

TRANSNATIONAL LITIGATION AND ELEMENTS OF FAIR TRIAL^{1,2}

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SUMMARY:

i. The regulation of transnational litigation is not worlds apart from civil procedural law. Transnational litigation does not seek to achieve any special or particular form of justice. The problem is to balance access to the courts and effective protection of individual rights with the right to be heard. Indeed, these are "eternal" problems of civil procedure.

ii. The Report points out from the outset the distinction between substantive law and procedural law. It represents a crucial point in the regulation of transnational litigation before national courts. The distinction between substantive law and procedural law fostered the view that procedural law is "neutral" as regards substantive law. Therefore, any procedural law could implement any substantive law. As a result of this idea, 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

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² English version of the General Report delivered at the XI World Congress of the International Association of Procedural Law (IAPL). "Procedural Justice in a Globalised World", Heidelberg, July 25-2 2011. The quotations from the EU Commission's proposal for a recast of the Reg. EC No. 402 (Brussels I-bis (2010) have been afterwards updated with the new Regulation (EU) No 1215/2012 of European Parliament and of the Council. First of all, I would like to thank the Executive Committee of the International Association of Procedural Law (IAK) for asking me to deliver a general report "Transnational Litigation and Elements of Fair Trial". I would also like to thank my colleagues for E. national reports, namely: M. Aguirrezdhar, Universidad de los Andes. A. Perez Ragone. Pontificia Universidad Católica de Valparaíso. A. Romero Segue, Universidad de los Andes (Chile); L. Sinopoli, University Paris Ouest Nanterre La Defense (France); A. Stadler, Universität Konstanz (Germany); N. Kiamaris, University of Athens (Greece); M. Kengyel, University of Pecs (Hungary); E. Alessandro University di Roma Tor Vergata (Italy); B. Kras, University of Groningen, R. Van Rhee, Universitat Maastricht. R. Verkijk, University of Maastricht (Holland); R. Perlingeiro Mendes Da Silva, Universidade Federal Fluminense, Rio de Janeiro (Latin American Report); K. Weitz, University of War (Poland); R.-A. Pantilimon, University of Pecs (Romania); V. V. Yarkov, Ural State Law Acadt (Russia); A. Galič, University of Ljubljana (Slovenia); F. Gascon Inchausti, Universidad Complute de Madrid (Spain); T. Dornej, Universität Zurich (Switzerland); A. Landoni Sosa, Universidad de la Republica Oriental del Uruguay (Uruguay). The national reports as well as the Italian version of General Report can be downloaded from www.iap1-2011-congress.com. All reporters provided an impressive account of national experiences with transnational litigation. Without their contributions general report could not have been written. I am also grateful to Nicolò Trucker and Stephen Burba for their rightful comments and suggestions. Stephen Courts, PhD Researcher, European University Institute, provided the language check. The usual disclaimers apply.

practice of courts is dominated by rules of jurisdiction as well as international civil procedure.

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

The Report refers to a number of critical situations, in which overstating public policy concerns can affect the balance between plaintiffs and defendant's interests.

The first situation stems from the link between the exercise of judicial jurisdiction and sovereignty. E.g., the English transient-service jurisdiction and the French citizenship jurisdiction completely disregard the consideration of fairness in relation to the defendant.

The second critical situation concerns the transnational service of process. According to widespread opinion in the civil law systems, service of process is an act of sovereignty. 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. However, this idea can be misleading. It is doubtful whether perceiving service as an act of sovereignty can really protect defendants. On the contrary, due to the fact that it could *lead* the Forum State to use an intra-State fictitious service of process, like the *remise au parquet*, it could in fact prejudice their situation.

The third critical situation where public policy intervenes in the assessment of trans-national civil proceedings can be related to the good functioning of the internal market, which represents a crucial public policy goal of the European Union. The interest of the European Union in enhancing the functioning of the internal market has led to a remarkable simplification of the enforcement of judgments in favour of the plaintiff. Questions may be raised as to whether this regulation is in itself harmful to the notion of a fair trial by penalizing the defendant. However the answer must depend on where the proceedings in fact take place. Conditions relating to the administration of justice differ according to the Member State in question and the principle of "mutual trust" amounts of little more than a rhetorical slogan.

- iv. Generally speaking, the regulation of transnational disputes must first and foremost seek to balance the plaintiff's interests (access to the court, effective protection of asserted rights) and the defendant's interests (right to be heard). Public policy concerns should normally play only a subordinate role in two-party litigation,

both domestic and transnational. Public policy concerns should not affect the balance between the interests of plaintiffs and defendants. This is true for both the interest of the State in exercising its jurisdiction to adjudicate and any interest the State may have in maintaining 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 can intervene in favour of either party in the dispute. Thus, the Forum State interest in exercising its jurisdiction to adjudicate is normally exercised in favour of the plaintiff whereas the sovereign interests of the State in avoiding (or limiting to certain means) cross-border discovery or service of foreign process on its own territory favors 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 polity is on the side of one party (either the plaintiff or the defendant), such a situation should not be detrimental to the "essence" (*Wesensgehalt*) of the fair trial guarantee and thereby 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. Little room should be given to considerations of public interest or of public policy which are not related to either the private interest of parties or to the needs of justice.

Of course, public policy issues should play a major role in our globalized world. However, it is primarily the political system that should be entrusted with the task of governing globalization and the regulation of transnational litigation has a limited role to play in this context. From the perspective of advancing the public interest, the regulation of transnational litigation has a specific and limited yet important task. It is the task of making the system of civil justice more competitive vis-a-vis arbitration.

In this regard legal scholarship has made an important contribution: the joint project between the American Law Institute and the Unidroit on the Principles of Transnational Civil Procedure. It has been carried out by lawyers and scholars belonging to different procedural law traditions and cultures. The result is of great value due to the balanced approach of the proposed solutions. A set of principles have been identified that should be considered as a common set of requirements for guaranteeing a fair trial in transnational litigation. They should be not only a point of reference in the scientific

debate on this issue but also a model for legislators. Moreover, they should serve as interpretative guidance for judges dealing with transnational litigation. Finally, they could be used as a kind of benchmark against which national and regional norms can be compared.

A second major contribution towards enhancing international litigation before national courts is the Convention on Choice of Court Agreements (2005), drawn up under the auspices of the Hague Conference on Private International Law. 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 and to facilitate the recognition and enforcement (in the contracting States) of decisions of courts whose jurisdiction is based on such agreements. This topic provides an excellent example of the current tension between the rights (and autonomy) of private parties and public policies, not only in the field of transnational litigation but also in the civil procedure more generally. If we agree on the purpose of restoring the competitiveness of state civil justice vis-à-vis arbitration, the path to take is to extend the degree of negotiability of procedural rules, and determine what exactly we consider to be non-negotiable.

v. In order to remove some regulatory deficiencies of civil law systems, and particularly of the European Union civil justice system, the U.S. approach and the central role played by the constitutional due process guarantee in shaping fundamental aspects transnational litigation, should be considered as a good model. This view is by no means new, but it is worth repeating and adapting it to present circumstances. The new legal framework introduced in the European Union law by the Lisbon Treaty makes this proposal more acceptable and more practicable than it was twenty years ago. The European Union now recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, which shall have the same legal value as the Treaties. 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. Art. 47 Ch. largely corresponds EU Art. 6 and Art. 13 ECHR. The Lisbon Treaty also provides for the accession of the EU to the ECHR. The European Court of justice, through long-standing case law has affirmed the role of the Convention in the operation of EU law. According to Art. 52(3) Ch., 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 mentioning that Art 6(3) TEU also makes reference 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. The fairness-based approach is common to both the U.S. legal system and civil law systems. In the continental legal tradition, the pre-determined rules of jurisdiction are also determined on the basis of considerations of proximity and fairness. 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 a general, abstract manner. The underlying view has always been that the established jurisdiction is fair to both the parties. Nevertheless, this general-abstract approach may fail in particular circumstances. This is a more general point and applies 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. However in exceptional circumstances the application of pre-fixed rules may lead to unfair, even inequitable, outcomes. In such a context there is room for constitutional considerations, through the application of the fair trial guarantee by the courts. In civil law systems, it is not necessary to set aside the general, abstract approach. The fair trial guarantee may be invoked to invalidate particular misconceived pieces of legislation or CO 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.

