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INTERNATIONAL PRIVATE AND PROCEDURAL LAW

The public policy proviso in European civil procedural law*

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I. Status quo of European civil procedural law

Although European civil procedural law was initially based on conventions,[1] secondary Community legislation in the form of regulations has come to dominate this area of law over the years. This development was triggered by the new legislative powers given to the Council by the Treaty of Amsterdam in Article 61(c) in combination with Article 65 EC Treaty, and which was retained in the Treaty of Nice[2] in a slightly amended version. This provision which was enshrined in primary Community law by the Treaty of Amsterdam allows for the passing of measures to harmonise international procedural law. Since then various legal instruments by the Community have been based on this newly established legal competence.

One of those legal instruments is the Brussels I Regulation.[3] Pursuant to Article 76 of the Brussels I Regulation, this secondary legal instrument came into force on 1 March 2002 in the whole of the Internal Market, except for Denmark. The Regulation replaces in its temporal, territorial and material scope of application the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.[4] The original version of this 'convention double' dates from 1968 and not only contains a catalogue of different jurisdictions, but also provides for uniform principles applicable to declarations on recognition and enforceability (*"Anerkennung und Vollstreckbarerklärungen"*) of executory titles from other signatory states. With the Brussels Convention the fundamental rules on European civil procedural law were laid down and it served as a precedent for the Lugano Convention,[5] a convention concluded in parallel to the Brussels Convention.

II. Scope of Article 34(1) of the Brussels I Regulation

1. Manifest breach of fundamental principles

Sedes materiae of the public policy proviso is Article 34(1) of the Brussels I Regulation ('ordre public attenué'). A similar provision is contained in Article 27(1) of the Brussels Convention. Pursuant to this provision, a judgment will not be recognised if it is contrary to national public policy. The public policy proviso breaks with the principle of the free movement of executory titles in the Internal Market. The report by *Jenard*[6] therefore points out correctly that this measure should only be resorted to in exceptional cases. This opinion may not only be found in legal literature,[7] but also the courts[8] in the signatory states have in the past been reluctant to use this measure of last resort.

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1 Regarding this development: *Junker*, FS Sonnenberger 2004, at 417, 422 *et seq*.

2 OJ 2001, C 80, at 1.

3 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001, L 12, at 1).

4 Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (German Federal Law Gazette II 1972, at 774).

5 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1988, L 319, at 9).

6 *Jenard*, Report on the Convention (OJ 1979, C 59), regarding Article 26 of the Brussels Convention.

7 Regarding the interpretation of Article 27(1) of the Brussels Convention: *Scholz*, Das Problem der autonomen Auslegung des EuGVÜ, 1998, at 51 *et seqq.*; *Völker*, Zur Dogmatik des ordre public, 1998, at 288 *et seqq.*; on this subject *Gebauer*, RabelsZ 2001, 342 *et seqq.*

8 In this context, see the decisions of the German Federal Court of Justice in civil matters (*Entscheidungen des Bundesgerichtshofes in Zivilsachen,"BGHZ"*) 140, 395 = JR 1999, 371 annotated by *Staudinger*: JZ 1999, 1117 annotated by *H. Roth*, 1119; IPRax 1999, 371 annotated by *Schulze*, 342 = *Dörner*, LM Article 27(1) of the Brussels Convention para. 58; the same author, FS Sandrock 2000, at 205 *et seqq.*; *Pfeiffer*, WuB II B Article 27 of the Brussels Convention 1.99; for the analysis of the judicial decisions of the German Federal Court of Justice (*Bundesgerichtshof, "BGB"*): *Stürner*, in: *Canaris et.al.* (eds.), 50 Jahre BGH – Festgabe aus der Wissenschaft, Volume III, at 677 *et seqq.*

However, the requirement that there must be a "manifest" breach of public policy was not included in the Brussels Convention. Such a requirement may for example be found in the Rome Convention on the law applicable to contractual obligations,[9] which is a convention concluded in parallel to the Brussels Convention. Pursuant to domestic German law in Section 328(1)(4) as well as Section 1044(2)(2) of the German Civil Procedural Code[10] (old version), there needs to be a "manifest" breach of public policy. In any case, the German Federal Supreme Court[11] (*Bundesgerichtshof, "BGH"*) borrowed in its decision on suretyships (*"Bürgschaftsentscheidung"*) from Section 328(1)(4) of the German Civil Procedural Code the criteria that there has to be a "manifest" breach and applied it to Article 27(1) of the Brussels Convention. This narrow approach may also be observed in recent decisions of the European Court of Justice (ECJ). In both cases *Krombach*[12] and *Renault SA*[13] the ECJ pointed out that Article 27(1) of the Brussels Convention required a "manifest" breach of public policy.

During the preparation of the Community instrument, the Commission already argued at the end of 1997[14] to abolish altogether the public policy proviso, a measure which was met with objections. Some academics considered such a measure to be generally the wrong approach[15] or in any case argued that it was too early at that point.[16] Contrary to its first attempt at reforming the provision containing the proviso, the Commission did not amend the provision in the proposal[17] which it made at a later stage. Here, at least according to the wording of the provision,[18] the prerequisites for the application of the proviso were raised in accordance with the proposal of the working group.[19] At present the recognition of an executory title has to be a "manifest" breach of the public policy of the second member state.[20] In addition, it appears that beyond the scope of application of the Brussels I Regulation there exists a similar requirement in other secondary legislation. This for example applies to Article 22(a) as well as to Article 23(a) of the Brussels IIa Regulation.[21] Similarly, Article 26 of the Regulation on insolvency proceedings requires a "manifest" breach of fundamental views held by the second member state.[22]

With regard to the Brussels I Regulation it therefore has to be noted that the public policy proviso may only be used in exceptional cases that are closely defined. So far the courts of the member states have used the proviso only in very few cases,[23] a trend which in view of the amended wording might actually be reinforced.[24]

2. Restricting effect of Community law

Each member state decides which rules of its respective *lex fori* belong to the fundamental principles and which are therefore to be considered part of its national public policy. However, since Article 34(1) of the Brussels I Regulation restricts the free movement of executory titles and therefore has to be interpreted narrowly,[25] the ECJ watches over the courts in the various member states so that they do not use the public policy proviso as grounds for refusing the recognition of an executory title in contravention of the overriding Community law.[26] Therefore the ECJ is obliged to set limits to ensure that the system of rules and exceptions laid down in the Brussels I Regulation is not thwarted by an inflationary use of the public policy proviso.

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9 Rome Convention of 19 June 1980 on the law applicable to contractual obligations (German Federal Law Gazette II 1980, at 812) in the version of the third Accession Convention of 29 November 1996, German Federal Law Gazette II 1999, at 7; see the consolidated version of the Convention based on the third Accession Convention (OJ 1998, C 27, at 34); see Article 16 of the Rome Convention; regarding German law see Article 6(1) of the Introductory Law of the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch, "EGBGB"*).

10 In contrast Section 1059(2)(2)(b) of the German Code of Civil Procedure (*Zivilprozessordnung, "ZPO"*); on this subject BT-Drucks. 13/5274, at 59. Despite the different wording, in the legal literature the term 'public policy' ('*ordre public*') is interpreted in accordance with Section 328(1)(4) of the German Code of Civil Procedure: *Thomas/Reichold*, in: *Thomas/Putzo*, Zivilprozessordnung, 26th edition 2004, Section 1059 of the German Code of Civil Procedure para. 16.

