more than one Contracting State are multiplied. Article 21 of the Convention (see Art. 27 'Brussels I' Regulation) deals with *lis pendens* and adopts a solution for a situation where proceedings involving the same cause of action and between the same parties are brought in the courts of two different Contracting States. The court second seised has to stay the proceedings until the court first seised establishes its jurisdiction. If this is the case, any other court than the court first seised should decline its jurisdiction. If related actions are brought in the courts of different Contracting States, Article 22 of the Convention (see Art. 28 'Brussels I' Regulation) provides that any other court than the court first seised may stay the proceedings until the court first seised establishes its jurisdiction. On an application of one of the parties a court other than the court first seised can decline its jurisdiction if it is permitted to do so by the law of that court. The aim of Articles 21 and 22 is to avoid a conflict between the decisions. These provisions have to preclude the situation where in accordance with Article 27(3) of the Convention a judgment given by a court of one Contracting State cannot be recognised in another Contracting State because of the irreconcilability with a judgment given by a court in the Contracting State where the recognition is sought (Case 144/86, *Gubisch* v. *Palumbo*, [1987] *ECR* 4861, *NILR* 1988 81 note Verheul). This is the reason why according to the case-law of the ECJ these Articles are to be interpreted broadly as to cover all situations of *lis pendens* before courts of the Contracting States (Case C-351/89, *Overseas Union Insurance*, [1991] *ECR* I-3317, *NILR* 1992 404 note Vlas, see also Case C-351/96, *Drouot Assurance* v. *CMI*, [1998] *ECR* I-3075).

In *Gantner* v. *Basch* (Case C-111/01, [2003] *ECR* I-4207) Basch brought in a Dutch court an action against Gantner for payment of damages caused by

Gantner by terminating a contract between parties.[23] Basch limited his claim by the deduction of a sum of a claim by Gantner which Basch considered to be justified. Before the Austrian court Gantner brought an action against Basch for payment of the goods delivered to Basch. In the opinion of Basch the Gantner's claim should have been dismissed as the justified portion of that claim had been deducted from Basch's claim before the Dutch court. Furthermore, Basch asked the Austrian court to stay the proceedings in accordance with Article 21 of the Brussels Convention on the ground of *lis pendens* or in accordance with Article 22 of the Brussels Convention because the proceedings constituted related actions. The ECJ rendered that in order to determine whether the actions in this case have the same cause of action no account is to be taken of the grounds of defence raised by a defendant. The deduction of the Gantner's claim by Basch has not been requested in the proceedings in the Dutch court. Basch has affected the deduction of the claim by an extra-judicial set-off. According to the Court's ruling at the outset of the proceedings it is to be determined if Article 21 is applicable. If regard should be had to the defence grounds, the solution of *lis pendens* of Article 21 could be frustrated by the defendant. The EC Court *held:*

> 'Article 21 of the Brussels Convention must be construed as meaning that, in order to determine whether two claims brought between the same parties before the courts of different Contracting States have the same subject-matter, account should be taken only of the claims of the respective applicants, to the exclusion of the defence submissions raised by a defendant.'

In our opinion the ruling of the ECJ in *Gantner* v. *Basch* is correct. The respective claims are related to different periods of time. The Basch's claim for damages caused by terminating of the contract by Gantner is related to a period of time after the contract between the parties is terminated. The Gantner's claim for payment of the price of delivered goods is related to the contract itself, i.e., to the period of time before the termination of the contract between the parties. Hence, the actions are not related to the same cause of action. The recognition of a judgment of the Austrian court cannot be refused in the Netherlands by virtue of Article 27(3) of the Brussels Convention, because it is not irreconcilable with a judgment of the Dutch court on the Basch's action. After all, the proceedings before the Dutch court does not involve the Gantner's claim on price payment as this claim is deducted by Basch in an extra-judicial set-off and, for instance, not by a counterclaim of Gantner as a defence against Basch in the Dutch proceedings. As the consequences of the judgments from the Dutch and Austrian proceedings are not irreconcilable, Article 22 of the Brussels Convention is inapplicable. The actions are not related on the same grounds as there is no *lis pendens* in the meaning of Article 21 of the Convention.

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23. See also *IPRax* 2003 426 note Reischl, *Rev. Crit.* 2003 551 note Pataut, *Clunet* 2004 638 note Huet.