The Report gives some examples of inconsistencies of civil law systems that can be eliminated by applying the Fair trial guarantee. The first example is related to the *lis alibi pendens* exception. 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 by, e.g., a inscriming procedings negative declaration (or relief), with a

view to prevent litigation before the second seised court. In such situations, avoid abusive litigation, the fair trial 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. The second example is related to the *forum non conveniens* doctrine. In cases when it is absolutely inappropriate for the court 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 guarantee *de lege lata* may exceptionally allow the court to decline its jurisdiction, applying the doctrine of *forum non conveniens*. In the light of the U.S. due process guarantee we can look at one of the most critical aspects related to the recognition and enforcement of judgment under the Brussels Convention and Regulation no 44/2001. 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. The European solution is an example of the disproportionate influence of public policy considerations (in this case: the smooth functioning of the internal market) with regard to the balance between the plaintiff's and the 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, the respect for this fairness, as 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. It is true that the public policy exception is an "emergency brake" to be activated only in exceptional cases, but the cases cannot be restricted so as to prejudice the guarantee of a fair trial. 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 (Arr. 35, I EC Regulation no 44/2001) vis-a-vis Art. 47 of the Charter of Fundamental Rights of the European Union.

VI. The final part of the report briefly sketches some specific aspects of the fair trial guarantee in transnational disputes, such as the principle of equality, the determination of the judicial jurisdiction, the interim protection of rights, the right to

engage a lawyer, the language, the extension of time limits, the question of the abuse of process, the abuse of jurisdiction by the plaintiff, the public policy exception.

I. General Remarks

1. Transnational Litigation as a Branch of Civil Procedure

As I started writing this General Report, I asked myself a question. It was the same question that Stephen B. Burbank asked himself in 1991³, when reviewing the book by Gary Born and David Westin:⁴ "Is there 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 International Association of Procedural Law has raised very similar issues at the World Congress on "Procedural Justice" in Heidelberg.⁵ I would like to address these questions from the very beginning of my report.

The regulation of transnational litigation is not worlds apart from civil procedural law.⁶ Transnational litigation does not seek to achieve any special or particular form of justice. The problem is to balance access to the courts and effective protection of individual rights with the right to be heard. Indeed, these are "eternal" problems of civil procedure.

2. Substantive Law and Procedural Law

When discussing transnational litigation and elements of fair trial, it is necessary to point out from the outset the distinction between substantive law and procedural law. It 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 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 dispute, in accordance with the conflict of laws rules of the Forum State (*lex causae* rule).⁷

The distinction between the *lex fori* rule and the *lex causae* rule has its origins in medieval jurisprudence. The foundation of the modern State strengthened the distinction between the *lex fori* rule and the *lex causae* rule whereby judicial jurisdiction came to

³ See B. Burbank. 1991, p. 1456.

⁴ See now G. B. Born, P. B. Rutledge, 2011.

⁵ See www.iap1-2011-congress.com.

⁶ See N. Klamaris, Greece. For some doubts, see Perlingeiro, Latin America.

⁷ See A. T. von Mehren. 2007. p. 29.

represent the exercise of state sovereignty in this new legal context. Moreover, 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 in order to improve the enforcement of the substantive law⁸.

3. Is Procedural Law Neutral?

The distinction between substantive law and procedural law has fostered the view that procedural law is "neutral" as regards substantive law. Therefore any procedural law could implement any substantive law⁹.

From the perspective of civil law, the idea of neutrality of procedural law is closely linked with the assumption of the priority of substantive law (*ubi ins, 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 international civil procedure. This is a result of the strong differences among national procedural systems, in particular between the U.S. system and the rest of the world.

4. American "Exceptionalism"

The distinctiveness of the American system of civil litigation has led to the coining of the expression: American "exceptionalism".¹⁰ In particular, the United States is a "plaintiff's heaven",¹¹ even though recent decisions of the U.S. Supreme Court may have changed to some extent the landscape of the pleading system.¹² The "American advantages" for the plaintiff in civil proceedings are discussed in detail in the Italian version of my report: contingency fees, no loser-pays rule, low court fees, pre-trial discovery, trial by jury, punitive damages, class actions. All these aspects need to be

⁸ See D. Cocscer-Walrjen. 1983.

⁹ See D. Leipold, 1989, p. 28.

¹⁰ See O. Chase, 2002, p. 277.

¹¹ See Lord Denning, *Smith Kline & French Laboratories v. Bloch* (1983) 2 Ail. E.R. 72 (C.A.).

¹² *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) has moved the system towards a stricter standard of plausibility. Most recently, *Ashcroft v. Iqbal*, 129 S. Ct. 1937. 1949 (2009) arguably extends even further the factual requirements in pleadings.

taken into account, since they are related to the balance between effective judicial protection of individual rights and rights of defence (in other words, they are related to fair trial).

Beyond these elements, the comparison between the U.S. civil procedure and the civil justice systems of other countries (especially of the European countries) shows differences between the overall purposes and role of civil justice. While in Europe civil litigation is not conceived as an instrument to effect important public policy goals and public interest litigation, in the United States the system of private civil justice is seen as an important element in the effective regulation of social and economic actors¹³.

This shows that the system of civil justice is all but neutral as to the means of protecting of private rights.

5. Public Policy Goals in Transnational Litigation

Public policy goals to be achieved by the regulation of the judicial process are more usu in transnational litigation than in domestic disputes. Let me provide two examples.

a) Jurisdiction of United States Courts

The first one stems from the U.S case law on judicial jurisdiction and can be found it the reasoning developed by of the U.S. Supreme Court in the Asahi case¹⁴: In

¹³ See P. L. Murray. R. Starner. 2004, p. 576.

¹⁴ *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987): Mr. Zurcher lost control of her motorcycle and collided with a tractor. He was seriously injured and his passenger, Mrs. Zurcher, 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 sued Cheng Shin, the Taiwanese manufacturer of the tire tube, for product liability. Cheng Shin filed a third-party complaint in California against Asahi Metal Industry Co., the Japanese tire valve assembly manufacturer. Asahi Metal *had* sold tire valve assembly directly to Cheng Shin in Taiwan and Cheng Shin then incorporated the valves into motorcycle tire Zurcher eventually settled out of court leaving Cheng Shin's indemnity claim as the only remaining issue to be decided. Asahi Metal moved to quash the service of summons, claiming that California could not exercise jurisdiction over it because sales in Cheng Shin took place in Taiwan and shippers were sent from Japan to Taiwan. Asahi Metal did any 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 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 the 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*. For this case summary see www.lawnix.com.

deciding this case, the Supreme Court argued that: "the determination of the reasonableness and the exercise of jurisdiction in each case will depend on an evaluation of several factors. The 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 policies¹⁵. 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) Procedural Regulations of the European Union

The second example of public concerns in the regulation of transnational litigation is provided by European Union law. It is the underlying rationale of the Brussels Convention on jurisdiction and Enforcement of judgments in civil and commercial matters¹⁶. The Brussels Convention of 1968 not only serves the interests of the parties involved in a cross-border dispute in Europe, but it should also be considered in the broader context of European integration.¹⁷ Thus, the "sound operation" of the internal market represents the public policy goal that led to the adoption of rules of judicial jurisdiction intended to be both highly predictable and to simplify the enforcement of judgments in the Member States.¹⁸

The Maastricht Treaty placed 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

¹⁵ In this case the Court found that 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 Californian 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.

¹⁶ See also the Lugano Parallel Convention, extending the rules of the Brussels Convention to Switzerland, Norway and Iceland.

¹⁷ See P. Jenard, 1979. p. 13.

¹⁸ Landmark decision on the link between the Brussels Convention and the European integration is ECJ. 10 February 1994, C-398/92. Mond & Fester. See B. Hess. 2010. p. 3.

decisions in civil and commercial cases, including decisions in extrajudicial cases". On that basis the Brussels Convention was replaced by Council Regulation EC 44/2001¹⁹ 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 Arts. 67 and 81 TFEU.²⁰

6. Overstating Public Policy Concerns

It is worth referring to a number of critical situations, in which overstating public policy concerns can affect the balance between plaintiff's and defendant's interests.

a) Jurisdiction and Sovereignty

The first situation stems from the link between the exercise of judicial jurisdiction and sovereignty.

