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Transnational Litigation and Elements of Fair Trial (*)

CONTENTS:

(*) I have written the full version of my general report in my native language (Italian). I am presenting in English only an abridged version.

Taking of evidence, aggregate litigation as well as - to some extent – Provisional measures and recognition and enforcement of judgments will be detailed and discussed in the final version of my report.

I. Acknowledgments

First of all, I would like to thank the Executive Committee of the International Association of Procedural Law (IAPL) for asking me to deliver a general report on «Transnational Litigation and Elements of Fair Trial».

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All reporters provided an impressive account of national experiences with transnational litigation. Without their contributions this general report could not have been written.

II. General Remarks

1. - Just as I started writing this General Report, I asked myself a question. It was the same question that STEPHEN B. BURBANK asked himself in 1991 ([1]), reviewing the book of Gary Born and David Westin: «Is there

([1]) S. B. BURBANK, 1991, p. 1456.

[..] an emerging field of international civil litigation?»; «Is there [..] a «distinct, cohesive body of law [ensuring] some underlying kind of justice»?

The Board of the IAPL has raised very similar issues as subjects of the World Congress on «Procedural Justice» in Heidelberg ([2]):

I would like to address these questions since the very beginning of my report.

The regulation of transnational litigation is not a world apart from civil procedural law ([3]).

There isn't any special kind of justice to be done in this sort of litigation. The problem is to balance, on the one hand, access to the courts, effective protection of individual rights, and on the other hand right to defense, right to be heard ([4]).

Indeed, these are the «eternal» problems of civil procedure ([5]).

2. – Dealing with transnational litigation and elements of fair trial, one should accordingly point out from the outset the distinction between substantive law and procedural law ([6]).

This distinction represents a crucial point in the regulation of transnational litigation before national courts.

Traditionally, the procedural law of the Forum State regulates all the aspects related to the judicial process (*lex fori* rule). On the other hand, in

([2]) «The reduction and management of an ever-increasing caseload to ensure the effectiveness of proceedings has been at the centre of debates in the area of procedural law for the past decades. Growing globalisation has shifted the focus to the question whether the existing procedural codes are still able to guarantee procedural equality and material justice through proceedings in our transforming world, whether our traditional criteria for the assessment of a fair trial still suffice or whether they need to be adjusted to the new demands».

([3]) See N. KLAMARIS, *Greece*; for some doubts, see R. PERLINGEIRO, *Latin America*.

([4]) That is the essential content of the «fair trial» guarantee, FR «*procès équitable*», SP «*juicio justo*», DE «*faires Verfahren*», IT «*giusto processo*».

([5]) In the words of S. B. BURBANK (1991, p. 1458): «Nor am I persuaded that international civil litigation is a discrete field today. It seems more accurate to view international civil litigation as part of a process of cross-fertilization in which doctrine and techniques developed in the context of domestic cases are brought to bear on problems presented in international litigation, and the increasingly international dimensions of litigation in our courts prompt changes in doctrine and techniques, which are then applied in domestic cases».

([6]) On the judicial process as an instrument for enforcing rights provided for by substantive laws, see the full version of my report.

cases that show foreign elements, such as the nationality or the domicile of the parties, or the place of the performance of a contract, courts may apply foreign law to the merits of the dispute, in accordance with the conflict of laws rules of the Forum State (*lex causae* rule) ([7]).

The distinction between *lex fori* rule and *lex causae* rule originates from the medieval jurisprudence ([8]).

The foundation of the modern State strengthens the distinction between *lex fori* rule and *lex causae* rule, since in this new context judicial jurisdiction represents the exercise of state sovereignty. Besides, procedural law is public law. Thus, it would make no sense if the exercise of judicial jurisdiction by courts of a state were regulated by the law of a foreign state.

However, the *lex fori* rule is nowadays based on practical, rather than on theoretical reasons. Accordingly, in some cases it may be acceptable that foreign procedural law has to be applied by the courts of the Forum State, in particular when this is required by the enforcement of substantive law ([9]).

3. – The distinction or better the separation between procedural law and substantive law has fostered the view that the former is «neutral» as regards the latter. Therefore any procedural law could implement any substantive law ([10]).

From a civil law way of thinking, the idea of neutrality of procedural law is closely linked with the assumption of the priority of substantive law

([7]) As A. T. VON MEHREN has already pointed out (2007, p. 29): «Generally speaking, contemporary law and practice are reluctant to link in principle jurisdictional and the substantive issues. Relatively few legal systems insist on the application of their own substantive law if the proceedings are to continue before their courts. Likewise, few contemporary legal orders refuse to accept jurisdiction when their domestic laws do not apply to the merits of the case».

([8]) As BARTOLO DA SASSOFERRATO wrote: «aut queris de his quae pertinent ad litis ordinationem et inspicitur locus iudicii aut de his quae pertinent ad ipsius litis decisionem».

([9]) D. COESTER-WALTJEN, 1983, Rn 6: the *lex fori* rule has «bereits seit einiger Zeit den Glanz seiner allgemeinen Gültigkeit verloren».

([10]) As D. LEIPOLD (1989, p. 28) put it: «Neben der Einheit des jeweiligen nationalen Prozeßrechts ist es vor allem aber auch die *Abstraktheit* (man könnte auch sagen: die Universälität) des Prozeßrechts, die den lex-fori-Grundsatz gerechtfertigt. Das Prozeßechts als eigenständige Rechtsmaterie erhebt den Anspruch, für die Verwirklichung jeglichen materiellen Rechts vor einem bestimmten Gericht geeignet zu sein».

(*ubi ius, ibi remedium*). As a result of the combination of these two ideas one might have expected that the choice of law would have played a leading role in transnational litigation.

On the contrary, quite the opposite is true. The daily practice of the courts is dominated by rules of judicial jurisdiction as well as of international civil procedure. This depends on the strong differences among national procedural systems, in particular between the U.S. system and all the others.

4. - The distinctive aspects of the American system of civil litigation have led to coin the expression: American «exceptionalism» ([11]). In particular, the United States is a «plaintiff's heaven» ([12]), even though *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) may have changed to some extent the landscape of the pleading system ([13]).

The «American advantages» for the plaintiff in civil proceedings are discussed in detail in the full version of my report: contingency fees, no loser-pays rule, low courts fees, pre-trial discovery, trial by jury, punitive damages, class actions. All these aspects need to be taken into account, since they are related to the balance between effective judicial protection of individual rights and right to defence (in other words, they are related to the fair trial).

([11]) See O. CHASE, 2002, p. 277.

([12]) In the famous words of LORD DENNING, *Smith Kline & French Laboratories v. Bloch* (1983) 2 All. E.R. 72 (C.A.): «As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk to having to pay anything to the other side. The lawyers there will conduct the case 'on spec' as we say, or on a 'contingency fee' as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40% of the damages, if they win the case in court, or out of court on a settlement. If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such cost deterrent as we have. There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that lawyers will take their 40% before the plaintiff gets anything. All this means that the defendant can be readily forced into a settlement. The plaintiff holds all the cards».

([13]) Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) has moved toward a stricter plausibility standard. Most recently, Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) arguably extends the fact requirements in pleading even further.

Beyond these elements, the comparison between the U.S. civil litigation system and the civil justice systems of other countries (especially of the European countries) shows similarities and differences of the overall purposes and roles of civil justice in Europe and the United States.

The main purpose of the European civil justice systems is the effective and efficient protection of private rights and interests based on the existing legal order. This purpose is also served by the U.S. civil litigation.

While in Europe civil litigation is not conceived as an instrument to effect important public policy goals and public interest litigation, *Prozeßführung im öffentlichen Interesse* is more an exception than the rule, in the United States the system of private civil justice is seen as an important element in the effective regulation of social and economic actors ([14]).

This shows that the system of civil justice is all but neutral as regards the way of protection of the private rights.

5. – Public policy goals to be achieved by the regulation of the judicial process are more usual in transnational litigation than in domestic disputes.

Let me provide two examples.

(*a*) The first one stems from the U.S American case law on judicial jurisdiction. It is the reasoning developed by of the U.S. Supreme Court in the *Asahi* case ([15]).

([14]) See P. L. MURRAY, R. STÜRNER, 2004, p. 576: «On the other side of the Atlantic for at least a generation representative parties and public interest organisations have made aggressive use of the courts to implement goals that redound not to the benefit of a private party but to the interest of the public».

([15]) *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). This case summary (*www.lawnix.com*): Mr. Zurcher lost control of his motorcycle and collided with a tractor. He was seriously injured and his passenger, Mrs. Zurcher, was killed. Zurcher alleged that the accident was the result of a defective tire tube which caused his rear wheel to lose air rapidly and explode. Zurcher brought suit and named as defendants Cheng Shin, the Taiwanese manufacturer of the tire tube, and Asahi Metal Industry Co., the Japanese tire valve assembly manufacturer. Asahi Metal had sold tire valve assemblies directly to Cheng Shin in Taiwan and Cheng Shin then incorporated the valves into motorcycle tires. Cheng Shin sought indemnity from Asahi Metal in the Zurcher suit and filed a cross claim against Asahi and the other defendants. Zurcher eventually settled out of court with all of the defendants leaving Cheng Shin's cross claim as the only remaining issue to be

To decide on this case, the Supreme Court argued that: «the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the Forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies» ([16]).

It is a five-factor test in determining whether «traditional notions of fair play» would permit the assertion of personal jurisdiction over a foreign defendant. It contains a good mix of both parties' interests (plaintiff's interest in obtaining relief, burden on the defendant) and public policy goals (interests of the Forum State, interstate efficiency and policy interests).

(*b*) The second example of public concerns in the regulation of transnational litigation can be given by the European Union Law. It is the underlying rationale of the Brussels Convention on Jurisdiction and Enforcement of judgments in civil and commercial matters (1968) ([17]).

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decided. Asahi Metal moved to quash the service of summons, claiming that California could not exercise jurisdiction over it because sales to Cheng Shin took place in Taiwan and shipments were sent from Japan to Taiwan. Asahi Metal did no business in California and did not directly import any products to California. Only 1.24% of the company's income came from sales to Cheng Shin and only 20% of Cheng Shin's sales in the United States were in California. Cheng Shin testified that that Asahi Metal was told and knew that its products were being sold in California.

The Superior Court found it fair to require Asahi to defend in California and denied Asahi Metal's motion to quash service of summons. The Court of Appeals reversed and issued a writ of mandate to compel the Superior Court to grant the motion to quash. On appeal the California Supreme Court reversed again, finding that Asahi Metal's intentional act of placing its assemblies into the stream of commerce, together with its awareness that some of them would eventually reach California, were sufficient to support state court jurisdiction under the Due Process Clause. Asahi Metal appealed and the United States Supreme Court granted *certiorari*.

([16]) The Court found that in this case the burden on the defendant was severe based on both the geographic distance and legal dissimilarities between Japan and the United States. Cheng Shin was not a California resident, diminishing California's interest in the case. Cheng Shin also did not show that it would be inconvenienced if the case for indemnification against Asahi were heard in Japan or Taiwan instead of California. Finally, neither interstate efficiency nor interstate policy interests would be served by finding jurisdiction.

([17]) See also the Lugano Parallel Convention, extending the rules of the Brussels Convention to Switzerland, Norway and Iceland.

The Brussels Convention serves not only interests of the parties involved in a cross-border dispute in Europe. It should also be considered in the broader context of the European integration ([18]).

Thus, the «sound operation» of the internal market represents the public policy goal that led at the same time to adopt rules of judicial jurisdiction intended to be highly predictable and to simplify the enforcement of judgment in the Member States ([19]).