11 Decisions of the German Federal Court of Justice in civil matters 140, 395, 397.

12 ECJ 28 March 2000 – C- 7/98 – *Krombach/Bamberski*, ECR 2000, I-1935, JZ 2000, 723, 724 para. 37 annotated by *von Bar*, 725 = ZIP 2000, 859, 862 No 37 annotated by *Geimer*, 863 = EWiR 2000, 441 annotated by *Hau* = IPRax 2000, 406 annotated by *Piekenbrock*, 364; referred to the German Federal Court of Justice on 4 December 1997, IPRax 1998, 205 annotated by *Piekenbrock*, 177; on this subject also *Leipold,* FS Stoll 2001, at 625, 642 *et seq.*; the final decision of the German Federal Court of Justice is printed in ZIP 2000, 1595 = JZ 2000, 1067 annotated by *Gross*; regarding the decision of the European Court of Human Rights in *Krombach* (NJW 2001, 2387): *Gundel*, NJW 2001, 2380 *et seqq.*; regarding the decisions of the ECJ and the European Court of Human Rights: *Matscher*, IPRax 2001, 428 *et seqq.*

13 ECJ 11 May 2000 – C-38/98 – *Régie nationale des usines Renault SA/Maxicar SpA*, ECR 2000, I-2973, IPRax 2001, 328 *et seqq.* = NJW 2000, 2185 *et seq.*; on this subject *Heß*, IPRax 2001, 301 *et seqq.*

14 OJ 1998, C 33.

15 *Bruns*, JZ 1999, 278, 284 *et seqq.*; critical view also by *Stadler*, in: *Gottwald* (ed.), Revision des EuGVÜ – Neues Schiedsverfahrensrecht, 2000, at 37, 43 *et seqq.*

16 *Kropholler,* Europäisches Zivilprozessrecht, 6th edition 1998, Article 27 of the Brussels Convention para. 2.

17 COM (99) 348 final, Council document 10742/99 = BR-Drucks. 534/99.

18 For the rationale behind this "more narrow wording" see: BR-Drucks. 534/99, at 23.

19 The proposal is printed in: *Gottwald* (ed.), Revision des EuGVÜ (*supra* note 15) at 73; also contained therein the synopsis "Gegenwärtige Fassung des EuGVÜ", "Vorschlag der EU-Kommssion Dez. 1997" as well as "Vorschlag der Arbeitsgruppe Febr. 1999", at 66 *et seq.*

20 The following author sees this as a confirmation of the narrow view taken so far: *Kropholler*, Europäisches Zivilprozessrecht, 7th edition 2002, Article 57 of the Brussels I Regulation para. 13.

21 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003, L 338, at 1).

22 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000, L 160, at 1).

23 To dispense with this proviso in the long-term is conceivable by: *Leipold*, FS Stoll 2001, at 625, 644 *et seq.*

24 *Zöller/Geimer,* Zivilprozessordnung, 24th edition 2004, Article 1 of the Brussels I Regulation para. 12; Article 34 of the Brussels I Regulation para. 7; the following author considers this to be a tightening measure with a purely cosmetic character: *Junker*, RIW 2002, 569, 576; *Stadler*, in: *Gottwald* (ed.), Revision des EuGVÜ (*supra* note 15) at 37, 46; similar view by *Hüßtege*, in: *Thomas/Putzo* (*supra* note 10) Article 34 of the Brussels I Regulation para. 2; *Rauscher/Leible*, Europäisches Zivilprozessrecht, 2004, Article 34 of the Brussels I Regulation para. 9; *Linke*, Internationales Zivilprozessrecht, 3rd edition 2001, para. 424; *R. Wagner*, IPRax 2002, 75, 82.

25 For references on the decisions of the ECJ see *Rauscher/Leible* (*supra* note 24) Article 34 of the Brussels I Regulation para. 2, 9.

26 For references on the decisions of the ECJ see *Rauscher/Leible* (*supra* note 24) Article 34 of the Brussels I Regulation para. 5.

3. National connecting factor as qualifying criteria

Similar to the conflict of laws rule contained in Article 16 of the Rome Convention on the law applicable to contractual obligations and respectively in Article 6 of the Introductory Law of the German Civil Code, the proviso contained in Article 34(1) of the Brussels I Regulation is qualified by the unwritten characteristic of a sufficiently close national connection when examining how the decision was reached by the first member state.[27] The closer the spatial connection of the facts of the case are to the territory of the recognising member state, the more it seems justified that the fundamental principles of this member state are to prevail in the exequatur proceedings.

4. Public policy in procedural law

Article 34(1) of the Brussels I Regulation is the provision that defines the effect of public policy on procedural law. This Article is of great practical relevance. For example, it can be argued that the principle of a fair trial also enshrined in Article 6 of the European Convention of Human Rights[28] (ECHR) has been infringed.[29] In addition, "anti-suit injunctions" may not be recognised, as this would definitely interfere with the jurisdiction of a court in another EU member state, and which would be completely contradictory to the rationale of the Brussels Convention and the Brussels I Regulation.[30]

a) Relationship to Article 34(2) of the Brussels I Regulation

Article 34(2) of the Brussels I Regulation applies to a particular group of cases where the facts of the case are such that the "principle of a fair trial" was also infringed in the first member state. In case a court disregarded the mandatory principle of the right to be heard before the court during the opening proceedings and as a result Article 34(2) of the Brussels I Regulation applies, Article 34(1) of the Brussels I Regulation becomes subsidiary and is no longer applicable.[31]

b) Precluding the public policy proviso

According to the prevailing view,[32] the judgment debtor may not rely on the public policy proviso, if he did not object to the decision in the first member state using (extra)ordinary legal remedies. Therefore the debtor is under an obligation to engage in litigation in the member state of origin.

5. Public policy in substantive law

a) Infringement of national substantive law and Community law

Firstly, part of the substantive law on public policy consists of provisions which have their origin in the national law of the second member state. For example, the basic principles of the rules on legal fees such as the prohibition in Germany, pursuant to Section 49b(2) Sentence 2 of the German Federal Code for Lawyers (*Bundesrechtsanwaltsordnung, "BRAO"*), to agree a contingency fee,[33] may prevent a decision from another member state to be recognised.

Provisions that have their origin in Community law are also subject to public policy.[34] In the decision *Eco Swiss* the ECJ[35] considered the violation of competition law rules of the EC Treaty, in particular that of Article 81 EC Treaty, as a breach of public policy. This was the case regardless of whether or not the forum state considered the infringement of national competition law to be in principle contrary to national public policy. Article 81 EC Treaty constituted a "fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market".[36] This resulted from Article 3(g) EC Treaty, pursuant to which the task of the Community is to reduce the distortion of competition. The paramount significance of Article 81 EC Treaty could be inferred from Article 81(2) EC Treaty.[37] In the latter provision, the EC Treaty determined "explicitly" that prohibited agreements and decisions were void.

From the decision in *Eco Swiss* it could incorrectly be concluded that Community law was automatically part of the public policy of the forum state, irrespective of its primary and secondary legal nature. The proceedings in *Eco Swiss*, however, concerned Article 81 EC Treaty which is a rule of primary Community law and which is directly applicable in accordance with the judicial decisions of the ECJ.[38] In addi-

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27 For details on the current state of the scholarly discussion: *Geimer/Schütze*, Europäisches Zivilverfahrensrecht, 2nd edition 2004, Article 34 of the Brussels I Regulation para. 40.