Traditional or classical thought in England would consider that "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".²¹ Accordingly, jurisdiction is established when the service of process is permitted: "Whoever is served 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".²² In this way, the judicial jurisdiction relies on the "power theory", linked to the 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

¹⁹ The overall structure of the Convention has not been modified by the Regulation, which has amended only specific provisions.

²⁰ See B. Hess, 2010, p. 75. Fn. 401

²¹ So 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 alive and well in the recent decision (June 27, 2011) of the U.S. Supreme Court]. *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".

²² *John Russel and Co Ltd. v. Cayzer, Irvine Ltd.* (1916). 2 AC 298. 302.

jurisdiction of the court. This form of transient-service jurisdiction is alive and well today.²³

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. In conclusion, as 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.²⁴

b) Transnational Service of Process

The second critical situation concerns the transnational service of process.²⁵ 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 documents) in sufficient time to prepare his or her defence.

According to widespread opinion in the civil law systems, service of process is an act of sovereignty.²⁶ 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, the 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.²⁷ From a common

²³ N. Tracker, 2011, p. 184

²⁴ R. Geimer, 1993.

²⁵ "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. See now the 5th edition, 2011). Such a definition fits also in civil law systems.

²⁶ For references see H. Schack 2001, p. 831.

²⁷ The Hague Convention on 'ervice Abroad ofJudicial and Lxtrajudicial Cioernments in Civil and Commercial Matters (Hague Service Convention, HSC, 1965) establishes a basic Central Authority mechanism ofservice under Article 5. In addition to that, the HSC also permits other means of extraterritorial service. Among these alternative procedures, Arr. 10 (a) permits the sending of judicial documents by

law point of view, sovereignty concerns relating to the 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.²⁸

What role should concerns of sovereignty play in the transnational service of process? As already mentioned, one could think that this idea might benefit the defendant who is resident in the State, in the sense that they protect him or her from encroachments of service from abroad.²⁹ However, this idea can be misleading. It is doubtful whether perceiving service as an act of sovereignty can really protect defendants. On the contrary, due to the fact that it could lead the Forum State to use an intra-State fictitious service of process, like the *remise au parquet*, it could in fact prejudice their situation³⁰. Under this system, service is rendered by handing over the document to the State attorney³¹ or by putting up a notice on the court notice-board.³² The addressee is subsequently notified by post, but the communication 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. (I) In order to fulfil its functions, service should be simple, quick, reliable and fair.³³ (2) Sovereignty concerns in transnational service of

postal service directly to the defendant, only if the receiving State has not objected. Some countries have declared their opposition to service by mail on their territories, raising sovereignty obstacles. Germany is among them. See § 6 HSC-AusG. Such an objection is no longer permitted under the Reg. EC Nn. 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 Art. 14 oldie EuSR, "each Member State shall be free to do service of judicial documents directly by postal services on persons residing in another Member State by registered letter with acknowledgement of receipt or equivalent".

²⁸ G. B. Born. P. B. Rutledge, 2007, p. 817. See now the 2011 edition.

²⁹ See R. Starnier, 1992, p. 327. For a critical appraisal, see H. Schack, 2001, p. 832.

³⁰ See Art. 683 of nouveau code de procedure 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".

³¹ As in France, Art. 684 nouveau c.p.c.

³² As in Italy, Art. 142 c.p.c.

³³ 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...".

process are definitely misplaced.³⁴ (3) A fine balance in protecting the plaintiff's and the defendant's interests is required. Since the plaintiff has a choice of the forum, the disadvantage; the foreign defendant should be minimized, according to the proportionality principle. Consequently, at the top of the blacklist should be fictitious national means of set of process. As Zuckerman put it "the right to fair trial, or due process, demands every litigant should have timely notice of any proceedings affecting his interests a reasonable opportunity to participate in them".³⁵ Fictitious means of service fail regard to the notification of the act instituting the proceedings to the defendant. Therefore, they do not comply with the fair trial guarantee.³⁶ (4) A multilateral convention³⁷ creating uniform rules on service of process is needed. Such a convention should or late not only the procedures of service abroad (as both the HSC and the EuSR do). It should also entail mandatory rules on its scope and should not leave the conditions of applicability to the national laws of the Contracting States. Other important matters to be regulated are: the translation of the document to be notified,³⁸ the date of the set to be taken into account with regard to the applicant, time limits for filing a defence remedying defective service, extension of time limits if the defendant (not entering³⁹ appearance) has had no sufficient time for his or her defence.

c) Good Functioning of the EU Internal Market

The third critical situation where public policy intervenes in the assessment of transnational civil proceedings can be related to the good functioning of the internal market.

³⁴ This point is concerned with the State in which the addressee of service is resident. With regard to Forum State, a link between service of process and sovereignty can be assessed in the legal orders (English law) in which the international judicial jurisdiction depends upon whether the rules of process have been complied with. In this context, jurisdiction — traditionally conceived as an extension of sovereignty — is established when service is permitted (R. Fenrman, 2010, p. 359).

³⁵ See A. Zuckerman, 2006, p. 155.

³⁶ Moreover, in the field of the European Law, the remission of jurisdiction does not comply with the prohibition of discrimination on grounds of nationality (Art. 18 TFEU).

³⁷ Therefore, neither the HSC, nor the EuSR are able to prevent the use of such intra-State method of service of process, since these legal instruments apply only to service abroad. See also Arts. 15 of HSC (postponement of judgment: extension of time limits), as well as Art. 19 of EuSR (postponement of judgment).

³⁸ Ali/Unidroit Principles of Transnational Civil Procedure. 5.2: "The documents referred to in Principle 5.1 must be in a language of the forum, and also a language of the state of an individual's habitual residence or a juristic entity's principal place of business, or the language of the principal document of 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".

³⁹ 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 judgment for failing to make timely response..."

which represents a crucial public policy goal of the European Union. In the last decade, it has led to the adoption of a number of legal instruments (Council Regulations). They are intended to simplify the formalities with a view to "rapid and simple" recognizing 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 recognized in the other Member States without any special procedure being required. In the view of the institutions of the European Union "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, the plaintiff's and the defendant's interests are well balanced: the judgment to be recognized can be in favour of either the plaintiff or the defendant. By virtue of the same principle of mutual trust, the procedure for making judgments enforceable in other Member States must also be efficient and rapid.

As a matter of fact the enforcement of judgments has been facilitated greatly over the last ten years. This fact can be illustrated by a number of examples. Under the Brussels Convention, the enforcement of judgments is declared in *ex parte* proceedings. The party against whom enforcement is sought is not in a position 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.⁴⁰ If enforcement is declared, the party against whom enforcement is sought may appeal against the decision within one month of service thereof.⁴¹ 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 had no sufficient time to arrange for his defence.⁴²

Under the Brussels 1 Regulation (EC n. 44/2001), the enforcement statement is automatically issued 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-

⁴⁰ See Art. 34 (2), in connection with Arts. 27 and 28.

⁴¹ See Art. 36.

⁴² 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. ...".

enforcement provided for by this Regulation.⁴³ It is up to the party against whom enforcement is sought to raise them through appeal against the declaration of enforceability.⁴⁴ If the judgment was given by default, it will be more difficult to challenge it⁴⁵. Furthermore, the new Regulation (EU) No 1215/2012 of the European Parliament and of the Council ("recast" of Council Regulation EC 44/2001; it will apply from 10 January 2015) will abolish the *exequatur* procedure for all judgments covered by the Regulation's scope (Art. 39).⁴⁶ According to the new Regulation 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 (Art. 46). The exception of substantive public policy will be abolished (Art. 52).

The interest of the European Union in enhancing the functioning of the internal market has led to a remarkable simplification of the enforcement of judgments in favor of the plaintiff. Questions may be raised as to whether this regulation is in itself harmful to the notion of a fair trial by penalising the defendant. However the answer must depend on where the proceedings in fact take place. Conditions relating to the administration of justice differ according to the Member State in question and the principle "mutual trust" amounts to little more than a rhetorical slogan.