([18]) As Jenard put it in his report on the 1968 Brussels Convention: «Underlying the Convention is the idea that the Member States of the European Economic Community wanted to set up a common market with characteristics similar to those of a vast internal market. Everything possible must therefore be done not only to eliminate any obstacles to the functioning of this market, but also to promote its development. From this point of view, the territory of the Contracting States may be regarded as forming a single entity». See P. JENARD, *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, in *Official Journal of the European Communities*, 1979, C 59, p. 1, p. 13.

([19]) Landmark decision on the link between the Brussels Convention and the European integration is ECJ, 10 February 1994, C-398/92, *Mund & Fester*. See. B. HESS, 2010, p. 3.

By its reference for a preliminary ruling, the German court is essentially asking whether Article 7 of the EEC Treaty (Equal treatment – Prohibition of discrimination on grounds of nationality), read in conjunction with Article 220 of the Treaty and the Brussels Convention, precludes a national provision of civil procedure (§ 917, II *Zpo*) which, in the case of a judgment to be enforced within the national territory, authorizes seizure only on the ground that it is probable that enforcement will otherwise be made impossible or substantially more difficult, but, in the case of a judgment to be enforced in another Member State, authorizes seizure simply on the ground that enforcement is to take place abroad. In order to answer that question, the Court have to consider whether that provision falls within the scope of the EEC Treaty: (11) «the fourth indent of Article 220 of the EEC Treaty provides that the Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, although it is not intended to lay down a legal rule directly applicable as such but merely to mark out the framework of negotiations between the Member States [..]. Its purpose is this: to facilitate the working of the common market through the adoption of rules of jurisdiction for disputes relating thereto and through the elimination, as far as is possible, of difficulties concerning the recognition and enforcement of judgments in the territory of the Contracting States. (12) It is on the basis of that article and within the framework defined by it that the Member States concluded the Brussels Convention. Consequently, the provisions of that Convention relating to jurisdiction and to the simplification of formalities concerning the recognition and enforcement of judgments and also the national provisions to which the Convention refers are linked to the EEC Treaty». On the merits, the ECJ holds that that § 917, II Zpo entails a «covert form of discrimination», which is incompatible with the European community law.

The Maastricht Treaty has assigned judicial cooperation within the competence of the Justice and Home Affairs Pillar of the European Union (the so called third pillar). The Amsterdam Treaty amended Art. 65 of the EC Treaty to give the Community the competence for «improving and simplifying [..] the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases». On that basis the Brussels Convention was replaced by Council Regulation EC 44/2001 ([20]) and the underlying public policy concerns have been widened towards the objective of maintaining and developing an area of freedom, security and justice, where the free movement of persons is ensured.

Under the Lisbon Treaty, this subject matter is governed by Art. 67 e 81 TFEU ([21]).

6. – Generally speaking, the regulation of transnational disputes in State courts has first of all to seek a balance between the plaintiff's interests (access to the court, effective protection of asserted rights) and the defendant's ones (right to defense, right to be heard).

In my opinion, public policy concerns should normally play only a subordinate role in the traditional civil litigation, both in the domestic and in the transnational disputes ([22]).

([20]) The overall structure of the Convention has not been modified by the Regulation, which has amended only specific provisions.

([21]) See B. HESS, 2010, p. 75, fn 401.

([22]) As a traditional system I refer here to the litigation form, in which one plaintiff asserts a substantive right against one defendant. Of course, the situation is different with regard to the procedures for aggregate litigation. In this case the traditional litigation form must in modern legal systems be stretched to accommodate various interests: the interests of justice, of judicial efficiency, or of regulatory goals. Particularly in the context of low-value claims, class action for monetary damages «generate efficiencies through aggregation that permit plaintiffs to assert legal rights which would otherwise not be enforced at all. In doing so, class actions serve multiple purposes: (1) providing compensation for harm that particular conduct causes to many individuals; (2) preventing unjust enrichment by forcing defendants to disgorge unlawfully received gain; and (3) changing the behavior of defendants and other entities by deterring unlawful conduct» (H. BUXBAUM, 2008).

In my letter to the national reporters, issues relating to the cross border class actions have been addressed ([22]). They have been focused mainly on the developments that may arise from the Vivendi Universal S. A. ruling. Following this landmark ruling in a securities litigation case against media group, foreign

Public policy concerns should not throw off balance plaintiff's and defendant's interests. This is true either the State interest in exercising its jurisdiction to adjudicate, or for the State interest in having control over its territory (territorial sovereignty), as well as for the European Union policies referring to the «sound operation» of the internal market.

Normally, public concerns are on the side either of one party or of the other. Thus, e.g., the Forum State interest in exercising its jurisdiction to adjudicate is on the side of the plaintiff. Thus, e.g., sovereignty interests of the State in avoiding (or limiting to certain means) cross-border discovery or service of foreign process on its own territory is on the side of the defendant who is resident there.

When assessing the relationship between parties' interests and public concerns, one should observe the following guideline. If the interest of a State (of a Federation, or of the European Union) is on the side of one party (either the plaintiff or the defendant), such a situation should not not be detrimental to the «essence» ([23]) of the fair trial/due process guarantee, damaging the counterparty.

In other words, the regulation of transnational litigation as well as the regulation of domestic litigation should focus on the balance between the parties' interests. Considerations of public interest or of public policy which could not be related either to the private interest of parties or to the ends of justice in the case which is before the court should be given little room.

Of course, I do not think that public policy issues should play no role in our globalised world. I do believe that quite the opposite is true ([24]). However, the political system has first to be entrusted with the objective to govern globalisation. The regulation of transnational litigation has little role to play in this context.

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investors have been granted permission to participate in a US class action suit. This new development potentially paves the way for future cross-border class actions. Some national reports have addressed these issues (e.g., *Germany* and *Holland*). Results will be dealt with in the final version of my general report.

([23]) Essence = *Wesensgehalt*. Art. 52 (1) Charter of Fundamental Rights of the European Union.

([24]) See R. STÜRNER, 2007.

7. - From a perspective of enhancing the public sphere, the state regulation of transnational litigation has a specific and limited task. Although this is an important one. It is the task of making state civil justice more competitive *vis a vis* arbitration.

(*a*) In this direction, an important contribution has come from legal scholars. I am referring to the realisation of a joint project between the *American Law Institute* and the *Unidroit* on the *Principles of Transnational Civil Procedure* ([25]). This has been a reliable assessment by lawyers and scholars belonging to different procedural law traditions and cultures. The result is of great value due to the balance of the proposed solutions. A set of principles are identified. These are the principles that should be considered as the common core of fair trial in transnational litigation. It should be not only a point of reference in the scientific debate on this issue, but also a model for legislators. Moreover, it should serve as an interpretative guidance for judges dealing with transnational litigation. In this regard, this set of principles could be used as a kind of benchmark with which the national and regional norms can be compared ([26]).

(*b*) A second major contribution with a view to enhance international litigation before State courts is the Convention on Choice of Court Agreements (2005), drawn up under the auspices of the Hague Conference on Private International Law ([27]). If compared to the original project, which was conceived in the last decade of the twentieth century and failed at the beginning of the new millennium, the 2005 Convention is certainly less ambitious. The original project was an attempt to draw up a global convention aimed at establishing norms on judicial jurisdiction to be applied

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([25]) Vedi, R. STÜRNER, 2005, p. 201; M. ANDENÆS, N. ANDREWS, R. NAZZINI (eds.), 2004; N. KLAMARIS, *Greece*.

([26]) See R. STÜRNER, 2005, p. 213 f.: «The Principles may gain the significance of an international 'Restatement of the Law of Civil Procedure' […]. They describe not only the minimum procedural requirements for a foreign procedure, to have its result acknowledged in foreign countries, they also establish standards of procedural fairness, which may guarantee recognition and enforcement all over the world if the court has complied with these standards before rendering its judgment».

([27]) For the text of the Convention, s. *www.hccp.net*. In 2009 it was signed by the European Union and the United States of America.

in the Forum State as well as norms that govern the recognition and enforcement of decisions in other States.

The objective of the 2005 Convention is to outline uniform rules for the enforcement of exclusive choice of court agreements between parties to commercial transactions ([28]), and to facilitate the recognition and enforcement (in the contracting States) of decisions of courts whose jurisdiction is based on such agreements. The Convention has drawn inspiration from the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. As far as parties to commercial transactions are concerned, it represents a real alternative to the inclusion of an arbitration agreement in their contracts ([29]).

This topic discloses an excellent example of the current tension between rights (and autonomy) of private parties and public policies, not only in the field of transnational litigation but also in general in the civil procedure. If we agree on the purpose of restoring the competitiveness of state civil justice *vis a vis* arbitration, the path to take is to extend the margins of the negotiability of procedural rules, and to find out what actually is non-negotiable ([30]).

In other words, the way forward is to overcome the conception which does not recognise the middle-grounds between arbitration, on the one hand, and state justice, on the other hand, in order to move towards a balanced extension of the impact of party disposition in the structure of the proceedings. This should be done to an extent that does not hinder the efficiency of the process in line with the objective of the fair settlement of the dispute ([31]).

In this context, the regulation on choice of court agreements stands out since it can make a significant contribution to the predictability of the development of the relationships between the parties to a contract ([32]). The degree of predictability that the choice of court agreements can achieve

([28]) The convention doesn't apply either to consumer contracts or contracts of employment (Art. 2).

([29]) See N. TROCKER, 2011, p. 205.

([30]) For more details R. CAPONI, 2008.

([31]) See P. SCHLOSSER, 1968.

([32]) See N. TROCKER, 2011, p. 199.

obviously varies depending on the legislative framework that applies to them. In civil law countries, a (valid) clause in which the parties had agreed on an exclusive choice of court tends to be considered as binding for courts. Conversely, in common law systems, the clauses regarding the choice of court are not completely binding. Courts retain a degree of discretion in deciding whether to give them effect or not ([33]).

In the Hague Convention of 2005, the balance between the rights of the parties regarding the choice of court and the state authorities was met through a sort of trade-off. Prerogatives of the latter have been protected in a general and abstract way, through a long list of matters which have been excluded from the scope of the Convention ([34]). The prerogatives of the parties are protected, within the scope of the Convention, by reducing judicial discretion. A court designated in an exclusive choice of court agreement '*shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State*' ([35]). There is therefore no room for the application of *forum non conveniens*.

Vice versa, as a general rule, the non-designated court '*shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies*' that is, it must respect the choice of the parties ([36]).

Thirdly, the decision issued by a court designated in an exclusive choice of court agreement has to be recognised and enforced in other contracting states, except in exceptional circumstances ([37]).

In European procedural law, the choice of court agreements is currently dealt with under Arts. 23 and 24 of EC Regulation no 44/2001: '*If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have*

([33]) See N. TROCKER, 2011, p. 199.
([34]) Art. 2 (2).
([35]) Art. 5 (2).
([36]) Art. 6. See also *Ali/Unidroit Principles of Transnational Civil Procedure* 2.4.: «*Exercise of jurisdiction must ordinarily be declined when the parties have previously agreed that some other tribunal has exclusive jurisdiction*».
([37]) Arts. 8 e 9. See N. TROCKER, 2011, p. 205.

jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise' (Art. 23) ([38]). However, if the court designated pursuant to a choice of court agreement is the second-seised court, it must stay its proceedings pending a decision by the court first seised in respect to the rule of prevention ([39]), even if the judicial action brought in the first place is the result of a clearly abusive strategy ([40]).

The Court of Justice's approach is unsatisfactory from the point of view of the fair trial guarantee. The proposal for a recast of the Reg. EC no. 44/2001 contains a provision intended to correct it. It provides that the court chosen by the parties has priority in deciding on its own jurisdiction, regardless of the fact that it is either the first-seised or second-seised court ([41]).

8. – At this stage, it is worth referring to a number of critical situations, in which the overestimation of public policy concerns threatens the balance between plaintiff's and defendant's interests.

(*a*) the first situation originates from the link between exercise of judicial jurisdiction and sovereignty.