28 German Federal Law Gazette II 1952, at 685, 953.

29 On this subject see details by *Rauscher/Leible* (*supra* note 24) Article 34 of the Brussels I Regulation para. 14 *et seq.*

30 ECJ 27 April 2004 – C-159/02 – *Turner/Grovit and others*, [2004] EuLF (E) 120, RIW 2004, 541 *et seqq.*; on this subject *Krause*, RIW 2004, 533 *et seqq.*; *Mankowski*, RIW 2004, 481, 497; the same conclusion was reached by *Rauscher/Leible* before the decision (*supra* note 24) Article 34 of the Brussels I Regulation para. 17 with further references; on the subject also *Collins*, FS Jayme 2004, at 142 *et seqq.*

31 On the subject *Rauscher/Leible* (*supra* note 24) Article 34 of the Brussels I Regulation para. 7 with further references.

32 For details on the current state of the scholarly discussion: *Rauscher/Leible* (*supra* note 24) Article 34 of the Brussels I Regulation para. 18; *Geimer/Schütze* (*supra* note 27) Article 34 of the Brussels I Regulation para. 30.

33 In this context please note the German Act on the modernisation of the law on court costs ("*Gesetz zur Modernisierung des Kostenrechts*"), German Federal Law Gazette I 2004, 718, 834. In this Act the "general prohibition of agreeing a contingency fee contained in Section 49b(2) Sentence 1 of the German Federal Code for Lawyers (*Bundesrechtsanwaltsordnung, "BRAO"*) shall be retained": BT-Drucks. 15/1971, at 232. On the subject of contingency fees in terms of international private law see recent decisions: German Federal Court of Justice, IPRax 2004/2005 with article by *Staudinger*; *Mankowski*, AnwBl 2004, 63 *et seq.*; the same author, RIW 2004, 481, 488; OLG Frankfurt a.M. (D), NJW-RR 2000, 1367 *et seqq.* = IPRax 2002, 399 *et seqq.*; on this subject *Jayme/Kohler*, IPRax 2001, 501, 512; *Krapfl*, IPRax 2002, 380 *et seqq.*; *Hohloch*, JuS 2001, 818 *et seq.*; *Obergfell*, K & R 2003, 118, 122.

34 Also see *Geimer/Schütze* (*supra* note 27) Article 34 of the Brussels I Regulation para. 44.

35 ECJ 1 June 1999 – C-126/97 – *Eco Swiss China Time Ltd/Benetton Int.*, ECR 1999, I-3055; on this subject *Kohler/Knapp*, ZEuP 2001, 116, 120 *et seq.*

36 ECJ 1 June 1999 – C-126/97 – *Eco Swiss China Time Ltd/Benetton Int.*, (*supra* note 35) para. 36.

37 ECJ 1 June 1999 – C-126/97 – *Eco Swiss China Time Ltd/Benetton Int.*, (*supra* note 35) para. 36.

38 See on this subject details by *Brinker* in: *Schwarze* (ed.), EU-Kommentar, 2000, Article 81 EC para. 1; ECJ 6 April 1962 – 13/61 – *De Geus/Bosch,* ECR 1962, 97.

tion to referring back to Article 3(g) EC Treaty, the ECJ points out in particular the sanction of invalidity contained in Article 81(2) EC Treaty, which has explicitly been included in this provision. Secondary legislation such as directives on the other hand requires legal implementation and therefore does not have a directly horizontal effect.[39] Accordingly, the basic principles of the decision in *Eco Swiss* cannot be applied to directives on consumer protection in such a way that all articles become central provisions of national public policy. When merely considering the measures that exist to harmonise the "European law on contractual obligations" listed by the Commission[40] in its communication, there is the danger that such an approach would lead to a complete erosion of the public policy proviso which functions as a measure of last resort. As a result the prohibition of the '*révision au fond*' would in effect be repealed in accordance with Community law standards.

The restrictive view advocated in this article is consistent with the latest judicial decision of the ECJ in *Renault*[41] which again concerned primary Community legislation. In this decision the ECJ clarified that a possible mistake in applying primary Community law did not *per se* require a more detailed examination in the exequatur proceedings. National and supranational law had to be treated the same in the context of Article 27(1) of the Brussels Convention (Article 34(1) of the Brussels I Regulation).[42] Also a different result would not be obtained when considering Article 10(1) EC Treaty, which established the principle that Community law has to be effective.[43]

b) Breaching basic principles of the conflict of laws rules

Article 27(4) of the Brussels Convention establishes specific grounds that allow for an executory title not to be recognised. It applies to cases where the first member state has decided on a preceding question ("*Vorfrage*") which refers to legal subject matters exempted under Article 1(2)(1) of the Brussels Convention in a way that is contrary to the conflict of laws rules of the second member state.[44] Article 27(4) of the Brussels Convention was criticised in the legal literature right from the start.[45] In view that Article 27(4) of the Brussels Convention only applied to cases involving "preliminary questions",[46] it was only of little importance.[47]

The European Commission as well as the working group argued that Article 27(4) of the Brussels Convention should be repealed.[48] Accordingly, this proviso was not included in Article 34 of the Brussels I Regulation when drafting it as secondary Community legislation.[49] From this it does not necessarily follow that such an infringement never justifies the prohibition to recognise an executory title where the essential principles of the conflict of law rules have been infringed.[50] In particular, the Brussels I Regulation does not contain an absolute prohibition as is laid down in Article 25 of the Brussels IIa Regulation. Accordingly, the recognition of a decision on the marital status in a second member state may not be rejected due to differences in the substantive law and the conflict of law rules.[51] In contrast, in respect of the Brussels I Regulation the following applies: the free movement of executory titles may not simply be limited because the state of origin relied on different substantive law than would have been applicable had the conflict of law rules of the second member state been followed. In addition, even after the Brussels Convention has been transformed into a Community instrument it is still possible that the breach of fundamental principles of international private law causes the substantive law on public policy law to be breached pursuant to Article 34(1) of the Brussels I Regulation.[52]

However, this is only the case where the application of in-

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39 See details by *Streinz/Schroeder*, EUV/EGV, 2003, Article 249 EC para. 116.

40 COM (2001) 398 final of 11 July 2001; when reviewing the comprehensive legal literature in particular see *Schwintowski*, JZ 2002, 205 *et seqq.*; *Sonnenberger*, RIW 2002, 489 *et seqq.* see details in *supra* note 2; *Staudenmayer*, ICLQ 2002, 673 *et seqq.*; *Cornides*, WBl. 2001, 407 *et seqq.*; *Schmid*, JZ 2001, 674 *et seqq.*; *Sturm*, JZ 2001, 1097 *et seqq.*; *von Bar*, ZEuP 2001, 799 *et seqq.*; the same author, ZEuP 2001, 515 *et seqq.* In the meantime the Commission has published the conclusions of the consultation rounds on the Internet. In addition, see the European Parliament resolution on the approximation of the civil and commercial law of the Member States COM (2001), 398 – C5-0471/2001 – 2001/2187 (COS); Report by the Committee on Legal Affairs and the Internal Market A5-0384/2001, reported on by *Lehne*, Member of Parliament; recent comments on current state of discussion: *Schulte-Nölke*, ZGS 2004, 321.

41 ECJ 11 May 2000 – C-38/98 – *Régie nationale des usines Renault SA/Maxicar SpA* (*supra* note 13), IPRax 2001, 328 *et seqq.* = NJW 2000, 2185 *et seq.*; on this subject *Heß*, IPRax 2001, 301 *et seqq.*

42 Also see *Jayme*, Nationaler ordre public und europäische Integration, in: Ludwig Boltzmann Institut für Europarecht an der Universität Wien (A), 2000, Issue 6, at 7: "Das Gemeinschaftsrecht erhält hier keine Sonderrolle im Bereich des ordre public".