7. Balancing Public Policy Concerns and Parties' Interests

Generally speaking, the regulation of transnational disputes must first and foremost seek to balance the plaintiff's interests (access to the court, effective protection of assembled rights) and the defendant's interests (right to be heard). Public

⁴³ See Art. 41, Reg. EC No. 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".

⁴⁴ See Art. 45 Reg. EC No. 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".

⁴⁵ Art. 34 Reg. EC No. 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...".

⁴⁶ The *exequatur* has already been abolished in previous regulations: see Reg. EC No. 805/2004 creating a European Enforcement Order for uncontested claims (21 April 2004); Reg. EC No. 1896/2006 creating a European order for payment procedure (12 December 2006); Reg. EC No. 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure (11 July 2007); Reg. EC No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decision and cooperation in matters relating to maintenance obligations (18 December 2008).

policy concerns should normally play only a subordinate role in two-party litigation, both domestic and transnational.⁴⁷ Public policy concerns should not affect the balance between the interests plaintiffs and defendants. This is true for both the interest of the State in exercising in jurisdiction to adjudicate and any interest the State may have in maintaining 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 can intervene in favour of either party in the dispute. Thus, the Forum Scare interest in exercising its jurisdiction to adjudicate is normal exercised in favour of the plaintiff whereas the sovereign interests of the State in avoiding (or limiting to certain means) cross-border discovery or service of foreign process on its own territory favours 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 polity is on the side of one party (either the plaintiff or the defendant), such a situation should not be detrimental to the "essence" (*Wesensgehalt*) the fair trial guarantee and thereby 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. Little room should be given to considerations of public interest or of public policy which are not related to either the private interest of parties or to the needs of justice.

Of course, I do not think that public policy issues should play no role in our globalised world. Rather I am of the opinion that quite the opposite is true.⁴⁸ However, it is primarily the political system that should be entrusted with the task of governing globalisation and the regulation of transnational litigation has a limited role to play in this context.

8. State Civil Justice v. Arbitration

⁴⁷ As a traditional system I refer here to the form of litigation in which a single plaintiff asserts a substantive right against a single defendant. Of course, the situation is different with regard to multi-part litigation. In this case the traditional litigation form must in modern legal systems be stretched accommodate various interests: compensation and/or preventing unjust enrichment, judicial efficiency, deterrence and/or regulation of social behavior (H. Buxbaum. 2008).

⁴⁸ See R. Starner. 2007.

From the perspective of advancing the public interest, the regulation of transnational litigation has a specific and limited yet important task. It is the task of making the system of civil justice more competitive *vis-a-vis* arbitration.

a) Ali/Unidroit Principles of Transnational Civil Procedure

In, this regard legal scholarship has made an important contribution: the joint project between the American Law Institute and the Unidroit on the Principles of Transnational Civil Procedure.⁴⁹ It has been carried out by lawyers and scholars belonging to different procedural law traditions and cultures. The result is of great value due to the balanced approach of the proposed solutions. A set of principles have been identified that should be considered as a common set of requirements for guaranteeing a fair trial in transnational litigation. They should be not only a point of reference in the scientific debate on this issue but also a model for legislators. Moreover, they should serve as interpretative guidance for judges dealing with transnational litigation. Finally, they could be used as a kind of benchmark against which national and regional norms can be compared⁵⁰.

b) Choice of Court Agreements: The Hague Convention

A second major contribution towards enhancing international litigation before national courts is the Convention on Choice of Court Agreements (2005), drawn up under the auspices of the Hague Conference on Private International Law.⁵¹ Compared with the original project, which was conceived in the last decade of the twentieth century, 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 in the Forum State, as well as norms that govern the recognition and enforcement decisions in other States. It failed at the beginning of the new millennium.⁵²

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 and to facilitate the recognition and enforcement (in the contracting States)

⁴⁹ See R. Starner, 2005, p. 201; M. Anderms, N. Andrews, R. Nanini (eds.). 2004; N. Klamaris, Greece.

⁵⁰ See R. Starner, 2005, p. 213 1.

⁵¹ 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.

⁵² For the reasons of this failure. see A. T. Von Mehrcn, 2007, p. 365 f.

of decision 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 concerned⁵³ if it represents a real alternative to the inclusion of an arbitration agreement in their contracts.⁵⁴

This topic provides an excellent example of the current tension between the right (and autonomy) of private parties and public policies, not only in the field of transnational litigation but also in the civil procedure more generally. If we agree on the purpose of restoring the competitiveness of state civil justice *vis-à-vis* arbitration, the path to *não sei* is to extend the degree of negotiability of procedural rules, and determine what exact we consider to be non-negotiable.⁵⁵

In other words, the way forward is to overcome the conception which does not recognize a middle-ground between arbitration, on the one hand, and state justice, on the other hand and to move towards a greater inclusion of the preferences of parties in the structure of the proceedings. This should be done to the extent that it does not hint the efficiency of the judicial process, in line with the objective of a fair settlement to a dispute.⁵⁶

In this context, the regulation on choice of court agreements stands out since it *não sei* make a significant contribution to the predictability of contractual relations between the parties.⁵⁷ The degree of predictability that the choice of court agreements can achieve 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 courts to be considered as binding for the courts. Conversely, in common law system clauses regarding the choice of court are not entirely binding. Courts retain a degree of discretion in deciding whether to give them effect or not.⁵⁸

In the Hague Convention of 2005, the balance between the rights of the parties regarding the choice of court and the interests of state authorities was met through a *não*

⁵³ The convention does not apply either to consumer contracts or contracts of employment (Art. 2).

⁵⁴ See N. Trocker, 2011, p. 205.

⁵⁵ For more details R. Caponi, 2008.

⁵⁶ See P. Schlosser. 1968.

⁵⁷ See N. Trocker. 2011. p. 199.

⁵⁸ See N. Trocker, 2011. p. 199.

sei of trade-off. Prerogatives of the latter have been protected in a general and abstract with through a long list of issues, which have been excluded from the scope of the Convention.⁵⁹ 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".⁶⁰ There is therefore no scope 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.⁶¹ Moreover, except in exceptional circumstances, the decision issued by a court designated in an exclusive choice of court agreement has to be recognized and enforced in other contracting states⁶².

c) Choice of Court Agreements: European Regulation

In European procedural law, a court designated in a choice of court agreement shall have exclusive jurisdiction, unless the parties have agreed otherwise".⁶³ 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,⁶⁴ even if the judicial action brought in the first place is the result of a clearly abusive strategy.⁶⁵

The approach of the Court of Justice is unsatisfactory from the point of view of guaranteeing a fair trial. The new Regulation (EU) No 1215/2012 ("recast" of Council Regulation EC 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 whether it is the first-seised or second-seised court.⁶⁶

9. Fair Trial Guarantee in the Civil Law Tradition

⁵⁹ Art. 2 (2).

⁶⁰ Art. 5 (2).

⁶¹ Art. 6. See also Ali/Unidroit Principles of Transnational Civil Procedure 2.4.

⁶² Arts. 8 and 9. See N. Tracker, 2011, g. 205.

⁶³ See Arts. 23 and 24 of EC Regulation No. 44/2001. Arr. 23 leaves no room for judicial discretion. In this regards see Eq, 16 March 1999, C-159197, *Trasporti Casrelletti*, referring to Art. 17 of the Brussels Convention of 1968.

⁶⁴ See Art. 27 Reg. EC No. 44/2001.

⁶⁵ See Eq. 9 December 2003, C-I 16/02. *Gasser*.

⁶⁶ See Art. 32 (2) of the proposal for a recast of the Reg. EC No. 44/2001, Brussels 1-615 (2010).

At the beginning of this Report the fair trial guarantee has been identified as balancing, on the one hand, access to the courts and the effective protection of individual rights and on the other hand the right to be heard. At this stage one should point out the differences between the notion of a fair trial in the civil law tradition and due process in the U.S. legal system.

First of all, in Europe the fair trial guarantee has come to cover 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*⁶⁷.