Along the lines of a traditional, or rather classical, way of thinking in England: «It is an essential attribute of the sovereignty of this realm, as of all sovereign independent states, that it should possess jurisdiction over all persons and things within its territorial limits and in all cases, civil and criminal, arising within these limits» ([42]). Accordingly, jurisdiction is established when the service of process is permitted: «whoever is served

([38]) This provision leaves no room for judicial discretion. In that sense, ECJ, 16 March 1999, C-159/97, *Trasporti Castelletti*.

([39]) See Art. 27 Reg. EC no. 44/2001.

([40]) See ECJ, 9 December 2003, C-116/02, *Gasser*.

([41]) See Art. 32 (2) of the proposal for a recast of the Reg. EC no. 44/2001 - Bruxelles I-*bis* COM (2010) 748.

([42]) LORD MACMILLAN in the *Cristina* case, 1938. Moreover: «the connection between jurisdiction and sovereignty is, up to a point, obvious, inevitable, and almost platitudinous, for to the extent of its sovereignty a State necessarily has jurisdiction» (F. MANN, 1964, p. 30).

This idea seems to be well and alive in the recent decision (June 27, 2011) of the U.S. Supreme Court *J. McIntyre Machinery, Ltd. v. Nicastro*: «The principal inquiry [..] is whether the defendant's activities manifest an intention to submit to the power of a sovereign»; see below.

with the King's writ, and can be compelled consequently to submit to the decree made, is a person over whom the Court has jurisdiction» ([43]). In this way, the jurisdiction of the courts relies on the «power theory», linked to service of the writ upon the defendant. It is not concerned with the assessment of a proper connection between the parties to the dispute and the forum. Even the mere transient presence of a person in England (unless induced by fraud) suffices to render him amenable to the jurisdiction of the court. This form of transient-service jurisdiction is well and alive ([44]).

The critical link between the rules of jurisdiction and sovereignty, by means of the plaintiff's citizenship, has influenced art. 14 of the French Civil Code. It establishes French jurisdiction for the benefit of any plaintiff of French nationality.

The English transient-service jurisdiction and the French citizenship jurisdiction completely disregard the consideration of fairness in relation to the defendant. Accordingly, under the Brussels Convention and Regulation EC 44/2001 (Art. 3) such rules of exorbitant jurisdiction shall not be applicable against persons domiciled in a Member State ([45]). In conclusion, as R. Geimer has suggested, rules on jurisdiction should not be primarily seen as an exercise of sovereignty but rather as the striking of a reasonable balance between the interests of the parties ([46]).

(*b*) The second critical situation concerns the transnational service of process ([47]). The plaintiff's interest in an easy and speedy service of process has to be balanced with the defendant's interest in having knowledge of the document instituting the proceedings (as well as of the subsequent

([43]) *John Russel and Co Ltd. v. Cayzer, Irvine Ltd.* [1916], 2 AC 298, 302.

([44]) N. TROCKER, 2011, p. 184.

([45]) The Commission's proposal for a recast of the Council Regulation EC 44/2001 (14 December 2010, COM, 748) aims to extend the jurisdiction rules of the Regulation to disputes involving third country defendants, (including those regulating the situations where the same issue is pending before a court inside and outside the EU). Pursuant to the new Art. 4 (2) «Persons not domiciled in any of the Member States may be sued in the courts of a Member State only by virtue of the rules set out in Sections 2 to 8 of this Chapter». The new Section 8 provides for a subsidiary jurisdiction and a forum necessitatis.

([46]) R. GEIMER, 1993.

([47]) «Service of process» is the formal transmission of documents to a party involved in litigation, for the purpose of providing it with a notice of claims, defenses, decisions, or other important matters» (See G. B. BORN, P. B. RUTLEDGE, 2007, p. 815). Such a definition fits also in civil law systems.

documents) in sufficient time to prepare defence.

According to a widespread continental opinion, service of process is an act of sovereignty ([48]). Thus, the State interest in having control over its territorial sovereignty plays a role in the service of process upon a defendant, who is resident there. According to this view, service of process is only possible, as a rule, by tolerance (such as to direct service by consular and diplomatic channels), consent or collaboration in the framework of international judicial assistance ([49]).

From a common law point of view, sovereignty concerns related to service of process might appear strange and unfamiliar. For instance, under the U.S. Federal Rules of Civil Procedure service is often effected by the plaintiff's attorneys or by private firms specializing in the service of process, not by government officials ([50]).

What role should sovereignty concerns play in the transnational service of process?

As already mentioned, one could think that these concerns might help the defendant who is resident in the State, in the sense that they protect him from encroachments of service from abroad ([51]).

However, this idea seems to be misleading. It is doubtful whether perceiving service as an act of sovereignty can really protect the defendants. On the contrary it could endanger their situation, due to the fact that it could

([48]) H. SCHACK 2001, p. 831 (criticizing).

([49]) The Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Service Convention, HSC, 1965) establishes a basic Central Authority mechanism of service under Article 5. In addition to that, the HSC also permits other means of extraterritorial service. Among these alternative procedures, Article 10(a) permits the sending of judicial documents by postal service directly to the defendant, only if the receiving State has not objected. Such an objection is no longer permitted under the Reg. EC no. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (European Service Regulation, EuSR, repealing Council Reg. EC no. 1348/2000). Pursuant to Article 14 of the EuSR, «each Member State shall be free to effect service of judicial documents directly by postal services on persons residing in another Member State by registered letter with acknowledgement of receipt or equivalent». Some countries have declared their opposition to service by mail on their territories, raising sovereignty obstacles. Germany is among them. See § 6 HSC-*AusG*.

([50]) G. B. BORN, P. B. RUTLEDGE, 2007, p. 817.

([51]) See R. STÜRNER, 1992, p. 327. For a critical appraisal, see H. SCHACK, 2001, p. 832

lead the Forum State to use an intra-State fictitious service of process, like the *remise au parquet* ([52]).

Under this system, service is rendered by handing over the document to the State attorney ([53]) or by putting up a notice on the court notice-board ([54]). The addressee is subsequently notified by post, but the comunication doesn't affect the validity of the service of process.

In conclusion, a well balanced regulation of service of process should take into consideration the following points.

(1) In order to fulfil its functions, service should be simple, quick, reliable and fair ([55]).

(2) Sovereignty concerns in transnational service of process are definitely misplaced ([56]).

(3) A fine balance in protecting plaintiff's and defendant's interests is required.

Since the plaintiff has a choice of the forum, the disadvantages for the foreign defendant should be minimized, according to proportionality principle.

Consequently, on the top of the blacklist there are fictitious national means of service of process.

([52]) See Art. 683 ff. *nouveau code de procédure civile*. For the Hague Service Convention to be applicable, a document is to be transmitted from one State party to the Convention to another State party for service. The law of the forum State determines whether or not a document has to be transmitted abroad for service in the other State. Therefore, the Convention does not exclude national means of fictitious intra-State service.

As M. KENGYEL, *Hungary*, put it: «If service abroad is impossible (e.g. there is no Hungarian foreign representation authority), the court shall apply *fictitious domestic service* in civil cases in accordance with the relating general rules».

([53]) As in France, Art. 684 *noveau* c.p.c.

([54]) As in Italy, Art. 142 IT c.p.c.

([55]) H. SCHACK, 2001, p. 832. *Ali/Unidroit Principles of Transnational Civil Procedure*, 5.1: «At the commencement of a proceeding, notice, provided by means that are reasonably likely to be effective, should be directed to parties other than the plaintiff [..]».

([56]) This point is concerned with the State in which the addressee of service is resident. With regard to the Forum State, a link between service of process and sovereignty can be assessed in the legal orders (as in English law), in which the international judicial jurisdiction depends upon whether the rules for service of process have been complied with. In this context, jurisdiction – traditionally conceived as exercise of sovereignty - is established when service is permitted (R. FENTIMAN, 2010, p. 359).

As Zuckerman put it: «the right to fair trial, or due process, demands that every litigant should have timely notice of any proceedings affecting his interests and a reasonable opportunity to participate in them» ([57]). Fictitiuos means of service fail with regard to the notification of the act instituting the proceedings to the defendant. Therefore, they do not comply with the fair trial/due process guarantee ([58]).

(4) A multilateral convention creating uniform rules on service of process is necessary. Such a convention should regulate not only the procedures of service abroad (as both the HSC and the EuSR do) ([59]). It should also entail mandatory rules on its scope and should not leave the conditions of its applicability to the national laws of the Contracting States. Other important matters to be regulated are: translation of the document to be notified ([60]), date of the service to be taken into account with regard to the applicant, time limits for filing a defence ([61]), cure of defective service, remission of time limits if the defendant (not entering an appearance) has had no sufficient time for his/her defence.

(*c*) The third critical situation can be related to the good functioning of the internal market, which represents a crucial public policy goal of the European Union. In the last decade it has enabled the adoption of a number of legal instruments (Council Regulations). They are intended to simplify

([57]) See A. ZUCKERMAN, 2006, p. 155:

([58]) Moreover, in the field of the European Law, the *remise au parquet* do not comply with the prohibition of discrimination on grounds of nationality (Art. 18 TFEU).

([59]) Therefore, neither the HSC, nor the EuSR are able to prevent the use of such intra-State methods of service of process, since these legal instruments apply only to service abroad. See also art. 15 and 16 HSC (postponement of judgment; extension of time limits), as well as art. 19 EuSR (postponement of judgment).

([60]) *Ali/Unidroit Principles of Transnational Civil Procedure*, 5.2: «The documents referred to in Principle5.1 must be in a language of the forum, and also a language of the state of an individual's habitual residence or a jural entity's principal place of business, or the language of the principal documents in the transaction. Defendant and other parties should give notice of their defenses and other contentions and requests for relief in a language of the proceeding, as provided in Principle 6».

([61]) *Ali/Unidroit Principles of Transnational Civil Procedure*, 5.1: «[..] A party against whom relief is sought should be informed of the procedure for response and the possibility of default judgment for failure to make timely response [..]».

the formalities with a view to «rapid and simple» recognition and enforcement of judgments of Member States.

Under the Brussels Convention and the Regulation EC 44/2001, a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

In the view of the European Union Institutions «mutual trust» in the administration of justice in the Member States justifies such automatic recognition of judgments given in another Member State.

With this provision, plantiff's and defendant's are well balanced: the judgment to be recognized can be in favour either of the plaintiff or of the defendant.

By virtue of the same principle of mutual trust, the procedure for making judgments enforceable in other Member States has to be efficient and rapid as well.

As a matter of fact, the enforcement of judgments has been facilitated in the last ten years. Here are some examples.

Under the Brussels Convention, the enforcement of judgments is declared in an *ex parte* proceedings. The party against whom enforcement is sought is not entitled to raise any objection to the request. However, the Court of the Contracting State in which enforcement is sought must *ex officio* identify and review grounds for non recognition of the judgment ([62]). If enforcement is declared, the party against whom enforcement is sought may appeal against the decision within one month of service thereof ([63]). Among the grounds of non recognition, in cases in which the judgment is given in default of appearance, there is the defective service of process, which occurs when the defendant has not had sufficient time to arrange for his defence ([64]).

([62]) See Art. 34 (2), in connection with Art. 27 and 28.

([63]) See Art. 36.

([64]) Art. 27: «A judgment shall not be recognized: 1. if such recognition is contrary to public policy in the State in which recognition is sought; 2. where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence; 3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought; 4. [..]».

Under the Brussels I Regulation (EC n. 44/2001), the enforcement statement is issued automatically after purely formal checks of the alleged documents, the court is left without any opportunity to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation ([65]). It is up to the party against whom enforcement is sought to raise them through appeal against the declaration of enforceability ([66]). If the judgment was given by default, it will be more difficult to challenge it ([67]).