43 As a result, the ECJ could leave it open for discussion as to whether the fundamental freedoms and competition law are actually part of the public policy of the Community; in the affirmative *Heß*, IPRax 2001, 301, 305.

44 However, this is only the case where there is a different result in substantive law.

45 For example the following author was irritated by this provision: *Kropholler* (*supra* note 16) Article 27 of the Brussels Convention para. 52; also see *Schlosser,* EuGVÜ – Europäisches Gerichtsstands- und Vollstreckungsübereinkommen, 1996, Article 27 to 29 of the Brussels Convention para. 27.

46 This term is not to be purely understood in terms of the conflict of law rules: *Kropholler* (*supra* note 16) Article 27 of the Brussels Convention para. 52.

47 When comparing domestic German law to the Convention, it becomes clear that it was easier to obtain recognition of a judgment under German law than under the Convention. This was due to repealing Section 328(1)(3) of the German Code of Civil Procedure (old version). Some authors therefore reject in their publications the applicability of Article 27(4) of the Brussels Convention from a German point of view by referring to the basic principle of "*favor recognitionis*"; see *Zöller/Geimer* (*supra* note 24) Section 328 of the German Code of Civil Procedure para. 163; *Geimer/Schütze,* Europäisches Zivilverfahrensrecht, 1997, Article 27 of the Brussels Convention para. 153; *R. Wagner*, IPRax 2002, 75, 82; of a different opinion *Linke*, IZVR (*supra* note 24) para. 418.

48 *Stadler*, in: *Gottwald* (ed.), Revision des EuGVÜ (*supra* note 15) at 37, 42.

49 This is welcomed by *Geimer*, IPRax 2002, 69, 71; *R. Wagner*, IPRax 2002, 75, 79; critical comments by *Jayme*, IPRax 2000, 165, 168; *Kohler*, in: *Baur* (ed.), Systemwechsel im europäischen Kollisionsrecht, 2002, at 147, 151 *supra* note 13.

50 However, this opinion – also in reference to the previous legal situation – is held by: *Zöller/Geimer* (*supra* note 24) Article 34 of the Brussels I Regulation para. 17; also see *Martiny*, in: Handbuch des Internationalen Zivilverfahrensrechts, 1982, Volume III/2 Chapter II para. 85, 94; *Schlosser*, EU-Zivilprozessrecht, 2nd edition 2003, Article 34 to 36 of the Brussels I Regulation para. 3: "Selbst eine noch so willkürliche kollisionsrechtliche Weichenstellung kann für sich allein nicht zur Anerkennungsversagung führen (...)"; of a different opinion *Rauscher/Leible* (*supra* note 24) Article 34 of the Brussels I Regulation para. 19.

51 *Kropholler* (*supra* note 20) Introduction para. 140; *Linke*, IZVR (*supra* note 24) para. 419; *Helms*, FamRZ 2001, 257, 263; also see report *Alegría Borrás*, OJ 1998, C 221, at 53, No 76.

52 Same as *Kropholler* (*supra* note 20) Article 34 of the Brussels I Regulation para. 17; generally see *Völker* (*supra* note 7) at 166 *et seqq.*

ternational private law would have led to a different result.[53] Moreover, the public policy proviso only applies where, in the view of the second member state, the fundamental principles on the connecting factors have been infringed. An example would be the principle enshrined in numerous directives on consumer protection, whereby the choice of law rules protect the consumer in that they prevent that the minimum standards applicable within the Internal Market are deselected. This approach is not contradicted by the ruling of the ECJ in *Eco Swiss* and *Renault*.[54] Although it may be concluded from these decisions that not all articles of all the directives on consumer protection are part of the public policy of the Community (*"ordre public communautaire"*) and that the same also has to apply to the respective implementing provisions, the result, however, might be different as far as Article 6(1) and Article 6(2) of the Directive on unfair terms in consumer contracts[55] and respectively Article 29a(1) and Article 29a(4)(1) of the Introductory law to the German Civil Code[56] are concerned. In view of the numerous legal instruments[57] which contain corresponding choice of law rules, the protection of the consumer from having the law of a third member state imposed on him[58] constitutes one of the fundamental principles, provided the facts of the case are closely connected to the Internal Market. This view is also supported by the ruling of the ECJ in *Ingmar*.[59]

The importance of the substantive law on public policy is bound to increase in the future as the conflict of law rules are more and more transformed into Community law. Therefore it is necessary to examine in detail which conflict of law rules contained in for example the Rome Convention on the law applicable to contractual obligations[60] and respectively the Rome I Regulation[61] or the Rome II Regulation[62] are subject to public policy.

6. Infringement of rules on jurisdiction contained in Community law

Pursuant to Article 35(3) Sentence 2 of the Brussels I Regulation, the provisions on jurisdiction are not part of public policy in terms of Article 34(1) of the Brussels I Regulation. This means that even if one relies on national jurisdiction excluded pursuant to Article 3(2) of the Brussels I Regulation (*"exorbitante Zuständigkeit"*),[63] it is not contrary to the public policy of the second member state. This narrow approach is in particular confirmed by the decision of the ECJ in *Krombach*.[64] According to this decision, it is not possible for a litigant to rely on the public policy proviso contained in Article 27(1) of the Brussels Convention (Article 34(1) of the Brussels I Regulation) by claiming that the jurisdiction established by the first member state is excluded pursuant to Article 3(2) of the Brussels I Regulation and contrary to public international law. It was not possible to rely on Article 28(3) of the Brussels Convention (Article 35(3) of the Brussels I Regulation) to interpret the facts of the case. In terms of its reasoning this decision may be applied to the Brussels I Regulation without any problems.

III. Examining breaches of public policy in application proceedings and appeal proceedings

1. Constitutional and public international law arguments against the rationale of the Brussels I Regulation

The fortress of public policy has already been eroded to a significant degree. Transforming the Brussels Convention into a Community instrument results in a complete U-turn in that the examination of the public policy proviso has been shifted to the appeal proceedings[65] provided for in Article 43 *et seqq*.[66]

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53 See *Kropholler* (*supra* note 20) Article 34 of the Brussels I Regulation para. 17.

54 See details under II. 5. a).

55 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993, L 95, at 29).

56 Please note the German Act on amendments to provisions regulating distance contracts in the field of financial services (*"Gesetz zur Änderung der Vorschriften über Fernabsatzverträge bei Finanzdienstleistungen"*), BT-Drucks. 1572946; BT-Drucks. 15/3483. See Article 2 of the amending law. Accordingly, Article 29a(4)(5) of the Introductory Law of the German Civil Code now refers to the Directive concerning the distance marketing of consumer financial services.

57 See Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002, L 271, at 16).

58 This covers the choice of legal provisions that are not part of domestic law as well as where provisions that originate in a third state are combined.

59 ECJ 9 November 2002 – C-381/98 – *Ingmar GB Ltd/Eaton Leonard Technologies Inc*, ECR 2000, I-9305, NJW 2001, 2007 *et seqq.*; on this subject *Bitterich*, VuR 2002, 155 *et seqq.*; *Fetsch*, Eingriffsnormen und EG-Vertrag, 2002, at 311 *et seqq.*; *Font i Segura*, EuLF (D) 2000/01, 179 *et seqq.*; *Idot*, Rev. crit. dr. internat. privé, 2001, 107 *et seqq.*; *Kindler*, BB 2001, 11; *Nemeth/Rudisch*, ZfRV 2001, 179 *et seqq.*; *Schwarz*, ZVglRWiss 101 (2002), 45 *et seqq.*; *Staudinger*, NJW 2001, 1974 *et seqq.*; recent publication by *Schurig*, FS Jayme 2004, at 837 *et seqq.*

60 See references provided in *supra* note 9.

61 Regarding the transformation of the Rome Convention into Community law, see *Ehle*, GPR 2003-04, 49 *et seqq.*; *Mankowski*, ZEuP 2003, 483 *et seqq.*; the same author, RIW 2004, 481, 482 *et seq.*; *Martiny*, ZEuP 2003, 590 *et seqq.*; note the contributions to: *Leible* (ed.) Das Grünbuch zum Internationalen Vertragsrecht, 2004; *Meeusen/Pertegás/Straetmans* (eds.), Enforcement of International Contracts in the European Union, 2004.

