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The Community Legal Instruments and their Impact on the Individual's Access to Civil Justice[1]

I. The present state of affairs of European Procedural Law

One decade after the entry into force of the Amsterdam Treaty, the European procedural landscape has changed considerably: In 1999, the Brussels Convention was the only operating legal instrument in the area of European Procedural Law. Today, more than 12 legal instruments – covering a wide range of issues such as insolvency, legal kidnapping of children, mediation and cross-border small claims – ensure that European Citizens obtain swift and efficient access to justice. Accordingly, the EU-Commission praised the "significant progress" in the field of judicial cooperation in civil matters in its recent Communication on the Implementation of the Hague Program.[2]

Unfortunately, this progress is not entirely reflected in practice. Only a considerably small number of the cases that are dealt with by the civil courts of the Member States concern cross border situations: The Heidelberg Report shows that the Regulation. Brussels I is being applied in only 1 – 1,5% of all civil proceedings in

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[1] (Preliminary version). Speech presented at a conference on Access to Justice in the European Union, organised by the Swedish Presidency, Stockholm, 7/22/2009.

[2] Communication of the EC Commission of June 6, 2009: Evaluation of the Hague Programme and Action Plan, COM (2009)263final, p. 11.

the Member States. Thus, there is a clear disparity between the number of cross border transactions (up to 30% in the Internal Market) and the number of cross border litigation.[3] Statistics obtained from other community instruments demonstrate similar figures: Not much case law has been reported as to the application of the European Enforcement Order. With regard to the new Regulation on Order for Payments, I have heard that the District Court in Berlin Wedding which is the competent court for all applications regarding this instrument in Germany, has dealt with approximately 500 cases from January to June 2009.[4] Compare this with the total number of applications for payment orders in Germany of about 8 million per year. These examples illustrate that cross border litigation is still an exception, not the rule in the European Judicial Area.

The main hurdles that private litigants must overcome in cross border disputes are: firstly, legal uncertainty (in terms of the applicable law and, accordingly, the outcome of the litigation); secondly, the lack of transparent proceedings in foreign courts (including enforcement and costs); and, thirdly, language barriers. Currently, many valid claims are not enforced. Creditors simply write them off.[5]

However, the European instruments directly address and resolve many of the difficulties private litigants face in cross border disputes. They provide for a coordination of national proceedings (Brussels I). They even establish specific European proceedings based on standardised forms, thereby helping to overcome language barriers and legal uncertainty by providing a uniform procedure to be applied identically in all Member States (Orders for Payment; Small Claims).[6]

Yet, further legislative action of the Community is necessary. The current legislative instruments do not address the issue of enforcement of the title, which still depends on (diverging) national laws. Until the Community does not resolve these matters, the working instruments cannot guarantee full protection of the creditor and the debtor.

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[3] *Hess/Pfeiffer/Schlosser*, The Regulation Brussels I – Report on its Application in 25 Member States, 2008, paras. 39 ss.

[4] Figures obtained from the Senator of Justice (Berlin) in July 2009.

[5] *Hess*, Europäisches Zivilprozessrecht (2009), § 1, paras 12 et seq.

[6] Different methodological approaches of the European legislator are described by *Hess*, Europäisches Zivilprozessrecht (2009), § 3 IV, paras 47 et seq.

II. Fragmentation and lack of transparency

Currently, litigants in Europe can choose between various legal instruments for the cross border recovery of debts: The Regulation Brussel I, the European Enforcement Order [for Uncontested Claims], the European Payment Order, the Small Claims Procedure and, shortly, the Maintenance Order.

The limited number of international cases in civil courts which I mentioned earlier is also due to the fact that most litigants and courts are not familiar with cross border recovery. Moreover, the procedures established by the legal instruments are very specific and therefore often unknown to the parties and the courts. This fragmentation of European procedural law causes difficulties in practice. Litigants struggle to determine the pertinent procedure. This lack of knowledge must be remedied through the training and education of lawyers and judges alike. In this context, the European Judicial Atlas has been very helpful, although it is still not sufficiently known by the legal practice.

The transparency of European procedural law depends to a large extent on the Member States: Member States must implement the European legal instruments in a way which facilitates litigants' knowledge of and access to the adequate instrument. In particular, Member States should regulate the interfaces between European and their domestic procedural laws. Also, they should designate all matters relating to the application of the European procedural instruments to specialised and experienced courts. The Regulation Brussels I, for instance, supports such an approach in its Annex II by obliging the Member States to determine competent courts for the exequatur proceedings. Many Member States designated as competent courts where exequatur proceedings are already concentrated. An example for successful implementation of European procedural laws by a national legislator is Germany. The German legislator inserted a new "book" (chapter) in the German Code of Civil Procedure containing all implementation legislation on European procedural law. Accordingly, litigants automatically use the relevant Community instrument when they refer to their own

national code. In this case, transparency of and access to European procedural law is established and supported by national legislation.[7]

III. The role of Regulation Brussels I in European Procedural Law

The significance of Regulation Brussels I is changing. On the one hand, it has been supplemented by specialised instruments. On the other hand, it remains the most important instrument in the area of European procedural law. The significance of the Regulation has even increased as it is used as the reference instrument for the interpretation of other European procedural instruments. In this respect, the case law of the ECJ is of considerable importance.