Furthermore, the Commission's proposal for a recast of the Council Regulation EC 44/2001 (14 December 2010, COM, 748) aims to abolish the *exequatur* procedure for all judgments covered by the Regulation's scope with the exception of judgments in defamation and compensatory collective redress cases ([68]). According to this proposal the abolition of *exequatur* will be accompanied by procedural safeguards which aim to ensure that the defendant's right to a fair trial is adequately protected. The Control of substantive public policy will be abolished.

The interest of the European Union to enhance the functioning of the internal market has led to a remarkable simplification of the enforcement of judgments in favour of the plaintiff. In the view of A. STADLER, *Germany*,

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([65]) See Art. 41, Reg. EC n. 44/2001: «The judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35».

([66]) See Art. 45 Reg. EC n. 44/2001: «the court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35».

([67]) Art. 34 Reg. EC n. 44/2001: «A judgment shall not be recognised: 1. [..]; 2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so [..]».

([68]) The exequatur has already been abolished in previous regulations: see Reg. EC n. 805/2004 creating a European Enforcement Order for uncontested claims (21 April 2004); Reg. EC n. 1896/2006 creating a European order for payment procedure (12 December 2006); Reg. EC n. 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure (11 July 2007); Reg. EC n. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (18 December 2008).

For diverging opinions on the abolition of exequatur, see A. STADLER, *Germany*; B. HESS, 2010, p. 90; P. OBERHAMMER, 210, p. 197.

this trend throws off balance plaintiff's and defendant's interests.

It may be questionable whether this regulation is in itself detrimental to the essence of the fair trial/due process guarantee, by penalizing the defendant.

The answer depends on where the proceedings takes place, because the conditions of the administration of justice differ according to the Member State in question, and the «mutual trust» represents only a rhetorical slogan.

9. – In the full version of my General Report you can find a lot of pages devoted to the definition of «transnational litigation» and «fair trial» ([69]).

In this presentation I would like only to point out the differences between the notion of «fair trial» in the civil law tradition and the notion of «due process» in the U.S. legal tradition.

First of all, in Europe the notion of «fair trial» has been enriched with the right of access to the courts. The landmark decision was taken by the European Court of Human Rights in 1975 (*Golder v. United Kingdom*) ([70]).

([69]) For the notion of *Justizanspruch*, see among other national reporters N. KLAMARIS (Greece), WEIZ (*Poland*).

([70]) ECHR, *Golder v. United Kingdom* (1975). The applicant, a prisoner, was prevented under the Prison Rules then in force, from consulting a solicitor in relation to defamation proceedings that he wanted to bring against a prison officer. The Court states (28): « Article 6 para. 1 [of the European Convention of Human Rights, ECHR] does not state a right of access to the courts or tribunals in express terms», but (31) «The terms of Article 6 para. 1 of the European Convention, taken in their context, provide reason to think that this right is included among the guarantees set forth». In the Court's view, great importance has to be attached to the expression «rule of law» included in the Preamble of the Convention: (34) «in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts». Moreover (35): «The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 must be read in the light of these principles». In conclusion (35): «It would be inconceivable [..] that Article 6 para. 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings».

The recognition of the right of access to the courts, as included in Article 6, para 1 of the European Convention of Human Rights (ECHR), paves the way for a quite radical change in the conception of fair trial. Traditionally, fair trial was conceived as a negative right, as a freedom from unlawful interferences by the public authority. This can be clearly observed in the first solemn declaration of the fair trial guarantee, the clause 39 of the *Magna Carta Libertatum* ([71]): «No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers or by the law of the land. To no-one will we sell or deny or delay right or justice» ([72]).

With the inclusion of the right of access to the courts within the fair trial notion, this guarantee tends to move from the area of negative rights into the area of positive rights, which impose positive obligations of the State.

For this change a crucial role has been played by the principle of effectiveness ([73]). In *Airey v. Ireland* (1979), the European Court of Human Rights applied the principle of effectiveness to the right of access to the courts, on the basis that the latter could not be effectively protected without the provision of legal aid by the State ([74]).

In addition to legal aid, other positive obligations have fallen within the area of the fair trial guarantee through the case law of the European Court of Human Rights. A crucial extension of the protection afforded by

([71]) Year 1215. Clause 39 became clause 29 in the 1297 Charter.

([72]) This is the second and most famous of the three surviving chapters of the Charter. It is Edward I's version (1297) which remains on the statute books to this day. See LORD NEUBERGER OF ABBOTSBURY, Master of the Rolls, Inner Temple, *Magna Carta Dinner*, 14 June 2011, http://tinyurl.com/6fzrtms.

([73]) N. TROCKER, 2010, p. 230.

([74]) «(24) The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective [..]. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial». «(25) In the first place, hindrance in fact can contravene the Convention just like a legal impediment [..]. Furthermore, fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive [..]. The obligation to secure an effective right of access to the courts falls into this category of duty».

Article 6, para 1 of the European Convention was accomplished with the introduction of the right to effective enforcement of judicial decisions ([75]).

The right to effective judicial protection of rights also requires an effective remedy, guaranteed in Article 13 of the Convention, which content extends beyond the safeguards of Article 6 ([76]).

These developments are abridged in Art. 47 of the Charter of Fundamental Rights of the European Union (see below).

10. - On the contrary, the implementation of the U.S. due process clause ([77]) through the case law of the U.S. Supreme Court nowadays still bears traces of the meaning enshrined in Art. 39 of the *Magna Charta Libertatum*, i.e. as a negative right, as a freedom from unlawful interferences. As the recent decision (June 27, 2011) of the U.S. Supreme

([75]) Landmark decision: *Hornsby v. Greece* (1997). In this case the Greek Ministry of Education wrongly refused to allow the applicants to set up a private school. The Supreme Administrative Court quashed the Ministry's decision but the Ministry refused to act accordingly. The Court reiterates that, according to its established case-law: «(40) Article 6 para. 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect [..]. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention [..]. Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6; moreover, the Court has already accepted this principle in cases concerning the length of proceedings».

([76]) ECHR, *Kudla v. Poland* (2000): «(157) Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the Convention and to grant appropriate relief».

([77]) «No person shall be [..] deprived of life, liberty, or property, without due process of law [..]»: Fifth Amendment, 1791, applicable only to actions of the federal government; the Fourteenth Amendment, 1868, contains virtually the same phrase, but expressly applies to the states.

Court *J. McIntyre Machinery, Ltd. v. Nicastro* put it: «Due process protects the defendant's right not to be coerced except by lawful judicial power».

The *due process* guarantee has made its major contribution to the shaping of judicial jurisdiction over non resident defendants, while access to the courts and effective remedies have been granted in the U.S.A. by those distinctive aspects of the American system of civil litigation that have transformed it to a «plaintiff's heaven».

This last consideration brings our attention to another difference between the European fair trial guarantee and the U.S. due process clause. During the nineteenth and the twentieth centuries the U.S. theories and practices of adjudication authority in international disputes were shaped and controlled by courts, thanks to the direct application of the due process clause. Landmark decision is *Pennoyer v. Neff* ([78]). The question at issue was whether a state court might exercise personal jurisdiction over a non-resident who had not been personally served while within the state and whose property within the state had not been attached before the onset of the litigation. The Court's answer, on the basis of the due process clause, is negative. A court may enter a judgment against a non-resident only if: 1) the party is personally served with process while within the state, or 2) the party has a property within the state, and the same property is attached before litigation begins (i.e. *quasi in rem jurisdiction*).

Pennoyer v. Neff relies on the rationale that «the foundation of jurisdiction is physical power» ([79]). The «reign of the power theory» ([80]) found its end in 1945, on the date of *International Shoe Co. v. Washington*. Since then the Supreme Court has replaced it with the «fairness theory» ([81]).

([78]) 95 U.S. 714, 24 L. Ed. 565 (1878). See the brief summary of this case on *www.lawnix.com*.

([79]) *Justice* Holmes in *McDonald v. Mabee*, 243 *US* 90 (1917), 91.

([80]) See A. T. VON MEHREN, 2007, p. 88.

([81]) See A. T. VON MEHREN, 2007, p. 97. *International Shoe Co. v. Washington*, 326 U.S. 310: «(316) Historically, the jurisdiction of courts to render judgment *in personam* is grounded on their *de facto* power over the defendant's person. Hence, his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*, 95 U. S. 714, 95 U. S. 733. But now [..] due process requires only that, in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the

The passage from the reasoning behind the decision (s. previous footnote) shows that the emergence of the «fairness theory» was due more to the constraints that the power theory had imposed, rather than to the excesses that the approach had permitted ([82]).

It is hard to predict whether the recent decision (June 27, 2011) of the U.S. Supreme Court *J. McIntyre Machinery, Ltd. v. Nicastro* will change to some extent this landscape ([83]).

International Shoe Co. v. Washington strengthens the trend towards *ex post* evaluation of the grounds for judicial jurisdiction in the light of the facts of a particular case ([84]). On the basis of this landmark decision, all the States of the Union have enacted the so called «long-arm» statutes, in the sense that they provide for «long-arm» jurisdiction over defendants.

On the contrary, in the civil law systems: «Locating the proper court

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maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' [..]. (319) Whether due process is satisfied must depend, rather, upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure».

Passages from *www.lawnix.com*: International Shoe Co. was a Delaware corporation with its principle place of business in St. Louis, Missouri. It had no offices in the state of Washington and made no contracts for sale there. International Shoe did not keep merchandise in Washington and did not make deliveries of goods in intrastate commerce originating from the state. International Shoe employed 11-13 salesmen for three years who resided in Washington. Their commissions each year totaled more than $31,000 and International Shoe reimbursed them for expenses. Prices, terms, and acceptance or rejection of footwear orders were established through St. Louis. Salesmen did not have authority to make contracts or collections. The state of Washington brought suit against International Shoe in Washington State court to recover unpaid contributions to the unemployment compensation fund. Notice was served personally on an agent of the defendant within the state and by registered mail to corporate headquarters. The Supreme Court of Washington held that the state had jurisdiction to hear the case and International Shoe appealed.

([82]) A. T. VON MEHREN, 2007, p. 97.

([83]) This case arises from a products-liability suit filed in New Jersey state court. Robert Nicastro seriously injured his hand while using a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd. The accident occurred in New Jersey, but the machine was manufactured in England, where J. McIntyre is incorporated and operates. The question here is whether the New Jersey courts have jurisdiction over J. McIntyre, notwithstanding the fact that the company at no time either marketed goods in the State or shipped them there.

As the U.S. Supreme court put it: «The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign».

([84]) S. B. BURBANK, 2004, p. 744.

in a civil action does not imply a nuanced inquiry into the specific circumstances of the particular case, but depends on pre-established concepts (e.g. domicile of the defendant, performance of contract, place of the wrongful conduct, etc.) and pre-fixed rules determined on the basis of considerations of proximity and fairness. Jurisdiction to adjudicate is perceived as the result of the existence of a general self-evident link, rather than a highly individualized operation of analysis which is intended to safeguard, in relation to each individual case, the fairness, justice and appropriateness of the forum» ([85]). Taking into account these features, the Brussels Convention and Regulation can be considered a real masterpiece. The success of the Brussels Convention relies on a few fundamental features:

(*a*) the rules of judicial jurisdiction laid down in the Convention are applicable in the Forum State, regardless of any proceedings for recognition and enforcement; the Brussels Convention is a so called «double treaty»; it has its own rules of jurisdiction, that are uniform and binding for the Member States;

(*b*) in relationships between the Member States such an autonomous system of international jurisdiction prevails over conflicting national rules of jurisdiction, including those which are generally regarded as exorbitant;

(*c*) the Brussels Convention adopts a very liberal approach to the question of recognition and enforcement of judgments, as a result both of certain safeguards granted to the defendant in the Forum State and of mutual trust in the administration of justice between the Member States. Precisely, the Convention reduces the number of grounds which can operate to prevent the recognition and enforcement and it simplifies the enforcement procedure;

(*d*) the autonomous interpretation of the Convention by a supranational Court, the European Court of Justice (ECJ).