Enshrining the right of access to the courts in Art. 6, para 1 of the European Convention of Human Rights (ECHR) paves the way for quite a radical change in perception of the fair trial. Traditionally, the fair trial was conceived as a negative i.e. as freedom from unlawful interferences by the public authority. This can be observed in the first solemn declaration of the fair trial guarantee; clause 39 of the first Carta Libertatum (1215): "*Wires liber homo capiatur, vel imprisonetur, aut dissaisia aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimzcs, nec sr eum mittemus, nisi per legatē iudicium parium suorum vet per legem terrae*".⁶⁸

With the inclusion of the right of access to the courts within the notion of a trial, this guarantee has moved from the area of negative rights into the area of position rights, which impose positive obligations on the State. The principle of effectiveness played a crucial role in this change.⁶⁹ In *Airey v. Ireland* (1979), the European Court of Human Rights applied the principle of effectiveness to the right of access to the court as the latter cannot be effectively protected without providing for legal aid on the part of the State.⁷⁰

⁶⁷ 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 concludes (para 35): "It would be inconceivable ... that Article 6 para 1 should describe in detail procedural guarantees afforded to parties in a pending lawsuit and should not first protect that with alone makes it in fact possible to benefit from such guarantees. That is access to a court. The fair trial and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings".

⁶⁸ See Holdsworth, I.E. ed., 1936. p. 214. This is the second and most famous of the three surviving chapters of the Charter. It is the Edwardian 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 Nov 2011, <http://tinyurl.com/6firtms>.

⁶⁹ N. Trocker, 2010, p. 230.

⁷⁰ *Airey v. Ireland* (1979): (para 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.

Besides legal aid, other positive obligations have been falling within the area of fair trial guarantee by means of the case law of the European Court of Human Rights. In particular and of crucial importance the protection provided for by Art. 6, para 1 ECHR was extended through the introduction of the right to effective enforcement of judicial decisions.⁷¹

The right to effective judicial protection also requires an effective remedy, guaranteed by Art. 13 ECHR, which extends beyond the safeguards provided for by Art. 6.⁷²

These developments are condensed in Art. 47 of the Charter of Fundamental Rights of the European Union.

10. Due Process in the U.S. Legal Tradition: The Issue of Judicial Jurisdiction

In contrast, the current implementation of the U.S. due process clause⁷³ by the case law of the U.S. Supreme Court 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 interference.

fulfillment 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".

⁷¹ Landmark decision: *Hornsby v. Greece* (1997). In this case the Greek Ministry of Education wrote 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: (para 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 a court 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 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".

⁷² ECHR, *Kudla v. Poland* (2000): (para 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".

⁷³ Fifth Amendment, 1791, applicable only to actions of the Federal Government: "No person shall be ... deprived of life, liberty, or property, without due process of law...". The Fourteenth Amendment, 1868, contains virtually the same provision, but expressly applies to the states.

The due process guarantee has contributed greatly 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.* by those distinctive aspects of the system of civil litigation that characterize it as a "plaintiffs 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 century the *U.S.* theories and practices of adjudicative authority in international disputes were shaped and controlled by courts, thanks to the direct application of the due process clause. *Pennoyer v. Neff*⁷⁴ is the landmark decision. 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 Supreme Court's answer, on the basis of the due process clause, was 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 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".⁷⁵

The "reign of power theory"⁷⁶ was ended in 1945 with the case of *International Shoe Co. v. Washington*. Since then the Supreme Court has replaced it with the "fairness theory"⁷⁷. The passage from the reasoning behind the decision reveals that the

⁷⁴ 95 U.S. 714. 24 L. Ed. 565 (1878). See the brief summary of this case on www.lawnix.com.

⁷⁵ Justice Holmes in *McDonald v. Mabee*. 243 US 90 (1917), 91.

⁷⁶ See A. T. von IvIehren, 2007, p. 88.

⁷⁷ See A. T. von Mehren, 2007. p. 97. *International Shoe Co. v. Washington*, 326 U.S. 310: (pars 31t "Historically, the jurisdiction of courts to render judgment is: pe-rsonasn is grounded on their fit fir to power over the defendant's person. Hence. his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*, 95 1 S. 714. 95 U. S. 733. But now ... due process requires only that, in order to subject a defendant to judgment in perranam. if he is not present within the territory of the forum, he has certain minimu contacts with it such that the maintenance of the suit does not offend 'traditional notions of Fair pl and substantial justice'...". (319) "Whether due process is satisfied must depend, rather, upon the quali and nature of the activity in relation to the Fair and orderly administration of the laws which it w the purpose of the due process clause to insure". Summary of the case from www.lawnix.com: Intern tinnal Shoe Co. was a Delaware corporation with its principle place of business in St_ Louis. Missou It had no offices in the state of and made no contracts For _sale there. International Sh did not keep merchandise in Washington and did not make deliveries of goods in intrastate commer originating from the state. International Shoe employed 11-13 salesmen for three years who resided Washington_ Their commissions each year amounted to more than £31,000 and international Sh reimbursed them for expenses. Prices, terms, and acceptance or rejection of footwear orders were esta fished through St. Louis. Salesmen did not have authority to make contracts or collections. The sr. of Washington brought suit against International Shoe

emergency of the "fairness theory" was due more to the constraints that the power theory had imposed rather than the excesses that arose as its consequence.⁷⁸ *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.⁷⁹ 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.

11. The European Approach to the Jurisdiction Rules

By contrast, in civil law systems: "Locating the proper court 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".⁸⁰

Taking into account these Features, the Brussels Convention and Regulation can be considered a genuine masterpiece. The success of the Brussels Convention relies on a few fundamental features: (1) 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; (2) in relationships between Member States such an autonomous system of international jurisdiction prevails over conflicting national rules of jurisdiction, including those generally regarded as exorbitant; (3) the Brussels Convention adopts a very liberal approach to the question of recognition and enforcement of judgments, as a result of certain safeguards granted to the defendant in the Forum State and

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.

⁷⁸ A. T. von Mehren, 2007. p. 97.

⁷⁹ S. B. Burbank. 2004. p. 744.

⁸⁰ N. Trucker. 2011. p. 182.

mutual trust in the administration of justice between the Member States. Specifically, the Convention reduces the number of grounds which can operate to prevent the recognition and enforcement and it simplifies the enforcement procedure; (4) the autonomous interpretation of the Convention by a supranational Court, the European Court of Justice (ECJ).

12. A Time-Honoured Achievement of the U.S. Legal Culture

The U.S. approach to judicial determination of jurisdictional rules has been criticized from a civil law point of view.⁸¹ However, such a criticism is to some extent excessive. At any rate it cannot overshadow a time-honored achievement of the U.S. legal culture: the recognition of the constitution as a higher law. The due process clause is a constitutional principle and — as with other constitutional principles — its goal is not only political. Constitutional principles are also legal norms, despite their somewhat broad nature. As a result of their inherent prescriptive nature they can directly regulate facts and life situations, without any legislative implementation.⁸²

Therefore, constitutional principles are generally recognized as a legal basis for judicial decisions in the following ways: (1) firstly, constitutional principles can fill a gap in the legislation; (2) secondly, constitutional principles orientate the interpretation of the legislation; (3) thirdly, if a constitution-based interpretation is not practicable, (because of grammatical, lexical, systematic, historic, and teleological constraints), constitutional principles have to serve as a basis for the non-application or invalidation of legislative provisions through constitutional review; it may be either a decentralized or a centralized judicial review of legislation⁸³ (for example in the European Union it

⁸¹ H. Schack. 2010, p. 163: "Lack of legal certainty".

⁸² 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. 5 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 aspects, H. Sagmeister, 2010.

⁸³ In the first case, judicial review can be carried out by every judge and its effects are confined to the decision at hand. In the second one, the review is carried out by a constitutional court seized by a referral of an issue arising during a proceeding before an ordinary court or by a request of a number of public bodies.

is for tilt European Court of Justice to invalidate legislation of the Union when there is a breach of constitutional principles);⁸⁴ (4) 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"⁸⁵ has been adopted by the contracting party in breach of the rights set forth in the Convention or the Protocols thereto.⁸⁶

13. Filling Regulatory Gaps through the Fair Trial Guarantee

The current section follows from what has been just said. I believe that in order to remove some regulatory deficiencies of civil law systems,⁸⁷ and particularly of the European Union civil justice system, the U.S. approach and the central role played by the constitutional due process guarantee in shaping fundamental aspects of transnational litigation, should be considered as a good model. This view is by no means new,⁸⁸ but it is worth repeating and adapting it to present circumstances. The new legal framework introduced in the European Union law by the Lisbon Treaty makes this proposal more acceptable and more practicable than it was twenty years ago.