62 COM (2003) 427 of 22 July 2003; recent articles on this subject by *Fuchs*, GPR 2/03-04, 100 *et seqq.*; *Leible/Engel*, EuZW 2004, 7 *et seqq.*; *Mankowski*, RIW 2004, 481, 482.

63 Up to now it has been disputed as to whether Article 28(3) of the Brussels Convention (Article 35(3) of the Brussels I Regulation) has to be interpreted according to its meaning and purpose in case where a person who is domiciled in a member state belonging or not belonging to the Internal Market is involved in legal proceedings with another person who relied on an exorbitant jurisdiction in terms of Article 3(2) of the Brussels Convention (Brussels I Regulation) which was unacceptable for the state where recognition was sought, and which was possibly in breach of Article 6(1) Sentence 1 ECHR; on this subject see details by *Kropholler* (*supra* note 20) Article 35 of the Brussels I Regulation para. 3. In the light of the decision of the ECJ in *Krombach*, it should be difficult to justify interpreting Article 35(3) of the Brussels I Regulation in this way and thereby allowing the public policy proviso to come into play; this is also the view taken by *Hüßtege*, in: *Thomas/Putzo* (*supra* note 10) Article 35(1) of the Brussels I Regulation; a narrow interpretation of Article 35(3) of the Brussels I Regulation is considered permissible for example by: *Matscher*, IPRax 2001, 428, 433; for details on the current state of the scholarly discussion see details in *Rauscher/Leible* (*supra* note 24) Article 34 of the Brussels I Regulation para. 7 with further references.

64 ECJ 28 March 2000 – C- 7/98 – *Krombach/Bamberski*, ECR 2000, I-1935, JZ 2000, 723, 724 para. 37 annotated by *von Bar*, 725 = ZIP 2000, 859, 862 No 37 annotated by *Geimer*, 863 = EWiR 2000, 441 annotated by *Hau* = IPRax 2000, 406 annotated by *Piekenbrock*, 364; case was referred to the German Federal Court of Justice on 4 December 1997, IPRax 1998, 205 annotated by *Piekenbrock*, 177; also on this subject *Leipold*, FS Stoll 2001, at 625, 642 *et seq.*; the final decision of the German Federal Court of Justice is printed in ZIP 2000, 1595 = JZ 2000, 1067 annotated by *Gross*.

65 Arguably the same applies to separate recognition proceedings pursu-

Therefore the court of first instance has to declare a foreign judgment enforceable even if this is contrary to public policy. Only the court of appeal or any higher court is of its own motion entitled to establish that public policy has been breached. The aim of moving away from the current legal position is to speed up the exequatur proceedings.[67] Recital 17[68] of the Brussels I Regulation states that a rapid and efficient order of enforcement was justified in view of the existing mutual trust in the administration of justice within the Internal Market. Incorporating the Brussels Convention into secondary legislation therefore has the effect that examining breaches of national public policy is at the disposition of the enforcement debtor.[69] This is to be welcomed in so far as for example a court in the second member state cannot prevent *ex officio* an executory title that is favourable to the debtor in terms of substantive law. However, the obligation for the debtor to take the initiative carries the risk that constitutional rights and fundamental principles are undermined. At first such a system may appear strange[70], and not only when comparing it to the control mechanisms for public policy that exist in domestic German law[71] pursuant to Section 328(1)(4)[72], Section 796a(3)[73], Section 1053(1) Sentence 2 as well as Section 1059(2) Sentence 2(b) of the German Procedural Code.[74] *Stadler*,[75] however, emphasises that in retrospect debtors would in many cases have indeed relied on a breach of public policy, but that the courts[76] accepted this view only in a few exceptional cases. It therefore could be argued that the public policy proviso was of little practical importance. In addition, under the Brussels Convention the grounds for refusing recognition of an executory title were actually already examined by the courts of their own motion in the application proceedings. Such grounds could, however, only be considered if the presiding judge at the regional court ("*Landgericht*") could extract from the file sufficient facts that were clear enough to justify his decision. Therefore in the past in many cases it was often only possible to check for a breach of public policy in terms of facts and law in the appeal proceedings.[77] In addition, relying on the public policy proviso as a last resort ensured within its small field of application not so much that government interests were observed but mainly that the correct application of procedural and substantive law was guaranteed in order to protect the defendant.[78] In view of this it seemed reasonable to put at the disposal of the persons to be protected to have examined whether or not public policy had been breached.[79] Equally, in the opinion of *Heß*[80] in the member states to which Community law applied[81] there was no reason anymore to protect government interests by the courts of their own motion by resorting to the public policy proviso.

In contrast, *Kohler* refers to the potential conflict a judge may be exposed to where fundamental rights or similar overriding principles were concerned.[82] Pursuant to the Brussels I Regulation, the judge for example in *Krombach*[83] would have been forced to declare a decision to be enforceable which evidently violated Article 6 ECHR[84] and in doing so to knowingly perpetuate the violation of public international law.[85] It

ant to Article 33(2) of the Brussels I Regulation. In contrast, Article 41 of the Brussels I Regulation does not apply to cases where the outcome depends on the determination of an incidental question of recognition pursuant to Article 33(3) of the Brussels I Regulation, so that the possibility of examining the grounds for refusal is not excluded in this respect; according to *Kohler* in: Systemwechsel im europäischen Kollisionsrecht (*supra* note 49) at 147, 151.

66 As already argued in the past by: *Gottwald*, ZZP 103 (1990), 257, 292.

67 On this subject *Micklitz/Rott*, EuZW 2002, 15, 22; regarding the revised system for the recognition of executory titles also *Sedlmeier*, [2002] EuLF (E) 35, 41.

68 OJ 2001, L 12, at 1, 2.

69 *R. Wagner*, IPRax 2002, 75, 83.

70 This development is welcomed by: *Zöller/Geimer* (*supra* note 24) Article 1 of the Brussels I Regulation para. 15; the same author, IPRax 2002, 69, 71. In relation to Article 34(2) of the Brussels Convention/Lugano Convention *Geimer* has already argued in the past for the courts not to examine the grounds of refusal of their own motion: *Geimer*, NJW 1973, 2138.

71 In this case the breach of public policy is examined by the courts of their own motion and not only when the litigant concerned objects.

72 *Musielak/Musielak,* Zivilprozessordnung, 3rd edition 2002, Section 328 of the German Code of Civil Procedure para. 32; *Stein/Jonas/Roth*, Zivilprozessordnung, 22nd edition 2003, Section 328 of the German Code of Civil Procedure para. 30; but also see *Zöller/Geimer* (*supra* note 24) Section 328 of the German Code of Civil Procedure para. 182; *Geimer/Schütze* (*supra* note 27) Article 41 of the Brussels I Regulation para. 27. *Geimer* differentiates as to whether government interests or merely the interests of the litigant concerned are involved. He argues that only in the former case it is necessary for the courts to carry out an examination of their own motion or to even ascertain the facts of the case; *Marx* agrees in, Der verfahrensrechtliche ordre public bei der Anerkennung und Vollstreckung ausländischer Schiedssprüche in Deutschland, 1994, at 23 *et seq.*

73 MüKo-ZPO/*Wolfsteiner*, Zivilprozessordnung, 2nd edition 2000, Section 796a of the German Code of Civil Procedure para. 34, 36.