The question arises whether Articles 21 and 22 are applicable in a case where an action is brought in the courts of two Contracting States, whereas one of these courts has jurisdiction under an exclusive jurisdiction agreement within the meaning of Article 17 of the Convention. In English legal practice Article 21 is not applicable if the court second seised is competent under Article 17 of the Convention (*Continental Bank* v. *Aekos*, [1994] 1 *WLR* 588 (CA)).[24] If the parties entered a contract and agreed on an exclusive choice of forum, this forum has exclusive jurisdiction in the matters arising from this contract. Other courts do not longer have jurisdiction under the Convention, apart from jurisdiction under Article 16. In *Gasser* v. *MISAT* the ECJ decided that Article 21 remains applicable even if the court second seised has jurisdiction under an exclusive choice of forum (Case C-116/02, not yet published in *ECR*).[25] Advocate-General Léger declared in his opinion that Article 21 of the Convention is not applicable if the court second seised has jurisdiction under a choice of forum clause, so it does not have to stay the proceedings. In the opinion of the EC Court Article 21 does not draw any distinction between the various heads of jurisdiction. There is a special position constituted by Article 19 of the Convention, but this Article is only applicable if one of the courts seised has an exclusive jurisdiction within the meaning of Article 16 of the Convention. The Court has pointed out that the parties can always invoke the choice of forum clause in the proceedings before the court which does not have jurisdiction under the clause, and by virtue of this clause decline the jurisdiction of the court seised. By invoking the clause, the court seised can verify the existence of the clause and can declare that it does not have jurisdiction. According to the ECJ Article 21 remains applicable even if the proceedings in the courts of the Contracting State in which the court first seised is established, are excessively long. The derogating of Article 21 because of excessive delays in the proceedings in that Contracting State would be contrary to the letter, the spirit and to the aim of the Convention. The Convention is based on mutual trust in the legal systems and judicial institutions of the Contracting States. The EC Court *held* in this respect:

> 'Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.
> Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.'

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24. See also P. Stone, *Civil Jurisdiction and Judgments in Europe* (London, Longman 1998) p. 135.

25. See also *IPRax* 2004 205 note Grothe, *Rev. Crit.* 2004 444 note Muir Watt, *Clunet* 2004 641 note Huet.

If the ECJ would have decided according to the opinion that the court second seised is not obliged to stay proceedings if it has jurisdiction under a choice of forum clause, a problem could arise in case of enforcement of the judgment of the court first seised in the Contracting State where the proceedings are pending under the choice of forum clause. In accordance with Article 27(3) of the Brussels Convention the recognition of the judgment of the court first seised could only be refused if this judgment would be irreconcilable with the judgment of the court which has jurisdiction under the choice of forum clause. If the court first seised would render a judgment before the court in the State of enforcement which has jurisdiction under the choice of forum clause, the recognition of the first judgment cannot be refused according to Article 27(3) of the Convention. In our opinion the recognition of this judgment cannot even be refused according to Article 27(1) of the Convention. The recognition of the judgment is not contrary to the public policy of the State of enforcement. The notion 'public policy' of Article 27(1) of the Convention is to be interpreted strictly and is only applicable if the recognition of a judgment from another Contracting State is manifestly contrary to the public policy (Case C-7/98, *Krombach* v. *Bamberski*, [2000] *ECR* I-1935, *NILR* 2002 133 note Zilinsky, see also Case C-38/98, *Renault* v. *Maxicar*, [2000] *ECR* I-2973). A judgment given in breach of a choice of forum clause is not contrary to the public policy, see also Article 28(3) of the Brussels Convention which provides that the test of public policy may not be applied to the rules relating to jurisdiction.

7. CONFLICTING JUDGMENTS

Although it is the aim of Articles 21 and 22 of the Brussels Convention to prevent conflicting judgments from courts of the Contracting States, it still may happen that a judgment of a court of a Contracting State is irreconcilable with a judgment of a court of another Contracting State. It is for example not clear yet if Article 21 is applicable if the plaintiff is applying for provisional matters in courts of two Contracting States or if one party applies for provisional matters in the court of one Contracting State and the opposite party applies in another State for provisional matters as well. It is out of a question that the proceedings are brought between the same parties. Because of the nature of a provisional matter it could be said that the proceedings do not have the same cause of the action. A provisional matter is meant to effect the situation in the State where it is rendered. Also in the situation when in one Contracting State the main proceedings are pending and in another State a provisional measure is asked for, it is not clear if Article 21 can be applied.