11. - The U.S. approach to judicial determination of jurisdictional

([85]) N. TROCKER, 2011, p. 182.

rules has been criticised from a civil law point of view ([86]).

However, such a criticism is to some extent excessive. At any rate it cannot overshadow a time-honoured achievement of the U.S. legal culture.

I mean: Constitution is a higher law. The due process clause is a constitutional principle and - precisely the same as other constitutional principles - it is not only a political aim. Constitutional principles are legal norms too, despite their slightly determined tenor. As a result of their own prescriptive nature they can regulate facts and life situations (*Lebenssachverhalte*) directly, without any legislative implementation ([87]). Therefore, constitutional principles are generally recognised as legal basis of judicial decisions in the following ways:

(*a*) firstly, constitutional principles can fill a gap in the legislation;

(*b*) secondly, constitutional principles orientate the interpretation of the legislation ([88]).

(*c*) thirdly, if a constitution-based interpretation is not practicable, (because of gramatical-lexical, systematic, historic, and teleological constraints), constitutional principles have to serve as a basis for non application or invalidation of legislative provisions in the constitutional review. It may be either a diffused or a centralized judicial review of legislation ([89]).

([86]) H. SCHACK, 2010, p. 163: «Der Mangel an Rechtssichereit in diesem Dschungel von Gesetzes- und Richterrecht ist chronisch [..]. Bedrohlicher ist die Tendenz der Rechtsprechung, sich des ohnehin schwachen Korsetts der minimum contacts zugunsten von individueller fairness und reasonableness gänzlich zu entledigen».

(87) The Charter of Fundamental Rights of the European Union sets out a difference between «rights» and «principles»: «European Union's Bodies and Member States shall respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties» (Art. 51 Ch.). «The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality» (Art. 52, V Ch.). Taking into account this difference, the fair trial guarantee (Art. 47 Ch.) is a (fundamental) right, not a «principle». For more details on this aspect, s. H. SAGMEISTER, 2010.

([88]) EN: constitution-based method of interpretation; DE: *verfassungskonforme Auslegung*; IT: *interpretazione conforme a costituzione*.

([89]) In the first case, judicial review can be carried out by every judge and

In the European Union it is for the European Court of Justice to invalidate legislation of the Union when there is a breach of constitutional principles ([90]).

(*d*) fourthly, within the framework of the European Convention of Human Rights it is for the European Court of Human Rights to declare that a «final decision» ([91]) has been adopted by the contracting party in breach ofthe rights set forth in the Convention or the Protocols thereto ([92]).

12. - These remarks pave the way to the further step of my research. I believe that in order to remove some regulatory deficiencies of civil law systems ([93]), and particularly of the Europen Union civil justice system, the U.S. approach, i.e. the great role played by the constitutional due process guarantee in shaping some fundamental aspects of the transnational litigation, should be considered as a good model.

This view is by no means new ([94]), but it is worth repeating it and adapting it to the new circumstances. The new legal frame introduced in the European Union law by the Lisbon Treaty can make this proposal at this stage acceptable and praticable at this stage than it was twenty years ago.

The European Union recognises now the rights, freedoms and

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its effects are confined to the decision at hand. In the second one, the review is carried out by a constitutional court, seised by a referral of an issue arising during a proceedings before an ordinary court or by a request of a number of particular bodies.

([90]) Art. 6, 19 TEU; Art. 251 ff. TFEU. In the recent case law of the ECJ, see for example ECJ, 1 March 2011, *Association Belge des Consommateurs Test-Achats ASBL*, C-236/09. With this judgment , the ECJ has declared invalid Art. 5 (2) of the Directive 2004/113/EC, implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Pursuant to Art. 5 (2): «Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data». The ECJ held such a provision, because of the lack of any temporal limitation, incompatible with Articles 21 and 23 of the Charterof Fundamental Rights of the European Union(equal treatment for men and women). On this decision, s. the criticism of T. PFEIFFER, *NJW* 2011, Editorial Heft 13, p. 3: «verdient jedenfalls dies dezidierten Widerspruch».

([91]) Art. 35 ECHR.

([92]) Art. 41 ECHR.

([93]) I would say: *Wertungslücken* in the german legal terminology, R. ZIPPELIUS, 2003.

([94]) P. SCHLOSSER 1991; R. GEIMER, 1993; T. PFEIFFER 1995; D. COESTER-WALTJEN, 2003.

principles set out in the Charter of Fundamental Rights of the European Union, which shall have the same legal value as the Treaties ([95]). In other words, the Charter has become a legally binding instrument of primary EU law. Among the rights set out in the Charter, there is the right to an effective remedy and to a fair trial ([96]). Art. 47 of the Charter largely corresponds to Art. 6 and Art. 13 of the ECHR. The Lisbon Treaty also provides for an accession to the ECHR ([97]). The role of the Convention for the EU law is deeply rooted in the case law of the European Court of Justice. According to Art. 52(3) of the Charter, in so far as the Charter contains rights which correspond to the rights guaranteed by the ECHR, the meaning and scope of these rights shall be the same as those laid down by the Convention. Moreover, it is worth to mention that Art 6(3) TEU also refers to the Convention. It provides that fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the EU law ([98]).

The fairness-based approach is common both to the U.S. legal system and to the civil law systems. In the continental legal tradition, the pre-fixed rules of jurisdiction are also determined on the basis of considerations of proximity and fairness. The adjudicatory authority has never been based solely on the fact that a person is to be found within the territory of a State court. Rules conferring jurisdiction are drafted in an abstract general way. The underlying view has always been that thus established jurisdiction is fair for both the parties ([99]).

([95]) Art. 6 TEU.

([96]) (Art. 47) «Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article./Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented./Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice».

([97]) Art. 6 (2) TEU: «The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties».

([98]) This provision corresponds, almost literally, to Article 6(2) TEU-Nice. For more details on the different roles in which the Lisbon Treaty presents the Convention, s. W. WEIß, 2011, p. 64.

([99]) P. SCHLOSSER, 1991, p. 12.

Nevertheless, this abstract-general approach may fail in particular circumstances. I would like to put it more generally, not only with regard to the rules of jurisdiction. Pre-established rules enhance the certainty and predictability of the law, but they are drafted in relation to the usual course of events. Fair results in applying the law rely both on pre-established rules and on standard situations in which the rules are to be applied. In exceptional circumstances the application of pre-fixed rules may lead to unfair, even iniquitous, outcomes.

In such a context there is room for constitutional considerations, through the application of the fair trial guarantee by courts.

In civil law systems, it is not necessary to set aside the abstract-general approch. The fair trial/due process ([100]) guarantee may be invoked to invalidate particular misconceived pieces of legislation or to restrict their scope of application.

It is worth noting that civil law courts are not alone in performing such operations. Judges in every country are more and more aware of belonging to a developing global community. The emergence of such a community of courts may achieve a number of goals in this respect: a cross-fertilization of legal cultures in general, but also solutions to some specific legal problems related to transnational disputes in particular ([101]).

13. - It is worth giving some examples of inconsistencies of civil law systems that can be eliminated by applying the fair trial/due process guarantee.

(*a*) The first example is related to the *lis alibi pendens* exception. Most civil law and common law countries admit such a defence based on

([100]) From now onwards, I would like to use this dual expression.

([101]) A.-M. SLAUGHTER, 2003, p. 219: «The judges themselves are in many ways creating their own version of such a system, a bottom-up version driven by their recognition of the plurality of national, regional, and international legal systems and their own duties of fidelity to such systems. Even when they are interacting with one another within the framework of a treaty or national statutes, their relations are shaped by a deep respect for each other's competences and the ultimate need, in a world of law, to rely on reason rather than force».

pendency before a foreign court ([102]), at least when there is good likelihood of recognition of the future foreign judgment. This defence implements policies of judicial economy by avoiding parallel proceedings.

Nevertheless, the consequences of this exception are quite different for civil law and for common law systems.

Within many civil law countries, once an action has become legally pending before one court, no other court may deal with the subject matter of the pending action. The second seised court has to stay or to dismiss its proceeding on the ground of *lis alibi pendens*. Under this rule courts are required to make an inquiry conceived as largely «automatic». Courts are not allowed to evaluate elements different from those listed by the relevant provisions: the subject matter, the parties and the time of commencement of the proceedings at hand ([103]).

([102]) There are a few countries where the problem of parallel proceedings is simply ignored, in particular for countries that do not to recognize and enforce foreign judgments, in the absence of a treaty.

([103]) An example of a rule adopting this approach is Art. 27 of the Council Regulation EC 44/2001 (former Art. 21 of the Brussels Convention): «1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established./2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court».

In its decision on the case *Gasser* (ECJ, 9 December 2003, C-116/02, *Gasser*), the European Court of Justice stated that under this provision courts are required to make an inquiry conceived as largely «automatic». In order to decide whether to go on with its proceeding or to stay it, the court has to assess the same cause of action, the same parties and which proceedings was commenced first. In *Gasser* the dispute arose between an Austrian seller of children's clothes, Gasser, and an Italian buyer, Misat. The contract between them contained an exclusive choice of court agreement in favour of the Austrian courts. However, Misat started proceedings first before an Italian court. That was a trick to take an (abusive) advantage of the «first seized» rule by instituting proceedings in a country (Italy), where proceedings may take long time (*italian torpedo*). Gasser brought proceedings in the Austrian courts, which were therefore second seized. The Austrian party argued that as the Austrian courts had exclusive jurisdiction under the agreements those courts should proceed and hear the case even though the Italian proceeding had been commenced earlier. The ECJ decided that the priority rule set out in Art. 21 of the Brussels Convention had to prevail over the exclusive choice of court agreement. Therefore the second seised court has to stay its proceedings, while the court first seized determines whether it has jurisdiction.

In a following case, 27 April 2004, C-159/02, *Turner*, the ECJ decided that it would be inconsistent with the Brussels Convention, if the courts of a Member State could grant antisuit injunctions to restrain a party from pursuing proceedings

If the problem of *lis alibi pendens* and parallel proceedings is resolved on the basis of the continental European priority rule, it may well happen that a court is seised first by, e. g., instituting a proceedings for negative declaration (or relief), with a view to prevent litigation before the second seised court.

In such situations, to avoid abusive litigation, the fair trial/due process guarantee *de lege lata* may allow the second seised court to retain its jurisdictional powers and to go further with its proceedings, if it appears that the dispute will not be fairly and effectively resolved by the first seised court ([104]).

(*b*) The second example is related to the *forum non conveniens* doctrine ([105]). In cases where it is absolutely inappropriate for the court

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in another EU Member State. With the decision, 10 February 2009, C-185/07, *West Tankers Inc*., the ECJ rendered it impossible to grant anti-suit injunctions against the breach of an Arbitration agreement.

With regard to the matters of parental responsibility, the priority rule, as stated in Art. 19 (2), reg. EC n. 2201/2003 has been mitigated in a particular case: s. 9 November 2010, C-296/10, *Purrucker*, C-13/1. The rule reads as follows: where, notwithstanding efforts made by the court second seised to obtain information by enquiry of the party claiming lis pendens, the court first seised and the central authority, the court second seised lacks any evidence which enables it to determine the cause of action of proceedings brought before another court and which serves, in particular, to demonstrate the jurisdiction of that court in accordance with Regulation No 2201/2003, and where, because of specific circumstances, the interest of the child requires the handing down of a judgment which may be recognised in Member States other than that of the court second seised, it is the duty of that court, after the expiry of a reasonable period in which answers to the enquiries made are awaited, to proceed with consideration of the action brought before it. The duration of that reasonable period must take into account the best interests of the child in the specific circumstances of the proceedings concerned.