74 *Musielak/Voit* (*supra* note 72) Section 1053 of the German Code of Civil Procedure para. 10.

75 *Stadler*, in: *Gottwald* (ed.), Revision des EuGVÜ (*supra* note 15), at 37, 41 *et seq.*, 44.

76 With regard to Germany see: German Federal Court of Justice, IPRax 1987, 236 (giving false evidence in the course of proceedings (*Prozessbetrug*)) annotated by *Grunsky*, 219; decisions of the German Federal Court of Justice in civil matters 123, 268 (personal liability of a civil servant contrary to Sections 636, 637 of the German Reich Insurance Code (*persönliche Haftung eines Beamten im Widerspruch zu §§ 636, 637 Reichsversicherungsverordnung, "RVO"*)); critical comments on this subject *Basedow*, IPRax 1994, 85; recent decisions of the German Federal Court of Justice in civil matters 144, 390 (breach of Article 103(1) of the German Constitution (*Verstoß gegen Art. 103 Abs. 1 Grundgesetz, "GG"*)); regarding the decisions of the German Federal Court of Justice: *Stürner*, in: *Canaris u.a.* (eds.), 50 Jahre BGH (*supra* note 8) Volume III, at 677 *et seqq.*

77 *Stadler*, in: *Gottwald* (ed.), Revision des EuGVÜ (*supra* note 15) at 37, 56.

78 A different opinion is held for example by *Leutner*, Die vollstreckbare Urkunde im europäischen Rechtsverkehr, 1997, at 230: "Der ordre public-Vorbehalt (...) stellt auch und vorrangig eine Reserve der Rechtsordnung des angerufenen Staates dar".

79 *Stadler*, in: *Gottwald* (ed.), Revision des EuGVÜ (*supra* note 15) at 37, 56.

80 *Heß*, IPRax 2001, 302, 305.

81 "Zum Raum des Rechts" see the critical comments by *Basedow*, ZEuP 2001, 43 *et seqq.*

82 *Kohler*, in: Systemwechsel im europäischen Kollisionsrecht (*supra* note 49) at 147, 152 *et seq.* critical comments in view of the fact that human rights are 'ousted' from the application proceedings and shifted to the appeal proceedings: *Jayme* (*supra* note 42) at 1, 23 *et seq.*

83 ECJ 28 March 2000 – C-7/98 – *Krombach/Bamberski*, JZ 2000, 723, 724 para. 37 annotated by *von Bar*, 725 = ZIP 2000, 859, 862 No 37 annotated by *Geimer*, 863 = EWiR 2000, 441 annotated by *Hau* = IPRax 2000, 406 annotated by *Piekenbrock*, 364; case was referred to the German Federal Court of Justice on 4 December 1997, IPRax 1998, 205 annotated by *Piekenbrock*, 177; also on this subject *Leipold,* FS Stoll 2001, at 625, 642 *et seq.*; the final decision of the German Federal Court of Justice is printed in ZIP 2000, 1595 = JZ 2000, 1067 annotated by *Gross*; regarding the decision in *Krombach* of the European Court of Human Rights (NJW 2001, 2387): *Gundel*, NJW 2001, 2380 *et seqq.*;regarding the decisions of the ECJ and the European Court of Human Rights: *Matscher*, IPRax 2001, 428 *et seqq.*

84 The reference for a preliminary ruling concerns the enforcement of a French judgment in Germany. In the context of criminal proceedings, the French court ordered the defendant who was resident in Germany to pay damages for a civil claim whereby his defence counsel was not allowed to defend him in the proceedings.

85 If a foreign decision which was issued in breach of Article 6 ECHR is

could not be presumed that the Brussels I Regulation was intended to or provided a legal basis to impose such a course of action upon the court in the second member state.

However, the decisions of the German Constitutional Court (*Bundesverfassungsgericht, "BVerfG"*) suggest that shifting the examination of the public policy proviso to the appeal proceedings does not cause any problems even where fundamental rights and principles are concerned.[86] This in particular follows from the decision of the *BVerfG*[87] in 1983 concerning the Treaty on Judicial Assistance between Germany and Austria *("Rechtshilfevertrag zwischen der Bundesrepublik Deutschland und der Republik Österreich")*.[88] In the opinion of the court it does not violate the German Constitution to allow for the execution of foreign executory titles if in the original state there existed *de facto* a degree of legal protection which fulfilled certain minimum requirements in terms of the rule of law.[89] This included the possibility of legal recourse before independent and impartial courts, (...) in particular that the right to be heard before the court and the assistance by qualified legal counsel are guaranteed as well as that the courts are sufficiently empowered to properly assess and decide on the application for legal protection before them.[90] In particular in respect of the public policy proviso, the *BVerfG* explained as follows: where this does generally not appear to be guaranteed, it will regularly be necessary to resort to German public policy in order to fulfil the requirements of Article 19(4) Sentence 1 of the German Constitution (*Grundgesetz, "GG"*).[91]

Regarding constitutional rights, public policy is only required as a last resort where the matter involved concerns the declaration on recognition and enforceability of executory titles from states where the degree of legal protection described above "generally" does not exist. It can therefore be concluded that the German Constitution allows for such legal protection to be applied to foreign courts,[92] provided the main proceedings in the respective member state offer the debtor equivalent legal protection. With a view to the member states currently subject to the Brussels I Regulation,[93] it will have to be assumed that the respective systems of legal protection comply with those requirements[94] which constitute the minimum requirements for proceedings to be held in accordance with the rule of law.[95] In the light of the decision by the *BVerfG,* it therefore even appears that with respect to Article 19(4) Sentence 1 of the German Constitution, it is conform to the Constitution to abolish altogether the measure of public policy[96] as happened in the Regulation[97] which created a European Enforcement Order for uncontested claims.[98] However, if this is the case, it must be even more conform to the German Constitution to retain this measure of last resort and to include in a legal provision the requirement that the debtor initiates appeal proceedings.

However, this does not only apply with respect to Article 19(4) Sentence 1 of the German Constitution. In view of it being a fundamental right as well as its paramount significance as basic rule for the whole of the legal system,[99] it is also conform to the German Constitution to make the public policy proviso conditional upon making an appeal. For example, where the discretion to act contained in Article 2(1) of the German Constitution or the principle of a social state based on the rule of law contained in Article 2(1) of the German Constitution as well as in Article 28(1) of the German Constitution are concerned, which is the case where suretyships are concerned.[100]

Similarly, the shifting of the examination of the public policy proviso to the appeal proceedings does not violate public international law.[101] In the opinion of the European Court of

declared enforceable, then this also constitutes a breach of Article 6 European Convention on Human Right in the second state: ECHR 20 July 2001 – 30882/96 – *Pellegrini/Italien*.

86 A different conclusion seems to have been drawn by *Rauscher/Mankowski* (*supra* note 24) Article 41 of the Brussels I Regulation para. 5; in contrast *Geimer/Schütze* (*supra* note 27) Article 41 of the Brussels I Regulation para. 33 *supra* note 33.