The European Union now recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, which shall have the same legal value as the Treaties.⁸⁹ 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. Art. 47 Ch. largely corresponds to Art. Não sei and Art. 13 ECHR. The Lisbon Treaty also provides for

⁸⁴ Art. 6, 19 TEU; Art. 251 ff. TFEU. In the recent case law of the EC. See, for example ECJ. 1 Man 2011. Association Beige des Consommateurs Test-Achats ASBL. C-236/09. In this judgment. the EU declared invalid Art. 5(2) Directive 2004/I 13/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): "later States may decide before 21 December 2007 to permit proportionate differences in individual 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 law of any temporal limitation was incompatible with Art. 21 and 23 Ch. (equal treatment for men and women). On this decision, see the criticism of T. Pfeiffer. NJW 2011. Editorial Heft 13. p. 3.

⁸⁵ Art. 35 ECHR.

⁸⁶ Art. 41 ECHR.

⁸⁷ I would say: *Werrungslücken* in the German legal terminology. R. Zippelius, 2003.

⁸⁸ P. Schlosser 1991; R. Geimer, 1993; T. Pfeiffer, 1995; D. Coester-Waltjen, 2003.

⁸⁹ Art. 6 TEU.

the accession of the EU to the ECHR.⁹⁰ The European Court of Justice, through long-standing caselaw has a (Ernie the role of the Convention in the operation of EU law. According to Art. 52(3) Ch., it 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 mentioning that Art 6(3) TEU also makes reference 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.⁹¹

The Fairness-based approach is common to both the U.S. legal system and civil law systems. In the continental legal tradition, the pre-determined rules of jurisdiction are also determined on the basis of considerations of proximity and fairness. 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 a general, abstract manner. The underlying view has always been that the established jurisdiction is fair to both the parties.⁹²

Nevertheless, this general-abstract approach may fail in particular circumstances. This is a more general point and applies 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. However in exceptional circumstances the application of pre-fixed rules may lead to unfair, even inequitable, outcomes. In such a context there is room for constitutional considerations, through the application of the fair trial guarantee by the courts.

In civil law systems, it is not necessary to set aside the general, abstract approach. The fair trial guarantee may be invoked to invalidate particular misconceived

⁹⁰Art. 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".

⁹¹ 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. e. W. Weiss, 2011. p. 64.

⁹² P. Schlosser. 1991. p, 12.

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.⁹³

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

a) Lis Alibi Pendens

The first example is related to the lie *alibi pendens* exception. Most civil law and common law countries admit such a defence based on pendency before a foreign court,⁹⁴ at least when there is significant likelihood that the future foreign judgment will be recognized. 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 a 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 *Ips 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.⁹⁵

⁹³ 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 2 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 other force."

⁹⁴ There are a few countries where the problem of parallel proceedings is simply ignored, in particular for countries not recognizing and enforcing foreign judgments. in the absence of a treaty.

⁹⁵ An example of a rule adopting this approach is Art. 27 of the Council Regulation EC 44/2001 (former Art. 21 of Brussels Convention): "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 seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. 2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favor of that court".

In its decision on the case Gasser (Eq. 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 pass the same cause of action, the same parties and which proceedings were first commenced. In Gasse the

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 guarantee *de lege data* 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.⁹⁶

b) Forum Non Conveniens

The second example is related to the *forum non conveniens* doctrine. In cases where it is absolutely inappropriate for the court 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 guarantee *de lege lam* may exceptionally allow the court to decline its jurisdiction, applying the doctrine of *forum non conueniens*.⁹⁷

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 Arr. 2 niche Brussels Convention had to prevail over the exclusive choice of court agreement. Therefore the second seized court has to stay its proceedings. while the court first seized determines whether it has jurisdiction. In a following case, 27 April 2014, C-159102, Turner. the ECJ decided that it would be inconsistency with the Brussels Convention, if the courts of a Member State could grant anti-suit injunctions to restrain a party from pursuing proceedings 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 injunction against the breach of an Arbitration agreement.

With regard to matters of parental responsibility, the priority rule, as stated in Art. 19 (2). Reg. EU No. 2201/2003, has been mitigated in a particular case: S. 9 November 2010, C-296110. Purruce C-1311. The rule reads as follows: where, notwithstanding efforts made by the court second seized 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 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 recognized 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.

⁹⁶ Ali/Unidroit Principles of Transnational Civil Procedure. 2.6.

⁹⁷ R. Starner, 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*

I do believe that *the forum non conveniens* doctrine should (exceptionally) be applied both to prevent abuse of process, and to keep transnational disputes out of absolutely inappropriate forums. The solution I have just suggested should be implemented by suspending the forum proceedings in deference to another court. The existence of a (more) convenient forum is a necessary condition. In this way the risk of a denial of justice can be avoided.⁹⁸

In conclusion, the aim here 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 simply on the grounds that another forum is more appropriate to resolve that transnational dispute.⁹⁹ The aim is rather to avoid an 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.¹⁰⁰

c) Reviewing Jurisdiction in the State of Recognition

In the light of the U.S. due process guarantee we can look at one of the most critical aspects related to the recognition and enforcement of judgments under the Brussels Convention and Regulation no 44/2001. Subject to few exceptions, the jurisdiction of the court of the Member State of origin may not be reviewed by the

doctrine within the Brussels Convention was refused by EC), 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).

⁹⁸ 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): "I. 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 or 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".

⁹⁹ See e.g. Code civile of Quebec. 3135 "Even though the Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authority of another country are in a better position to decide". On this point, see N. Crocker, 2011, p. 197, n. 53.

¹⁰⁰ 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".

court seized with the enforcement request in other Member States. The public policy defence may not be applied to the rules related to jurisdiction.¹⁰¹

An example of such a situation is the Krombach case.¹⁰² In this case, a civil action for damages 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 established by the Brussels Convention.¹⁰³ 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 its 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 limit to the exercise of a court's jurisdiction against the non-resident defendant. It is undisputed that respect for this limit can also be ensured by the courts of the State where the execution of the

¹⁰¹ See Art. 28.111. Brussels Conv., as well as Art. 35, III Reg. CE No. 44/2001. See Art. 24 Reg. CE Ni 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, but the court in which recognition or enforcement is sought, of the jurisdiction of the court in which the original judgment was given".

¹⁰² ECJ. 28 March 2000. C-7198. *Krombach c. Bamberski*.

¹⁰³ 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 act giving rise to criminal proceedings. in the court seized of those proceedings, to the extent that if 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 up by the ECJ.

judgment is sought.¹⁰⁴ 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 exorbitant jurisdiction in light of Art. 3 (2) Brussels Convention and Regulation.

The US solution is in line with the constitutional guarantee of fair trial, 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 considerations (in this case: the smooth functioning of the internal market) with regard to the balance between the plaintiff's and the 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, the respect for this fairness, as 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.¹⁰⁵ 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 prejudice the guarantee of a fair trial.¹⁰⁶ 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.

IL Specific Aspects

This final part of the report briefly sketches some specific aspects of the fair trial guarantee in transnational disputes.

1. Principle of Equality: General Remarks

One of the elements of the Fair trial guarantee with regard to the regulation of transnational litigation which deserves attention is the principle of equality and its implications. Issues of fair trial in transnational litigation arise frequently due to the

¹⁰⁴ Cfr. *Somportex Ltd. v. Philadelphia Chewing Guns Corporation*, 453 F.2d 435 (3rd Cir. 1971); A. F. Lowenfeld. 2006, p. 552.

¹⁰⁵ See ECHR, 29 April 2008. no 1864/04. *Mc Donald c. Francis*: "h Cour considere quo l'article G implique un controle des regles do competence en vigueur dans les Esau contracrants aux fins de s'assurer quo celles-ci ne portent pas atreinte a un droit protege par is 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".