([104]) See *Ali/Unidroit Principles of Transnational Civil Procedure*, 2.6.

In the European Union, the Commission proposal for a recast of the Council Regulation EC 44/2001 of December, 14, 2010, (COM, 748) includes an amendment which aims at rendering more flexible the first in time rule, to improve the effectiveness of choice of court agreements: where the parties have designated a particular court to resolve their dispute, the proposal gives priority to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seised. Any other court has to stay its proceedings until the chosen court has established or – in case the agreement is invalid – declined jurisdiction.

([105]) Nei sistemi di *common law*, l'istituto del *forum non conveniens* consente ad una corte fornita di giurisdizione di esercitare discrezione nel declinarla, poiché un altro foro è più appropriato a trattare e risolvere la controversia. A seconda degli ordinamenti processuali nazionali, ci sono diverse

vested with jurisdiction to handle proceedings with foreign parties, e.g. because the court and the lawyer are completely ignorant of the foreign language and reliable translators are not available, the fair trial/due process guarantee *de lege lata* may allow the court exceptionally to decline its jurisdiction, applying the doctrine of *forum non conveniens* ([106]).

I do believe that the *forum non conveniens* doctrine should (exceptionally) be applied not only to prevent abuse of process, but also to keep transnational disputes out of absolutely inappropriate forums. The solution I have just suggested could be implemented by suspending the forum proceeding in deference to another court. The existence of a (more) convenient forum is a necessary condition. In this way the risk of denial of

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versioni di questa dottrina. In Inghilterra, il *leading case* è *Spiliada Maritime Corp. v. Cansulex Ltd* [1986] 3 WLR 972, 3 All. ER 843, [1987] A.C. 460: «a stay will only be granted on the grounds of *forum non conveniens* when the court is satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for trial of the action», in cui cioè il caso può essere trattato «more suitably for the interest of all the parties and to the ends of justice». Si prevede una verifica in due stadi: nel primo spetta al convenuto di dimostrare l'esistenza di un foro più appropriato; se la dimostrazione riesce spetta all'attore dimostrare l'esistenza di circostanze che, nonostante ciò, inducono a non sospendere il processo: su questo caso, v. N. TROCKER, 2011, p. 194; M. LUPOI, 2002, p. 167.

Nell'ordinamento statunitense, la dottrina del *forum non conveniens* è strumento frequente di politica protezionistica a vantaggio di imprese statunitensi convenute da attori stranieri, nel foro della loro principale sede di affari, in azioni di responsabilità. Caustico sul punto H. SCHACK, 2005, p. 847: «*kaum verhüllte Wirtschaftpolitik zu Gunsten von US-Unternehmen mit den Mitteln des forum non conveniens*».

Esempio: *Piper Aircraft Co v Reyno* (1981) 454 US 235. Un piccolo aereo commerciale precipita in Scozia. Muoiono sei persone scozzesi che si trovano al suo interno. Le eliche erano state fabbricate negli Stati Uniti. I parenti delle vittime vengono persuasi ad agire negli Stati Uniti contro il produttore delle eliche, facendo valere che esse erano difettose. La Corte suprema degli Stati Uniti non consente che il processo prosegua, poiché l'unico foro appropriato è quello scozzese.

([106]) R. STÜRNER, 2011, p. 258. A good example is the decision of the *Oberlandesgericht* Stuttgart, affirmed by the *Bundesgerichtshof*, 2 July 1991, in *BGHZ*, 115, 90.

The application of the *forum non conveniens* doctrine within the Brussels Convention was refused by ECJ, 1 March 2005, C-281/02, *Owusu*: «Application of the forum non conveniens doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention» (n. 41).

justice can be avoided ([107]).

In conclusion, here the aim is not to implement the *forum non conveniens* doctrine in continental European law systems. Courts vested with jurisdiction should not have the discretion to decline it just on the ground that another forum is more appropriate to resolve the transnational dispute ([108]). The aim is rather to avoid the abuse of process, i.e. vexation and oppression of the defendant, and at the same time to prevent entirely inappropriate courts from handling transnational disputes ([109]).

c) It is in the light of the U.S. due process guarantee that one of the most critical aspects related to the recognition and enforcement of judgments under the Brussels Convention and Regulation no. 44/2001 can be regarded.

Subject to few exceptions, the jurisdiction of the court of the Member State of origin may not be reviewed by the court seised with the enforcement request in other Member States. The public policy defence may not be applied to the rules related to jurisdiction ([110])

([107]) Reg. EC No 2201/2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility goes one step further, namely towards the «court better placed to hear the case» (Art. 15): «1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child: (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.1».

([108]) See e.g. *Code civile of Quebec*: «*3135. Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide*». On this point, see N. TROCKER, 2011, p. 197, n. 53.

([109]) See *Ali/Unidroit Principles of Transnational Civil Procedure*, n. 2.5.: «*Jurisdiction may be declined or the proceeding suspended when the court is manifestly inappropriate relative to another more appropriate court that could exercise jurisdiction*».

([110]) See Art. *28, III, Conv. Bruxelles, as well as Art. 35, III reg. CE n. 44/2001. See Art. 24 reg. CE n. 2201/2003 as well.* As Jenard put it in his report on the 1968 Brussels Convention to justify this provision: «*the very strict rules of jurisdiction laid down in Title II and the safeguards granted in Article 20 to defendants who do not enter an appearance, make it possible to dispense with any review, by the court in which recognition or enforcement is sought, of the*

An example of such a situation is the *Krombach* case ([111]). In this case, a civil action for damage was brought during a criminal process and the French court had assumed jurisdiction on the basis of the French nationality of the victim. This is a jurisdiction based on similar grounds to that under Art. 14 of the French Civil Code, which is considered as exorbitant by the system of the Brussels Convention ([112]). The *Bundesgerichtshof* referred to the Court of Justice for a preliminary ruling. The ECJ found that the public policy clause applies only in exceptional cases and confirmed that, in the system of the Brussels Convention, the court of the State in which recognition and enforcement is sought cannot control the compliance with the rules on jurisdiction by the courts of the State of origin. So the court of the State in which enforcement is sought cannot take into account, in relation to a defendant domiciled in the State territory, the mere fact that the court of the state of origin had based its jurisdiction on the nationality of the victim of a crime.

The contrast between the United States system and the system of the Brussels Convention is striking.

Since *Pennoyer v. Neff* onwards, the US notion of due process has been applied in interstate (and international) disputes as a parameter of exercise and control of the jurisdiction of courts against the non-resident defendant. It is undisputed that the respect of this parameter can also be controlled by the courts of the State where the execution of the judgement is sought ([113]).

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jurisdiction of the court in which the original judgment was given».

([111]) ECJ, 28 March 2000, C-7/98, *Krombach c. Bamberski*.

([112]) In his opinion, delivered on 23 September 1999, Advocate General Saggio held that: «in the present case the French criminal court derived its jurisdiction to hear the claim for damages from its jurisdiction with regard to the criminal proceedings. Therefore it correctly applied Article 5, point 4, of the Convention [Art. 5, point 4 reads as follows: «(a person domiciled in a Contracting State may, in another Contracting State, be sued) as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings]. Consequently, apart from the foregoing discussion of whether the German court may consider that there is a conflict with its public policy, the French court did not contravene the provisions of the Convention concerning jurisdiction in this respect either». This argument has not been taken again by the ECJ.

([113]) Cfr. *Somportex Ltd. v. Philadephia Chewing Gum Corporation*, 453

In the system of the Brussels Convention and Regulation, the court that ought to execute the decision cannot examine the jurisdiction of the court of the state of origin, not even when the latter is based on a norm that provides for an exhorbitant jurisdiction in the light of Art. 3 (2) Brussels Convention and Regulation.

The US solution is in line with the constitutional guarantee of fair trial/due process, while the solution envisaged by the Brussels Convention and EC Regulation is not. The European solution is an example of the disproportionate influence of public policy issues (in this case: the smooth functioning of the internal market) with regard to the balance between plaintiff's and defendant's interests.

In other words, if the fairness of the exercise of jurisdiction over a non-resident defendant is an element of fair trial/due process, the respect for this fairness, as it is envisaged by the Convention and the EC Regulation no. 44/2001 norms on jurisdiction, should also be reviewed in the state where the recognition and enforcement is sought, through the public policy defence ([114]). It is true that the public policy exception is an «emergency brake» to be activated only in exceptional cases, but these cases cannot be restricted so as to cause detriment of the guarantee of fair trial/due process ([115]). National courts should be encouraged to take the opportunity to put a preliminary question before the ECJ, under Art. 267, TFEU, on the validity of Art. 28, III, Convention (Art. 35, III, EC Regulation no 44/2001) *vis-a-vis* Art. 47 of the Charter of Fundamental Rights of the European Union.

III. Specific Aspects (*to be completed*)

F.2d 435 (3rd Cir. 1971); A. F. LOWENFELD, 2006, p. 552.

([114]) See ECHR, 29 April 2008, no. 1864/04, *Mc Donald c. Francia*: «la Cour considère que l'article 6 implique un contrôle des règles de compétence en vigueur dans les Etats contractants aux fins de s'assurer que celles-ci ne portent pas atteinte à un droit protégé par la Convention». See A. NUYTS, 2005, p. 185: «there seems to be no good reason why the rules of jurisdiction of the Brussels Convention/Regulation should be immunized from scrutiny as to their compatibility with the fair trial doctrine of article 6 ECHR».

([115]) Cfr. A. NUYTS, *Due Process and Fair Trial: Jurisdiction in the United States and in Europe compared*, cit., p. 197.

1. - Implications of the principle of equality is one of the elements of the fair trial/due process guarantee with regard to the regulation of transnational litigation which deserves attention.

Issues of fair trial in transnational litigation arise frequently due to the material inequality between the party that acts in a foreign environment and the other party acting in its own habitual environment.

Peter Schlosser states this in a rather emphatic way: «foreign language to be used in court (including the particularly irritating judicial vocabulary), foreign rules of procedure, very often also foreign law with respect to the substance of the matter, the necessity of having counsel both at home and abroad, the concern that judges abroad may be biased in favour of their compatriot, particularly if the latter is posing as the victim of his opponent's fraudulent conduct, and uncertainty regarding the financial expenditures of the proceedings» ([116]).

We can agree with these observations. Material inequality between the parties in transnational litigation is usually greater than in domestic disputes. Such an inequality is likely to affect the substance of justice in the resolution of the dispute.

However, material inequality between the parties is one of the «eternal» problems of civil procedure. This is not a feature that is peculiar to transnational disputes. It is not an aspect calling for a radically different approach from the one provided for domestic disputes ([117]).

If the focus is on the disputes with the highest economic value, that is, on the business litigation of multinational companies, and we neglect small claims, it is easy to see that the problems are mainly addressed through international networks of law firms. This is likely to reflect the national plurality of business centres in which the multinational company operates. The multinational approaches a law firm in its home country and it is then assisted, in the Forum State, by another law firm, which is part of the same international network of law firms.

This increases the expenditures, e.g., due to the costs incurred to cover the translation of documents and records. But the company solves the

([116]) P. SCHLOSSER, 1991, p. 11.
([117]) See on this point, M. KENGYEL, *Hungary*.

problem by allocating more financial resources to the resolution of transnational litigation, compared to those assigned to the resolution of domestic disputes.

2.- Equality of both parties in the process, however, should be examined specifically with regard to transnational litigation.

Equal treatment means the prohibition of any type of unlawful discrimination against the parties, in particular on the basis of nationality or residence ([118]).