87 Decisions of the German Constitutional Court (*Bundesverfassungsgericht, "BVerfGE"*) 63, 343 *et seqq.*

88 Treaty on legal assistance and administrative cooperation in matters concerning customs, excise duties and cartels (*"Vertrag über Rechts- und Amtshilfe in Zoll-, Verbrauchsteuer- und Monopolangelegenheiten"*) between the Federal Republic of Germany and the Republic of Austria of 11 September 1970 (German Federal Law Gazette II 1972, at 14); regarding the Amending Treaty see German Federal Law Gazette II 1981, at 116.

89 Decisions of the German Constitutional Court 63, 343, 378.

90 There continue to be similarities to the guarantees contained in Article 6 ECHR.

91 Decisions of the German Constitutional Court 63, 343, 378. *Kohler* considers this as going too far, in: Systemwechsel im europäischen Kollisionsrecht (*supra* note 49) at 145, 160.

92 See details by *Heß*, IPRax 2001, 389, 393.

93 This also applies to Denmark. In the legal literature there exists doubt with respect to some of the member states which have recently joined the EU as well as with respect to some of the prospective member states.

94 Same as *Kohler*, in: Systemwechsel im europäischen Kollisionsrecht (*supra* note 49) at 147, 160; also see Recitals 16 und 17 of the Brussels I Regulation. These two Recitals in particular emphasise the mutual trust in the administration of justice in the Community.

95 In its decision the German Constitutional Court (*Bundesverfassungsgericht, "BVerfG"*) held without any reservations that this includes the the legal protection against notices to collect taxes by Austrian authorities.

96 The result of this would be that in domestic German law there would exist no final decision (*"Abschlussentscheidung"*) in the exequatur proceedings which could be appealed by way of launching a constitutional complaint against the decision (*"Urteilsverfassungsbeschwerde"*). This raises the question as to whether there exists a comparable protection by the courts in the state of origin. In any case the possibility to make a complaint where human rights are infringed (*"Menschenrechtsbeschwerde"*) in accordance with the ECHR has not been repealed. Such a complaint serves as a legal remedy for private individuals and may be lodged with the European Court of Human Rights: on this subject see *Heß*, IPRax 2001, 389, 395; also see *Leipold*, FS Stoll 2001, at 625, 645 *et seq.*

97 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004, L 143, at 15); recent article on this subject by *Stein*, IPRax 2004, 181 *et seqq.*

98 The example of "comparing suretyships" (*"Bürgschaftsvergleich"*) in breach of good morals shows that there may be cases, even if the executory title was issued based on mutual consent, where the public policy proviso is of relevance. In addition, it cannot be excluded that settlements are agreed under considerable economic pressure. This is pointed out by *Heß*, JZ 2000, 373, 377; in the latter publication, however, he talks about this subject only with regard to class action settlements.

99 Decisions of the German Constitutional Court 58, 1, 40.

100 Decisions of the German Federal Court of Justice in civil matters 140, 395 = JR 1999, 371 annotated by *Staudinger*; JZ 1999, 1117 annotated by *H. Roth*, 1119; IPRax 1999, 371 annotated by *Schulze*, 342 = *Dörner*, LM Article 27(1) of the Brussels Convention para. 58; the same author, FS Sandrock 2000, at 205 *et seqq.*; *Pfeiffer*, WuB II B Article 27 of the Brussels Convention 1.99; for the analysis of the judicial decisions of the German Federal Court of Justice see: *Stürner*, in: *Canaris and others* (eds), 50 Jahre BGH (*supra* note 8) Band III, at 677 *et seqq.*

101 On this subject see the convincing analysis of the decisions of the European Court of Human Rights by *Stein*, IPRax 2004, 181, 186 *et seq.*; different view held by *Rauscher/Mankowski* (*supra* note 24) Article 41 of the Brussels I Regulation para. 5.

Human Rights in Strasbourg convention states are not allowed to avoid their obligations arising out of the ECHR by transferring sovereign rights. The EC itself is not subject to the ECHR. However, for the purposes of the European Court of Human Rights it is enough, if there exists sufficient legal protection in the member state of origin. When making a declaration on recognition and enforceability of executory titles in the second member state, it was not necessary to go through exactly the same procedure as in the first member state to ensure that the same comprehensive guarantees in terms of legal proceedings existed in the second member state. Thus, the mechanism of the Brussels I Regulation should correspond to that of the ECHR. In addition, it has to be noted that at present the Treaty of Nice does not explicitly provide for a catalogue of fundamental rights. Regardless of this fact, the guarantees in terms of legal proceedings contained in Article 6 ECHR may be considered part of the public policy of the Community. This not only results from Article 6(2) EU Treaty which imposes a duty to observe all the fundamental rights guaranteed by the ECHR. Article 47(2) of the Charter of Fundamental Rights of the European Union also vouches for the guarantees in terms of legal proceedings provided by Article 6 ECHR.[102] Although the Charter is currently not binding, pursuant to the provisional consolidated version of the draft Treaty establishing a Constitution for Europe dated 25 June 2004,[103] the Charter shall be implemented as Part II of the Constitution. Thus, the guarantees enshrined in the Charter will in the future be legally binding and be awarded constitutional status.

2. Distribution of the burden of proof

If the debtor appeals, the court of appeal is entitled of its own motion to examine whether national public policy has been breached, even if the debtor does not especially rely on these grounds for refusal. Similarly, the court may of its own motion examine an appeal concerning a breach of public policy in substantive law for example where the debtor relied on the part of the public policy proviso which regulates the procedural aspect.[104]

IV. Future of the European civil procedural law

1. Regulation (EC) No 805/2004[105]

The process of introducing Community law that harmonises international civil procedural law[106] as well as international private law[107] has only just begun. In view of the rapid developments in this legal field, the following overview can at best give a rough idea of the current legal situation. In accordance with the Council Regulation creating a European Enforcement Order,[108] the interim proceedings are dispensed with which so far were required for the recognition and execution of foreign judgments in the second member state, provided certain minimum requirements are observed.[109] Pursuant to Article 1 of this Regulation, it is aimed at improving the free movement of executory titles in the member states.[110] Abolishing the exequatur proceedings and in particular the examination of the public policy proviso[111] in the second member state is consistent with the conclusions of the European Concil at Tampere[112] as well as the programme of measures [113] for implementation of the principle of mutual recognition of decisions in civil and commercial matters adopted in November 2000.[114] This measure is still at the planning stage and is part of a model involving several stages. In a next step it is intended to create a harmonised system of summary proceedings for orders to pay debts.[115]

This development makes increasingly clear that there exists a two-track system in the field of international procedural law. While in all the member states, with the exception of Denmark, the examination of the public policy proviso is shifted to the appeal stage or is completely abolished in respect of certain executory titles, this "streamlined version" of the exequatur proceedings and respectively the unrestricted free movement of executory titles does not apply to declarations on recognition and enforceability of decisions from non-EU member states. In particular the Convention on Jurisdiction and Foreign Judgments,[116] which is intended to apply world-wide and which is a project that is being tackled by the Hague Conference since 1992, does not seem to have resulted in the intended harmonisation of international procedural law. It may be argued that in legal literature[117] the Convention has appropriately been described as a failure.

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[102] On this subject *Hess*, FS Jayme 2004, at 339, 358 *et seq.*

[103] The text can be found under: http://www.eu-konvent.de/ verfassungsvertrag.pdf (German text); http://ue.eu.int/igcpdf/en/04/cg00/ cg00087.en04.pdf (English text).

[104] It seems that a different view is held by *Geimer/Schütze* (*supra* note 27) Article 34 of the Brussels I Regulation para. 31; *Kropholler* is expressing his doubts (*supra* note 20) with respect to Article 33 of the Brussels I Regulation para. 6.