¹⁰⁶ See A. Nuyts, 2005. Es. 197.

material inequality between the party that acts in a foreign environment and the 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 or 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 in posing as the victim of his opponent's fraudulent conduct, and uncertainty regarding the financial expenditures of the proceedings”.¹⁰⁷ 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 on civil procedure. This is not a feature that is peculiar to transnational disputes. It is now an aspect calling for a radically different approach from the one provided for domestic disputes.¹⁰⁸ If the focus is on those disputes with the greatest economic value, that is, on the business litigation of multinational companies, and we neglect small claims, it is easy to see that these problems are principally addressed through international networks on law firms. This is likely to reflect the national diversity of the multinational company activities. The multinational approaches a law firm in its home country and it is the assisted, in the Forum State, by another law firm, which is part of the same international network of law firms. This increases the expense, e.g., due to the costs incurred to cover the translation of documents and records. But the company solves the problem by allow caring more financial resources to the resolution of transnational litigation, compared to those assigned to the resolution of domestic disputes.

2. Principle of Equality: Specific Aspects

The equality of both parties in the process should however be examined specifically with regard to transnational litigation. Equal treatment means the

¹⁰⁷ P. Schlosser. 1991, p. 11.

¹⁰⁸ See on this point, M. Kengyel. Hungary.

prohibition of any type of unlawful discrimination against the parties, in particular on the basis of nationality or residence.¹⁰⁹

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

According to 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 enjoys any of the fundamental freedoms recognized 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.¹¹⁰ 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 and is now contained in Art. 3 (2) TEU.

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). It is worth mentioning some key aspects, which are subject to this prohibition. First and foremost, the State should guarantee access to its courts to Foreigners on an equal footing with nationals.¹¹¹ The guarantee of equal access

¹⁰⁹ On this topic, see N. Klamaris, Greece.

¹¹⁰ Leading case: Eq. C-20192, Hubbard. 1993.

¹¹¹ P. Gottwald. 1991, p. 7; T. Pfeiffer. 1995, p. 21.

protects the foreigner, both as a plaintiff,¹¹² and as a defendant. Foreign nationality or residence abroad cannot justify unequal treatment compared to that offered to nationals or residents in the Forum Stare: (1) in order to exclude access to legal aid;¹¹³ (2) in order to impose a security for costs, Or a security for liability for pursuing provisional measures;¹¹⁴ (3) in order to use fictitious means of service of process, like the *remise au parquet*.

If the foreign plaintiff is resident in 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, the 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 or her rights before a court and the reasonable opportunity for the defendant to defend himself or herself is more difficult to achieve. It depends on balanced and proportionate legislative provisions on the international jurisdiction to adjudicate. As has already been mentioned, this balancing must leave space for a "judicial correction" based on fairness and reasonableness derived from the guarantee of fair trial — of unfair results that can be determined in the particular case by the application of general rules on jurisdiction to adjudicate.

3. Jurisdiction

The determination of the judicial jurisdiction of courts is the "cornerstone" of any international litigation. It represents a central aspect of the guarantee of fair trial in transnational litigation. As has already been mentioned, the exercise of judicial jurisdiction is traditionally considered to be an aspect of sovereignty. Within its own sphere of sovereignty, the stare would be free to determine the conditions and limitations of the adjudicatory authority of its courts, with the exception of obligations created through international treaties. This freedom would not be limited by rules of general international law or by Art. 6 ECHR for the Contracting States.¹¹⁵

However, I think that this argument can be overcome by the progressive erosion of the reserved domain (domestic jurisdiction), as has already occurred in relation to the

¹¹² The action the plaintiff has brought before the court should have a "substantial connection" with the State. See Ali/Unidroit Principles, 2.1.2.

¹¹³ See, example, the Hague Convention of 25 October 1980 on International Access to Justice.

¹¹⁴ Ali/Unidroit. Principles, 3.3.

¹¹⁵ H. Schack. 2010, p. 80.

protection of human rights. Fair trial is a guarantee that tends to be implemented universally: 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" arise from the fair trial 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 recognized, 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.

Despite the differences between legal systems, there are some elements that are widely accepted at a global level that reflect a common core of the fair trial guarantee. The first one is the parties' power to establish the international jurisdiction of a court by agreement. Furthermore, 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.¹¹⁶ 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 legal entity has received its charter of organization 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*).¹¹⁷

4. Interim Protection of Rights

The interim protection of rights is an indispensable tool for ensuring the effectiveness of judicial remedies and is therefore one of the fundamental features of a fair trial.¹¹⁸ The structure of the proceedings, the types of provisional remedies and their executions vary among different legal orders. With regard to the type of measures, the provision of Art. 8.1 Ali/Unidroit Principles is very broad: "The court may grant provisional relief when necessary to preserve the ability to grant effective relief by

¹¹⁶ However, this ground of jurisdiction is likely to produce exorbitant results in particular situations, a. P. Schlosser. 1991. p. 6, on *Worldwide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

¹¹⁷ See Ali/Unidroit Principles. 2.1.2. R. Stümer. 2005. p. 217.

¹¹⁸ See N. Traker, 2009, p. 48.

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.¹¹⁹

It is widely recognized 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.¹²⁰ In civil law systems, this solution is seen as supporting the parties in the dispute, and not just to support the court which has jurisdiction over the merits.¹²¹ In this regard, both Art. 24 Brussels Conv. and now Art. 31 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. 44/2001.¹²²

5. Right to Engage a Lawyer

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.¹²³ In the United States it is worth mentioning the Pro Hac Vice Admission.¹²⁴ In the European Union it is worth mentioning both the Directive to facilitate the effective exercise by lawyers of

¹¹⁹ See M. Storme (ed.), 1994, p. 106; R. Starner, 2003, p. 143-186; C., Tarzia, 1985.

¹²⁰ 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".

¹²¹ Sec N. Tracker. 2011, p. 49.

¹²² 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".

¹²³ See Ali/Unidroit Principles, 4.1. R. Stürner. 2005, p. 253; Id., 2011, p. 253. p. 256.

¹²⁴ See The Model Rule on Pro Hac Vice Admission ache ABA, Report of the Commission on Multijurisdictional Practice (2002). Recommendation 6.

freedom to provide services,¹²⁵ 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.¹²⁶

6. Language

A common difficulty faced by the Foreign party participating in the proceedings is the need to act and defend himself or herself before a court in a language other than his or her mother-tongue. This problem should be neither underestimated, nor can it be considered as being 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 has to be translated into the language of the habitual residence of the defendant, of the principal place of business of the latter, or of the principal documents in the transaction.¹²⁷ Within the European Union, Art. 8 of EC Regulation no. 1393 (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.¹²⁸

The language problem cannot be resolved by the appointment of a lawyer from the Forum State. This problem is rather displaced towards 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 present, but are exacerbated when the language of the *lex caustica* is different from the language of the *lex fori*.

¹²⁵ See the Council Directive 77/249/EEC (1977). Art. 4: "Activities relating to the re-presentation 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".

¹²⁶ See the Directive 9815/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). Moreover, see the Council Directive 89/48/EEC (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.

¹²⁷ Ali/Unidroit, Principles, 5.2.

¹²⁸ See EQ. 8 May 2008, C-14107, Weiss c Partner: ECJ, 8 November 2005, C-443103. Leffler.

The close relationship between law and language calls for special care in the work of translation and interpretation of legal texts especially when they serve a judicial function. Problems can be solved only if the link between the *lex fori* and the language of the Forum is made more flexible, as happens in the practice of international arbitration. International arbitration allows for 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.

Strict rules on the use of the language of the forum are very often exploited, requiring the translation of documents and interpreters for witnesses even in cases where the parties and their advocates can understand the language of the documents and of the witness statements. Faced with such an abuse of process and while waiting for the legislation to be made more flexible, a provisional solution may be to refuse to declare null and void an act written in a foreign language in the case where it has served its purpose,¹²⁹ and 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 this does not prejudice the position of the parties. It also provides for the use of interpreters when the party or the witness has not mastered the language in which the proceedings take place. The translation of voluminous documents may be limited to relevant pieces by agreement of the parties or by order of the court.¹³⁰

It cannot be denied that in some cases when translations are bad, they are "a cure worse than the disease". If it is a translation of a legal text the clash between different cultures (always present in translation work) is manifested as a clash between the two legal systems that constitute the start and end 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 firstly grasping the meaning of the terms, not only by reference to the legal nature of the language but also in the specific context of the legal order of origin and secondly identifying the terms that express the equivalent meaning in the terminology and the legal order of arrival. One faces the double and parallel work of

¹²⁹ See Art. 156 (3) IT c.p.c.: "the nullity shall not be declared if the act served its purpose".