At present, it does not seem to be necessary to replace the Regulation Brussels I by a completely new instrument (for example a European Code of Conflict of Laws). However, the Community legislature should avoid replacing the Regulation Brussels I by parallel instruments with an identical wording (e.g. the Maintenance Regulation). This method may lead to diverging procedural instruments when Regulation Brussels I is reformed while parallel instruments remain unchanged.

IV. Mutual trust and mutual recognition

Mutual recognition is considered the cornerstone of judicial cooperation in European procedural law. The Council and the Commission seek to abolish all exequatur proceedings. Such proceedings are considered interim proceedings which entail additional costs and cause unnecessary delay. However, the Heidelberg Report showed that exequatur proceedings under Articles 38 and 43 JR are efficient. More than 90% of all judgments are recognized and enforced without any review in the Member State of enforcement. Recently, Eva Storskrubb analysed the concept of mutual recognition in her study on Civil Procedure and EU Law. She found that the “abolition of exequatur proceedings has raised widespread concern in the Member States.”[8]

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[7] See sections 1068 et seq. óf the German Code of Civil Procedure (providing for a new “book” (chapter) of the Code).

[8] *Storskrubb*, Civil Procedure and EU Law (2008), p. 307 ff.

The EC-Commission's Report on the Application of Brussels I further stresses the need to replace exequatur proceedings by functional safeguards.[9] The Heidelberg Report proposes to further simplify the proceedings under the Regulation Brussels I by introducing a binding standard form.[10] However, litigants in Europe should be granted access to a court of last resort in the Member State of enforcement in extraordinary cases. The recent case law of the ECJ in *Gambazzi* and in *Apostolides* demonstrates that there still is a need for a limited review (public policy) in extraordinary situations.[11] Nevertheless, such extraordinary review in the Member State of enforcement should be based on clear Community law provisions. A simple reference to the domestic laws of the Member States (as provided for by the Maintenance Regulation) gives rise to fragmentation and lack of transparency.

V. The future of Regulation Brussels I

Finally, I would like to address the prospects of Regulation Brussels I. The Green Paper on the Regulation demonstrates that the basic structure of this successful instrument should not be changed.

In my view, the following improvements seem necessary.

Firstly, the Regulation should address the interfaces with parallel instruments such as the New York Convention on International Commercial Arbitration. However, this matter should not be regulated entirely. Legislative action should be limited to the mentioned interfaces and the overcoming of the negative effects caused by the *West Tankers* decision of the ECJ.[12]

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[9] COM (2009)174final

[10] *Hess/Pfeiffer/Schlosser*, The Regulation Brussels I – Report on its Application in 25 Member States, 2008, para395 et seq.

[11] ECJ, 4.2.2009, case C-394/07, *Marco Gambazzi./.DaimlerChrysler Canada Inc., CIBC Mellon Trust Company,* ECR 2009 I-, paras 40 et seq. ECJ, 4.28.2009, case C-420/07, *Apostolides./.Orams,* ECR. 2009 I-, para. 55, commented by *Hess*, Europäisches Zivilprozessrecht (2009), § 3 I, para. 28 et seq.

[12] ECJ, 2.28.2009, case . C-185/07, *Allianz SpA, Generali Assicurazioni Generali SpA./.West Tankers Inc.; Hess/Pfeiffer/Schlosser*, The Regulation Brussels I – Report on its Application in 25 Member States, 2008, paras 105 – 137; *Schlosser*, SchiedsVZ 2009, 129 et seq; *Steinbück/Illmer,* SchiedsVZ 2009, 188 et seq..

Secondly, the present situation concerning choice of court agreements should be improved. The competent courts should be granted priority to decide on the validity of the clause. In this respect, the Regulation should be basically aligned with the Hague Choice of Court Convention. In addition, it seems to be feasible to adopt a regime where the designated court (by an exclusive agreement) shall have (exclusive) jurisdiction to decide on the validity of the clause even when this court has been seized later than other courts of EC Member States.[13]

Thirdly, the operation of the Regulation in the international field should be enhanced. The rules on jurisdiction should also apply when the defendant is domiciled in a third state. In addition, harmonised subsidiary jurisdiction rules should be inserted to protect parties which cannot obtain adequate legal protection in third States. In this context, the Regulation should also address the recognition of third State judgments.

Fourthly, the Regulation should address provisional and protective measures comprehensively. It should provide for the basic definitions. Also, the court of the main proceedings should have the power to modify and even to set aside supportive relief given by courts of other Member States. As a matter of principle, the Regulation should oblige courts to cooperate closely when granting provisional relief.[14]

Coming to the end of this intervention, I would like to address the further prospect of European Procedural Law under the Stockholm program. I fully agree with the basic contention that the existing instruments must be evaluated and improved. However, I believe that additional legislative action is required in the following areas:

- the Community should adopt an instrument on the provisional attachment of bank accounts;[15]
- the Community should improve the Insolvency Regulation;

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[13] *Hess*, Europäisches Zivilprozessrecht (2009), § 6 III, paras 165 et seq.

[14] *Hess/Pfeiffer/Schlosser*, The Brussels I Regulation, paras 731 et seq.

[15] Green Paper of 10/24/2006 on the efficient enforcement of judgments in the European Union: provisional attachment of bank accounts, COM (2006) 618 final.; *Hess*, Europäisches Zivilprozessrecht, § 10 VII, paras 155 et seq.

- and lastly, the Community should adopt a specific instrument for transnational commercial litigation – similar to the small claims procedure – which shall provide for flexible and accelerated proceedings in commercial matters.