[105] Siehe details under III.1.

[106] *Heß*, NJW 2000, 23 *et seqq.*; the same author, JZ 2001, 573 *et seqq.*; the same author, IPRax 2001, 389 *et seqq.*

[107] The Brussels I Regulation partly allows the plaintiff to choose between several jurisdictions. In view of the risk of potential forum shopping, it is clearly necessary to unify the field of international private law.

[108] The way this legal instrument is affected by the Brussels I Regulation, which is already in force, is determined by Article 27.

[109] See Article 1 of the Proposal for the Regulation.

[110] Article 2(3) of the Proposal again contains a special rule for Denmark.

[111] On this subject *Hüßtege*, FS Jayme 2004, at 371 *et seqq.*

[112] The text is printed in NJW 2000, 1925 *et seqq.*; on the area of judicial cooperation in civil matters see the conclusions in para. 33 *et seqq.*

[113] Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters of 24 November 2000 (OJ 2001, C. 12, at 1 *et seqq.*); printed in: IPRax 2001, 163 *et seqq.*

[114] No doubt there exists the risk that the examination of the public policy proviso is shifted to the enforcement proceedings in the second member state.

[115] Green Paper on an order for payment procedure, COM (2002), 746 final; Proposal for a Regulation creating an order for payment procedure, COM (2004), 173 final.

[116] Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, may be viewed under the following Internet address: http://www.hcch.net/e/conventions/draft36e.html; recent article on the Draft Convention by*Schütze*, RIW 2004, 162, 167; *van Loon*, in: Systemwechsel im europäischen Kollisionsrecht (*supra* note 49) 200 *et seqq.*; also see *Burbank*, The American Journal of Comparative Law 2001, 203 *et seqq.*; *Grabau/Hennecke*, RIW 2001, 569 *et seqq.*; *von Mehren*, The American Journal of Comparative Law 2001, 191 *et seqq.*; the same author, Rev. crit. dr. internat. privé 2001, 85 *et seqq.*; the same author, IPRax 2000, at 465 *et seqq.*; regarding a publication on one of the Hague Conventions on the recognition of judgments already see *Juenger*, GS Lüderitz, 2000, at 329 *et seqq.*

[117] *Schack*, Internationales Zivilverfahrensrecht, 3rd edition 2002, para. 111b.

However, it is necessary to take a precautionary approach when following up the harmonisation of this area of law. The measure of completely abolishing the public policy proviso for all executory titles, including those that are contested, may for example be criticised for the reason that, with the prospective further enlargement of the EU, the member states which have only recently joined the EU should first be given sufficient time to correctly interpret and apply secondary Community legislation such as the Brussels I Regulation. The measure of completely abolishing the public policy proviso does in any case not depend on the creation of a uniform system of procedural law within the whole of the Internal Market. Despite the proposal of a model law that contained common European principles on procedural law[118] issued by the *Storme* Commission[119] on behalf of the European Commission in 1993, a procedural code for the whole of the Internal Market will most likely remain wishful thinking. Equally, it is not required to approximate the different systems of substantive law in the member states, which would for example be inconceivable in the field of law of succession. Nevertheless, it should be taken into consideration that for example the Brussels I Regulation on civil matters is presently complemented by the Rome Convention on the law applicable to contractual obligations or soon the Rome I Regulation and similarly the Rome II Regulation, which for example provides the underlying legal basis for non-contractual obligations. In contrast, proposing legal instruments such as the Brussels IIa Regulation on matrimonial matters seems to be 'putting the cart before the horse'. While the field of declarations on recognition and enforceability is being harmonised, there is a lack of uniform rules on connecting factors.[120] There is also the risk of the same "blindness" in terms of conflict of law rules[121] (*"Kollisionsrechtblindheit"*), if a legal instrument on the declaration on recognition and enforceability of decision in the field of law of succession, including the law of wills, should be created without harmonising the rules on connecting factors in the Internal Market.[122]

In summing up, the following has to be noted: streamlining exequatur proceedings or abolishing such interim proceedings already convinces in terms of methodology in cases where the courts in the first member state reach their decisions on the basis of corresponding conflict of law rules. Only once such legal uniformity exists in international private law, it can be considered to shift the public policy proviso as grounds for refusal to the appeal stage or to abolish it altogether.

3. Revision of the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters in 1988

At the suggestion of the Standing Committee in accordance with Protocol No 2 to the Lugano Convention (Article 3(1)), a conference with the aim of reviewing the Brussels Convention and the Lugano Convention took place in 1998-99.[123] The conference prepared the grounds for producing the Brussels I Regulation from the Brussels Convention. However, at present it is not clear to what extent the Lugano Convention will be adapted to correspond to the Brussels I Regulation.[124]

For the Lugano Convention to be adapted accordingly, Article 27(4) of the Lugano Convention should be deleted and Article 27(1) should be specified to the extent that only if there is a "manifest" breach of public policy in the second member state, then the free movement of executory titles is restricted. In addition, it seems preferable to simplify the exequatur proceedings so that the grounds for refusal are not examined in the application proceedings, but that the examination for example of the public policy proviso is shifted to the appeal stage. This, however, requires that the issuing of orders of enforceability by such rapid and efficient proceedings can be justified by the mutual trust in the administration of justice in the convention states.

ECJ 28 October 2004 – C-148/03 – Nürnberger Allgemeine Versicherungs AG v Portbridge Transport International BV

Brussels Convention[1] Articles 20 and 57(2) – Geneva Convention on the Contract for the International Carriage of Goods by Road[2] – Failure by the defendant to enter an appearance – Defendant domiciled in another Contracting State – Conflict between conventions

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Article 57(2)(a) of the Brussels Convention should be interpreted as meaning that the court of a Contracting State in which a defendant domiciled in another Contracting

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118 It remains to be seen to what extent the project containing proposals for reform will be revived in view of the new legal powers contained in Article 61 *et seqq.* Treaty of Nice; regarding the approximation of civil procedural law see *Kerameus*, RabelsZ 66 (2002), 1 et *seqq.*; the same author, in: Arbeitsdokument des Europäischen Parlamentes, 1999, at 85 *et seqq.*; also see *Storme*, Uniform Law Review 2001-4, 763 *et seqq.*; *Tarzia*, Rivista di diritto internazionale e processuale 2001, 869 *et seqq.*; in this context also see *Schelo*, Rechtsangleichung im Europäischen Zivilprozessrecht, 1999.

119 *Storme* (ed.), Rapprochement du Droit Judiciare de l´Union européenne, 1994.

120 At present the Commission is working on a White Paper for a legal instrument concerning international private law in matrimonial matters; on this subject *R. Wagner*, NJW 2004, 1835, 1836.

121 In this context also see *Kohler*, FamRZ 2002, 709 *et seqq.*

122 Therefore in the programme of measures of the European Council it has been correctly suggested to include as a "complementary measure" the harmonisation of conflict of law rules in the areas "wills and probate matters"; IPRax 2001, 168; under E.; on this subject also see *R. Wagner*, NJW 2004, 1835, 1836.

123 See *Jayme/Kohler*, IPRax 2001, 501, 509.

124 See *R. Wagner*, NJW 2004, 1835, 1837.

1 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978, L 304, at 36, "the Brussels Convention"), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978, L 304, at 1, and – amended version – at 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982, L 388, at 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989, L 285, at 1) and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997, C 15, at 1).

2 Convention on the Contract for the International Carriage of Goods by Road (Convention relative au Contrat de transport international de marchandises par route, "CMR"), signed in Geneva on 19 May 1956.