¹³⁰ Ali/Unidroit Principles. 6.

interpretation. Since no two legal systems are identical, the search for the legally equivalent meaning is always doomed to achieve only a rough result and sometimes it is doomed to failure.¹³¹

7. Extension of Time Limits

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 should be provided for Foreign parties by law or, where possible, by courts.¹³² The judge must fix the timetable of the proceedings, taking into account the needs of the foreign party in particular.¹³³

8. Prohibition of Abuse of Process

The question of the abuse of process and its prohibition plays an important role in transnational litigation as an element of the fair trial guarantee. Beyond specific provisions the prohibition of abuse of process also acts as a general principle to prohibit conducts that is motivated solely by a desire to cause harm to others, despite the fact that such conduct is formally carried out in a legally correct manner. In the field of transnational litigation the problem of the abuse of process arises in several situations, and it is usually) dealt with on a case-by-case basis taking into account the individual circumstances of the proceedings in question. One could pose the question of the legal basis of such a prohibition on the abuse of process. Generally, the prohibition of abuse of process in transnational litigation can be considered as an aspect of the prohibition of abuse of right: as a general principle stemming from international customary law,¹³⁴ or, in Europe, as a general principle of European Union law.¹³⁵ Otherwise, we have to rely on particular remedies under international conventions or under the *lex fori*.

An analysis of the fair trial guarantee provides the opportunity to address the prohibition of abuse of process in transnational litigation and to identify the need to develop a specific normative framework for the regulation of this phenomenon. In

¹³¹ For more details, see R. Caponi. 2006.

¹³² Ali/Unidroit Principles. 3.2,7.2. 14.1; see R. Starner. 2011. p. 256.

¹³³ See P. Sürtnner, 2011, p. 356.

¹³⁴ See Y. Shany, 2007, p. 292.

¹³⁵ See Art. 54 Charter of Fundamental Rights of European Union.

this context we shall identify only some elements of this proposal, with no claim of comprehensiveness.

9. Abuse of Jurisdiction by the Plaintiff

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 the procedural or substantive law offered by the Forum State.¹³⁶

A relevant case decided by the German *Reichsgericht* concerns a husband who, after failing for divorce in vain several times before the German courts, moved to Latvia and there submitted divorce papers. 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 damage.¹³⁷ In other words, instituting proceedings before a foreign court (although vested with jurisdiction) in order to avoid the application of (German) substantive law was qualified as an unlawful act.¹³⁸

In particular, exorbitant for are those 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 the defendant's (personal) property that the plaintiff had brought to Germany against the will of the latter.¹³⁹ 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 from the jurisdiction of the court which would be competent in his case.¹⁴⁰

¹³⁶ See H. Schack. 2011. p. 192.

¹³⁷ See RGZ 157, 136, which refers also to § 249 I BGB.

¹³⁸ See H. Schack, 2011. p. 193.

¹³⁹ See § 23 ZPO. See H. Schack, 2011, p. 193

¹⁴⁰ See Art. 6(2) Reg. EC No. 44/2001.

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 provide for antisuit injunctions.

10. Public Policy Exception

At this point it is appropriate to consider the public policy defence as an impediment to the 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.¹⁴¹ Since sovereignty is exercised over a particular territory, the effects of judicial decisions are limited to the boundaries of the state.¹⁴² They produce effects in the legal system of another state with the consent of the latter, i.e. recognition.¹⁴³ Presuppositions and conditions for recognition are the result of approval by the receiving state which, in principle, does not face 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 recognized and enforced.¹⁴⁴

The considerable variation between procedural systems of different countries, within the western world, and the different values that emerge from the substantive law at the global level, have weighed in favour of the preservation of the public defence (*ordre public*) in order to prevent the recognition and enforcement of judgments.

¹⁴¹ F. Mann, 1964.

¹⁴² "No legal judgment has any effect, of its own Force, beyond the limits of the sovereignty from which its authority is derived", so *Yahoo! Inc. v. La Ligne Contre Le Racisme et l'Antisemitisme*, 169 F. Stipp. 2d 1181, 1187 (N.D. Cal. 2001), quoted by N. Tröcker. 2010. p. 26.

¹⁴³ For a brief outline, see A. F. Lowenfeld, 2006, p. 471.

¹⁴⁴ See N. Tröcker, 2010. p. 26.

This general clause has two components: a substantive and a procedural one. It concerns the respect of fundamental substantive or procedural values. On leave aside the substantive law aspect, the link between the public policy defence the fair trial guarantee becomes apparent.¹⁴⁵ If the proceedings in the Forum State sufficiently respectful of the guarantees of fair trial, there is no scope for the application of the public policy defence in its procedural aspect.

Alongside the substantive aspect of the public policy defence, its procedural de should be maintained as a sort of "emergency brake"¹⁴⁶ to be activated in except circumstances. This restrictive interpretative approach is found, in particular, in the law of the European Court of Justice. It is one of the expressions of solidarity bet the interest of the European Union for the proper Functioning of the internal m and the individual interest of the creditor. The leading case is *Krombach*.¹⁴⁷

The solution is well balanced: the public policy provision is a clause set to protect fundamental boundaries¹⁴⁸ of the national identities of the Member States inheriting their fundamental political and constitutional structures.¹⁴⁹ It is therefore advisable initially leave it to Member States to determine, in accordance with their own national concepts, aspects of their public policy.¹⁵⁰ However, to fully entrust the identification of the key elements of national identity of a "reserved domain" of Member State petence would "plant the seed" of the dissolution of the European Union. And it this does not happen: respect for the national identities of the Member States is part of the competences of the European Union.¹⁵¹ The European Court of

¹⁴⁵ The link is evident in the definition oldie 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) *Grundgesz*."

¹⁴⁶ See Ali/Unidroit Principles of Transnational Civil Procedure, 30: "A final judgment awarded in any 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".

¹⁴⁷ Eq. 28 Mardi 2000, C-7/98, *Krombach c. Bamberski*

¹⁴⁸ See Weiler. 1999. p. 102.

¹⁴⁹ Art. 4 (2) TEU: "The Union shall respect the equality of Member States before the Treaties as their national identities, inherent in their fundamental structures, political and constitutional.

¹⁵⁰ EC.1. 28 March 2000. C-7/98, *Krombach c. Ramberski*. para 22.

¹⁵¹ Art. 4, II TEU.

Justice is them entrusted with the task of ensuring the respect for the law in the interpretation an application of the treaties.¹⁵²

The determination of the content and limits of the concept of public policy is placed in a framework of a process of mutual learning between the Court of Justice and courts of the Member States. This is implemented through a dialogue seeking the solution, tailored to the specific case at hand, and achieved through the preliminary ruling system.¹⁵³

Respect for the essential content of the debtor's right of defence is at stake in this judicial dialogue.¹⁵⁴ Who has the final word on whether the decision violates a Fundamental principle of the Member State or not? Is it the national court that is called upon to identify the content of the notion of public policy? Or is it the Court of Justice that is called upon to identify the limits of the same notion? In a flexible manner and on a case-by-case basis, the Court of Justice has been inclined to define the limits of the notion of public policy itself or, after referring to "the general criteria with regard to which the national court must carry out its assessment,¹⁵⁵ to entrust the national courts with this task.

¹⁵² Art. 19 TEU.

¹⁵³ E. 28 March 2000. C-7198, 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 purpose of refusing recognition to a judgment emanating from a court in another Contracting State".

¹⁵⁴ Eq. 28 March 2000. C-7198, 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 recognized as being Fundamental within that legal order". See also Eq. 2 May 2006, C-341104, Eurofood.

¹⁵⁵ Cosi, ECJ, 2 April 2009. C-394/07, Gambazzi, no. 39.