In general international law, equality between citizens and foreigners in the process is traditionally linked to equality between sovereign States, through the principle of reciprocity. The application of this principle in the relationships between states promotes the equality of treatment between citizens and foreigners. However, the principle of reciprocity has some apparent limitations: if a State is not willing to recognise equal treatment of foreigners before its own courts, this in turn affects the ability of the citizens of this state to act as parties in proceedings abroad.

According to the European law, Art. 18 of the Treaty on the Functioning of the European Union prohibits any discrimination on grounds of nationality. Since this prohibition operates within the scope of the European Union law, a person can enjoy the protection offered by the prohibition of discrimination if he or she is entitled to any of the fundamental freedoms recognised by the EU law. A party to the proceedings can benefit from this protection if the procedural regulation is for the implementation of these freedoms. Some discriminatory procedural norms have been considered as obstacles to fundamental freedoms, primarily through landmark decisions of the Court of Justice ([119]). These decisions have paved the way towards the objective of maintaining and developing the Union as an «area of freedom, security and justice, in which the free movement of persons is assured». This objective was introduced by the Treaty of Amsterdam. Today it is contained in Art. 3 (2) TEU.

([118]) On this topic, see N. KLAMARIS, *Greece*.

([119]) Leading case: ECJ, C-20/92, *Hubbard*, 1993.

The *Ali/Unidroit Principles of Transnational Civil Procedure* provide that the «court should ensure equal treatment and reasonable opportunity for litigants to assert or defend their rights» (3.1) and that «[t]he right to equal treatment includes avoidance of any kind of illegitimate discrimination, particularly on the basis of nationality or residence» (3.2).

Some key aspects, which are subject to this prohibition are listed below.

First and foremost, the State should guarantee access to its courts to foreigners on an equal footing with nationals ([120]). The guarantee of equal access protects the foreigner, both as a plaintiff ([121]), and as a defendant.

Foreign nationality or residence abroad cannot justify unequal treatment compared to that offered to nationals or residents in the Forum State:

(*a*) in order to exclude access to legal aid ([122]);

(*b*) in order to impose a security for costs, or a security for liability for pursuing provisional measures ([123]);

(*c*) in order to use fictitious means of service of process (like the *remise au parquet*).

If the foreign plaintiff is resident of the state, his or her access to the courts traditionally derives from a principle of customary international law concerning treatment of foreigners, i.e. the duty to protect, breach of which gives rise to the denial of justice.

If the foreigner is the defendant, the balance between the reasonable opportunity for the plaintiff to assert his rights before a court and the reasonable opportunity for the defendant to defend himself is more difficult to achieve. This depends on balanced and proportionate legislative provisions on the international jurisdiction to adjudicate. As it has already been mentioned, this balancing must leave space for a «judicial correction» – based on fairness and reasonableness derived from the guarantee of fair

([120]) P. GOTTWALD, 1991, p. 7; T. PFEIFFER, 1995, p. 21.

([121]) The action the plaintiff has brought before the court should have a «substantial connection» with the state. See ALI/UNIDROIT *Principles*, 2.1.2.

([122]) See, for example, the Hague Convention of 25 October 1980 on *International Access to Justice*.

([123]) ALI/UNIDROIT, *Principles*, 3.3.

trial - of the unfair results that in a particular case can be determined by the application of general rules on jurisdiction to adjudicate.

3. - The determination of the judicial jurisdiction of courts is the «cornerstone» of any international litigation.

The determination of the international jurisdiction of the court represents a central aspect of the guarantee of fair trial in transnational litigation.

As it has already been mentioned, traditionally the exercise of judicial jurisdiction is an aspect of sovereignty. Within its own sphere of sovereignty, the state would be free to determine the conditions and limitations of the adjudicatory authority of its courts, with the exception of the obligations created through international treaties. This freedom would be limited neither by rules of general international law, nor by Art. 6 ECHR for the Contracting States ([124]).

However, I think that this argument can be overcome by the progressive erosion of the reserved domain (domestic jurisdiction), as it has happened in relation to the protection of human rights. Fair trial/due process is a guarantee that tends to be universally implemented: not only in domestic disputes, but also in transnational litigation; not only in asserting the right of parties to be heard, but also in determining the jurisdiction of the courts.

Let me provide an example. In my opinion, the «right not to be sued abroad» arises from the fair trial/due process guarantee, at least if the foreign state cannot rely on any link supporting the exercise of its adjudicatory authority.

This matter has some practical relevance. Once the existence of the right not to be sued abroad is recognised, it may open the way to the next step, that is the limitation of the rules of exorbitant jurisdiction. This is, however, subject to some exceptions. I refer to cases where this limitation effectively prevents the plaintiff from asserting his right before a court or makes it extremely difficult.

([124]) H. SCHACK, 2010, p. 80.

Despite the differences between legal systems, there are some elements that are widely accepted at a global level: a common core which generates the fair trial guarantee.

The first one is the parties' power to establish the international jurisdiction of a court through their agreement.

There are a number of grounds for jurisdiction that are based on a substantial connection of the parties or of the object of the dispute with the Forum State ([125]). A substantial connection exists when a significant part of the transaction or event has taken place in the Forum State, for instance when an individual defendant is a habitual resident of the Forum State or a jural entity has received its charter of organisation or has its principal place of business therein, or when the property to which the dispute relates is located in the forum state (*forum rei sitae*) ([126]).

[..]

4. - Interim protection of rights is an indispensable tool for ensuring the effectiveness of judicial remedies and, therefore, it is one of the fundamental features of fair trial ([127]). The structure of the proceedings, the types of provisional remedies and their executions vary among different legal orders.

With regard to the kind of measures, the provision of Art. 8.1 of the *Ali/Unidroit Principles of Transnational Civil Procedure* is very broad: «The court may grant provisional relief when necessary to preserve the ability to grant effective relief by final judgment or to maintain or otherwise regulate the status quo». In this provision, three fundamental types of measures can be envisaged, which are well known in the European experience. These are: conservative, regulatory and anticipatory measures ([128]).

([125]) However, this ground of jurisdiction is likely to produce exorbitant results in particular situations, see P. SCHLOSSER, 1991, p. 6, on *Worldwide Volkswagen v. Woodson*, 444 *U.S.* 286 (1980).

([126]) See *Ali/Unidroit Principles*, 2.1.2. R. STÜRNER, 2005, p. 217.

([127]) See N. TROCKER, 2009, p. 48.

([128]) See M. STORME (ed.), 1994, p. 106; R. STÜRNER, 2003, p. 143-186; G. TARZIA, 1985.

It is widely recognised that courts may grant interim relief with regard either to a person or to a good which is in the Forum State, even if they do not have jurisdiction over the merits ([129]). In civil law legal systems, this solution is perceived to support the parties in the dispute, and not just to support the court which has jurisdiction over the merits ([130]).

In this regard, both Art. 24 of the Brussels Convention and now Art. 31 of the EC Regulation no. 44/2001 are good examples: «Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter». The conditions, the proceedings and the types of interim measures are determined by the *lex fori*. But the case law of the Court of Justice has indicated some limits to the provisional measures that fall within the scope of Art. 31 Reg. EC no. 44/2001 ([131]).

In the proposal for a «recast» of the Brussels I (2010) it is provided that: «if proceedings as to the substance are pending before a court of a Member State and the courts of another Member State are seised with an application for provisional, including protective measures, the courts concerned shall cooperate in order to ensure proper coordination between the proceedings as to the substance and the provisional relief» ([132]).

([129]) See *Ali/Unidroit Principles*, art. 2.3.: «A court may grant provisional measures with respect to a person or to property in the territory of the forum state, even if the court does not have jurisdiction over the controversy».

([130]) See N. TROCKER, 2011, p. 49.

([131]) See, among the others, ECJ, 17 November 1998, C-391/95, *Van Uden*: «the granting of provisional or protective measures on the basis of Article 24 of the Convention of 27 September 1968 is conditional on, *inter alia*, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought./Interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 of the Convention of 27 September 1968 unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made».

(132) In particular, the court seised with an application for provisional, including protective measures shall seek information from the other court on all relevant circumstances of the case, such as the urgency of the measure sought or any refusal of a similar measure by the court seised as to the substance. See the new text of art. 31, Reg. Bruxelles I-bis COM (2010) 748.

[..]

5. – The right to engage a lawyer should include both representation by a lawyer admitted to practice in the forum and active assistance before the court of a lawyer admitted to practice elsewhere, e.g. in the party's home country ([133]). In the United States it is worth mentioning the *Pro Hac Vice Admission* ([134]). In the European Union it is worth mentioning both the Directive to facilitate the effective exercise by lawyers of freedom to provide services ([135]), and the Directive to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained ([136]).

6. - A usual difficulty faced by the foreign party participating in the process is the need to act and defend himself before a court in a language other than his mother-tongue. This problem should be neither underestimated, nor could it be considered as resolved merely by guaranteeing representation by a lawyer from the Forum State.

If the foreign party is sued, the service of process deserves a special treatment. Therefore the provision of the *Ali/Unidroit Principles*, relating to this issue, is welcome. According to this norm, the document instituting the proceedings must be translated into the language of the habitual residence of the defendant, of the principal place of business of the latter, or of the

([133]) See *Ali/Unidroit Principles*, 4.1. R. STÜRNER, 2005, p. 253; ID., 2011, p. 253, p. 256.

([134]) See *The Model Rule on Pro Hac Vice Admission of the ABA, Report of the Commission on Multijurisdictional Practice* (2002), *Recommendation 6*.

([135]) See the Council Directive 77/249/EEC of 22 March 1977, Art. 4: «Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State».

([136]) See the Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (Art. 5, 3° comma). Moreover, see the Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years.

principal documents in the transaction ([137]). Within the European Union, Art. 8 of EC Regulation no 1393 of 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters requires the translation of the documents to be served into the language of the place where the service is to be effected or into a language that can be understood by the addressee ([138]).

The language problem cannot be solved by the appointment of a lawyer from the Forum State. This problem is rather displaced and focused on the relationship between the lawyer from the country of the party and the lawyer from the Forum State. This problem is clearly related to the problems arising from the legal translation, which are not only related to costs. Rather, it is also about the risks of misunderstanding, which are always immanent, but are exacerbated when the language of the *lex causae* is different from the language of the *lex fori*.

The close relationship between law and language calls for the consideration of a special care in the work of translation and interpretation of legal texts especially when they serve judicial activity.

Problems can be solved only if the link between the *lex fori* and the language of the forum is made more flexible, as it happens in the practice of international arbitration. This one allows the use of multiple languages during the process, if it does not affect the parties or third parties, and other experimental solutions that have already been adopted before national courts ([139]).

Very often strict rules on the use of the language of the forum are exploited, requiring the translation of documents and interpreters of witnesses even in cases where the parties and their advocates understand the language in which the documents and witness statements have been expressed. Faced with these actual forms of abuse of process and while

([137]) ALI/UNIDROIT, *Principles*, 5.2.

([138]) See ECJ, 8 May 2008, C-14/07, *Weiss e Partner*; ECJ, 8 November 2005, C-443/03, *Leffler*.

([139]) Si veda per esempio il progetto pilota avviato dal 1° gennaio del 2010 nel distretto della corte di appello di Colonia, che consente alle parti di un processo civile riguardante una controversia transnazionale di discutere concordemente la causa in lingua inglese.

waiting for the legislation to be made more flexible, a provisional solution may be not to declare null and void an act written in a foreign language in case it has served its purpose ([140]), as it has been understood by the parties concerned.

The solution of the *Ali/Unidroit Principles* is very balanced. It reaffirms the general rule according to which the process should be conducted in the language of the court, but the court may permit the use of other languages if there is no prejudice to the parties. It provides for the use of interpreters when the party or the witness does not master the language in which the process takes place. The translation of voluminous documents may be limited to relevant pieces by agreement of the parties or order by the court ([141]).