To prevent the recognition and enforcement of a judgment of a court of one Contracting State in another Contracting State where it would be irreconcilable with a judgment given in the latter State, Article 27(3) of the Brussels Convention provides that a judgment shall not be recognised if it is irreconcilable with a judgment given in a dispute between the same parties in the State of enforce-

ment. According to this Article it is not necessary that the judgments involve the same action. The judgment given in the State of enforcement does not have to fall within the scope of the Convention. It is the effect and the consequences of the judgments which have to conflict (Case 145/86, *Hoffman* v. *Krieg*, [1988] *ECR* 6450, *NILR* 1988 83 note Verheul).

In *Italian Leather* v. *WECO* (Case C-80/00, [2002] *ECR* I-4995) the ECJ rendered that if in one Contracting State a provisional matter is denied and in another Contracting State the same provisional matter is rendered, the judgments concerning the provisional matters are irreconcilable within the meaning of Article 27(3) of the Convention.[26] Italian Leather, a company domiciled in Italy, brought proceedings before a German court for provisional matters against WECO, a company domiciled in Germany. It had to restrain WECO from using the brand name of Italian Leather for marketing purposes. The German court dismissed the application for this provisional matter as there was no ground for granting such an order. Italian Leather has not proved that there was a possibility of irreparable damages, which is one of the requirements for granting of provisional matters according to German law. A few days before the German court rendered its judgment, Italian Leather applied for a provisional matter in an Italian court. The Italian court had jurisdiction according to the choice of forum clause in the distribution contract between Italian Leather and WECO. Contrary to the German court the Italian court held that the requirements for granting of a provisional matter have been fulfilled. The court granted the asked provisional matters restraining WECO from using the brand name of Italian Leather for distribution of products in several Member States. On the application of Italian Leather the German court initially declared the judgment of the Italian court according to the provisions of the Brussels Convention enforceable in Germany. On appeal of WECO, the declaration of enforceability of the Italian judgment has been withdrawn on a ground that it is irreconcilable with an earlier German judgment denying the granting of a provisional matter. The German Supreme Court (*Bundesgerichtshof*) referred questions on the interpretation of Article 27(3) to the ECJ. The EC Court observed that according to its case-law two judgments are irreconcilable if they entail legal consequences which are mutually exclusive. As Article 25 of the Convention refers to the term 'judgment' and as the interim judgments are judgments within the meaning of this provision, the irreconcilability can exist between an interim judgment and a judgment given in the main proceedings. The irreconcilability lies in the effects of the judgments. The requirements of national law for granting of interim relief which can vary from one Contracting State to another, are irrelevant. The ECJ rendered that a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought.

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26. See also *IPRax* 2003 55 note Wolf & Lange, *Rev. Crit.* 2002 173 note Muir Watt.

In our opinion, the irreconcilability of the judgments as it occurred in *Italian Leather* v. *WECO*, could be prevented if the Italian court as a court second seised would have stayed the proceedings on a ground of *lis pendens* (Art. 21 of the Brussels Convention). The proceedings have been brought to this court whereas the proceedings concerning the same cause have been still pending in a German court. In this case the proceedings for the provisional matters involve the same cause of action, namely restraining of using the brand name by WECO for marketing purposes, and the proceedings are brought between the same parties. In the Italian proceedings as well as in the German proceedings Italian Leather is the plaintiff and WECO is the defendant. Article 21 is however not applicable if the provisional matter would have been asked for in the main proceedings before the Italian court having jurisdiction as a chosen forum in the contract between the parties and this court would have been the court second seised. Only if the main proceedings are brought in the court first seised and in the second court interim relief is asked for, this provision is to be applied under the condition that the interim relief frustrates the decision in the main proceedings.[27]

It is to be mentioned that also under Article 34(3) of the 'Brussels I' Regulation it is possible to deny recognition to a foreign judgment if it is irreconcilable with a judgment in the Member State of enforcement. Contrary to the Brussels Convention a granting of the declaration of enforceability can only be refused if an appeal against the declaration is lodged. The court seised may not test the foreign judgment on his own motion.

27. See P. Vlas *NILR* 2003 151 (156) in his note under *Hoge Raad* (Dutch Supreme Court) 21 June 2002, *Spray Network* v. *Telenor Venture.*