It cannot be denied that in some cases when translations are bad, they are «a remedy worse than the disease». If it is a translation of a legal text, and in particular of a normative one, the encounter between different cultures (always present in translation work) stands out specifically as an encounter between two legal systems which constitute the starting and ending points of the translation work (if the language of the *lex causae* is different from the language of the *lex fori*). Hence, it is about first grasping the meaning of the terms to be translated not only in a legal language, but also – and especially - in the legal order of «departure» and, second, identifying the terms that express the equivalent meaning in the terminology and the legal order of «arrival». One faces a double and parallel work of interpretation. Since no legal system is identical to the another, the search for the meaning which is legally equivalent is always doomed to achieve a rough result and sometimes is doomed to failure ([142]).

7. - Foreign parties need more time than domestic parties to collect the necessary materials, to understand the judicial proceedings and to respond. Therefore, *ad hoc* extensions of time limits must be provided – by

([140]) See Art. 156 (3) IT c.p.c.: «the nullity shall not be declared if the act served its purpose».

([141]) *Ali/Unidroit Principles*, 6.

([142]) For more details, see R. CAPONI, 2006.

law or, where possible, by courts - for foreign parties ([143]). The judge must fix the agenda of the process, taking into account, particularly, the needs of the foreign party ([144]).

[..]

8. - Ever since the fair trial guarantee has been called to handle the issue of efficiency of civil justice and of proportionality in the use of resources for the judicial protection of rights, the reflection on the prohibition of abuse of process has become an essential component of it.

Apart from the aspect related to the waste of scarce state resources, the duty on the holder of a right to abstain from performing acts which have no other aim than to hurt or harass others ([145]) is part of the obligation to act with honesty and loyalty. Beyond the specific provisions in which this is expressed, it operates as a general final clause to disapprove and restrain conducts that, behind the screen of exercising a right or using tools in a formally correct way, prove that their only motive is to cause harm to others.

In the field of transnational litigation the problem of the abuse of process arises on several occasions, and it is usually dealt with in relation to the individual aspects of the proceedings that are affected. One wonders what the legal basis to restrain abuse of process is. Generally, the prohibition of abuse of process in transnational litigation could be considered as an aspect of the prohibition of abuse of rights as a general principle stemming from international customary law ([146]), or, in Europe, as a general principle of European Union law ([147]). Otherwise, we must rely on single remedies under international conventions or under the *lex fori*.

One of the tasks of an analysis on fair trial/due process is to grasp the opportunity to address specifically the prohibition of abuse of process in transnational litigation, thus advocating the need to develop a specific normative framework for the regulation of this phenomenon. In this context,

([143]) *Ali/Unidroit Principles*, 3.2, 7.2, 14.1; see R. STÜRNER, 2011, p. 256.
([144]) See R. STÜRNER, 2011, p. 256.
([145]) See, for instance, Art. 833 IT civil code.
([146]) See Y. SHANY, 2007, p. 292.
([147]) See Art. 54 Charter of Fundamental Rights of the European Union.

we shall only identify some elements of this proposal, with no claim of comprehensiveness, and refer to a future contribution to the discussion of the problematic aspects within individual subjects.

9. – I refer to the term «jurisdiction snatched by deception» when the plaintiff intentionally causes the occurrence of the event on which jurisdiction can be grounded, only to enjoy the benefits of either procedural or substantive law offered by the Forum State ([148]).

A relevant case decided by the German *Reichsgericht* is about the husband who, after filling for divorce in vain several times before the German courts, moved to Latvia and submitted divorce papers there. His wife, who was acting before the German courts, had demanded that her husband withdraw his application for divorce abroad and compensate her for the legal expenses incurred. The *Reichsgericht* granted the application on the basis of § 826 BGB, which establishes that those who intentionally cause damage to others are obliged to compensate such a damage ([149]). In other words, instituting proceedings before a foreign court (although vested with jurisdiction) in order to avoid the application of (German) substantive was qualified as an unlawful act ([150]).

In particular, the exorbitant fora are most likely to be used for this kind of operations.

What remedies are available? A correct interpretation of the rules on jurisdiction sometimes helps to solve the problem. So the plaintiff cannot claim the jurisdiction of the German courts on the basis of (personal) property of the defendant which he had brought to Germany against the will of the latter ([151]). In other cases, specific rules are needed. For example, under the Reg. EC no. 44/2001 a person domiciled in a Member State may not be sued, as a third party in an action on a warranty or guarantee (or in any other third party proceedings), before the court seised of the original proceedings, if these were instituted solely with the object of removing him

([148]) See H. SCHACK, 2011, p. 192.
([149]) See RGZ 157, 136, which refers also to § 249, I BGB.
([150]) See H. SCHACK, 2011, p. 193.
([151]) See § 23 *Zpo*. See H. SCHACK, 2011, p. 193.

from the jurisdiction of the court which would be competent in his case ([152]).

Otherwise, there is a remedy in civil law systems that provides for a modern version of the *exceptio doli generalis* (such as under German law, the §826 BGB), or in common law systems which set up *antisuit injunctions* ([153]).

[..]

10. - At this point it is appropriate to consider the public policy defence as an impediment to recognition and enforcement of foreign judgments.

The starting point is that judicial decisions are acts of state authority and produce effects only within the territorial boundaries of the state. State sovereignty still plays a central role. Jurisdiction is an aspect of state sovereignty ([154]). Since sovereignty is exercised over a particular territory, the effects of judicial decisions are limited to the state boundaries ([155]). They produce effects in the legal system of another state with the consent of the latter, i.e. recognition ([156]). Presuppositions and conditions for recognition are the result of an approval by the state which, in principle, does not face

([152]) See Art. 6, n. 2 Reg. EC no. 44/2001.

([153]) *Antisuit injunction* hanno per oggetto un ordine, impartito ad una persona che ha instaurato una causa all'estero, di rinunciare a proseguirlo. Certamente l'ordine è impartito solo alla parte, ma in via mediata l'ordine interferisce sull'esercizio della giurisdizione della corte estera ed entra in tensione con la *comity*, con la deferenza nei confronti di altri ordini giudiziari.

Nel *leading case* inglese si è affermato che tale potere deve essere esercitato con estrema circospezione, in presenza di comportamenti chiaramente abusivi: «*vexatious or oppressive*», v. *Société Aérospatiale v. Lee Kui Jak* [1987] A. C. 871, 896 (P. C.).

Nel diritto processuale civile europeo, la Corte giust., 27 aprile 2004, C-159/02, *Turner*, esclude l'ammissibilità di *anti-suit injunctions*, anche quando la parte agisca in mala fede allo scopo di ostacolare il procedimento già pendente. Nel successivo caso, Corte giust., 10 febbraio 2009, C-185/07, *West Tankers Inc*., esclude che le *anti-suit injunctions* possano essere impiegate a protezione di un accordo arbitrale.

([154]) F. MANN, 1964.

([155]) «*No legal judgment has any effect, of its own force, beyond the limits of the sovereignity from which its authority is derived*», so *Yahoo! Inc. v. La Ligne Contre Le Racisme et l'Antisemitisme*, 169 *F. Supp.* 2d 1181, 1187 (*N.D. Cal*. 2001), quoted by N. TROCKER, 2010 [..], p. 26.

([156]) For a brief outline, see A. F. LOWENFELD, 2006, p. 471.

any limits in general international law.

However, there are many international – bilateral and multilateral - treaties which provide for the mutual recognition of judicial decisions between contracting states. In this respect, the experience of the European Union is very advanced. It involves the development of a new concept of sovereignty which entails the inclusion of the state within the larger international and supranational communities.

Elsewhere, there is still a great emphasis on the notion of sovereignty conceived in traditional terms.There is a lack of confidence in the courts of other states, especially in the case where the prevailing party is a citizen of the state where the decision has been taken, and the losing party is a citizen of the state where such decision is supposed to be recognised and enforced ([157]).

The considerable variation between procedural systems of different countries, even within the western civilisation, and the different values that emerge from the substantive law at the global level, have weighed in favour of the preservation of the public policy defence (*ordre public*) as an impediment to the recognition and enforcement of foreign judgments.

This general clause has two components: a substantive and a procedural one. It concerns the respect of fundamental substantive or procedural values. Once we leave aside the substantive law aspect, the link between public policy defence and fair trial/due process guarantee becomes apparent ([158]). If the process in the Forum State is sufficiently respectful of the guarantees of fair trial, there is no scope for the public policy defence in its procedural aspect.

Alongside the substantive aspect of the public order defence, its procedural element should be maintained as a sort of «emergency brake» ([159]) to be activated in exceptional circumstances.

([157]) See N. TROCKER, 2010, p. 26.

([158]) The link is clearly captured in the definition of the reason for denial contained in § 328 (1), n. 4 of the German Code of Civil Procedure (*Zpo*): '*if the recognition would lead to a result that is obviously incompatible with basic principles of German law, especially when it is inconsistent with basic constitutional rights*', including the right to be heard in court (Art. 103 (1) *Grundgesetz*).

([159]) See *Ali/Unidroit Principles of Transnational Civil Procedure*, 30: «A

This restrictive interpretative approach is held, in particular, by the case law of the European Court of Justice. It is one of the expressions of solidarity between the interest of the European Union for the proper functioning of the internal market and the individual interest of the creditor. The leading case is *Krombach* ([160]).

The solution is balanced: the public policy is a clause set to protect the fundamental boundaries ([161]) of the national identities of the Member States inherent in their fundamental political and constitutional structures ([162]). It is therefore advisable to leave it initially the Member States to determine, in accordance with their own national concepts, the aspects of their public policy ([163]). However, to fully entrust the identification of the key elements of the national identity to the «reserved domain» of the Member States would mean to «inoculate the seed» for the dissolution of the European Union. And in fact this does not happen: the respect for the national identities of the Member States is part of the competences of the European Union ([164]). Hence, the role of the Court of Justice to ensure respect for the law in the interpretation and application of the treaties is directly called into play ([165]). The determination of the content and limits of the concept of public policy is then placed in a framework of mutual learning between the Court of Justice and the courts of the Member States. This is implemented through a dialogue in the search of the best solution, tailored to the specific case at hand, and achieved through the preliminary rulings ([166]).

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final judgment awarded in another forum in a proceeding substantially compatible with these Principles must be recognized and enforced unless substantive public policy requires otherwise. A provisional remedy must be recognized in the same terms».

([160]) ECJ, 28 march 2000, C-7/98, *Krombach c. Bamberski*.

([161]) See J.H.H. WEILER, 1999, p. 102.

([162]) Art. 4 (2) TEU: '*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional*'.

([163]) ECJ, 28 march 2000, C-7/98, *Krombach c. Bamberski*, no. 22.

([164]) Art. 4, II TEU.

([165]) Art. 19, TEU.

([166]) ECJ, 28 march 2000, C-7/98, *Krombach c. Bamberski*, no. 23: «*Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the*

In this dialogue between judges, what is at stake is the respect for the essential content of the debtor's right of defence ([167]).

Who has the final word on whether the decision violates or not a fundamental principle of the Member State? Is it the national court called upon to identify the content of the notion of public policy? Or is it the Court of Justice called upon to identify the limits of the same notion? In a flexible way and according to each case, the Court of Justice is inclined to retain the competence or – after refering to «*the general criteria with regard to which the national court must carry out its assessment*» ([168]) – to entrust the national courts with this task.

[..]

11. – [..]

IV. References

(*Selection from the full version of my general report*)

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purpose of refusing recognition to a judgment emanating from a court in another Contracting State».

([167]) ECJ, 28 march 2000, C-7/98, *Krombach c. Bamberski*, no. 37: «*Recourse to the public-policy clause in Article 27, point 1, of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order*».

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([168]) Così, ECJ, 2 April 2009, C-394/07, *Gambazzi*, no. 39.

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