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NOTE

from: General Secretariat of the Council
to: Committee on Civil Law Matters

Subject: Review of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
– Relevant case-law of the Court of Justice

Delegations will find herewith a compilation of relevant case-law of the Court of Justice concerning the Brussels Convention and the Brussels I Regulation with a view to the discussions on the review of the Brussels I Regulation in the Committee on Civil Law Matters on 17 July 2009.

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a) Article 1 of the Convention / Regulation (scope)

1. **Case C-185/07 : Judgment of the Court (Grand Chamber) of 10 February 2009, Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.**

Not yet published.

Recognition and enforcement of foreign arbitral awards - Regulation (EC) No 44/2001 - Scope of application - Jurisdiction of a court of a Member State to issue an order restraining a party from commencing or continuing proceedings before a court of another Member State on the ground that those proceedings would be contrary to an arbitration agreement - New York Convention.

It is incompatible with Council Regulation (...) No 44/2001 (...) for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.

2. **Case C-129/92 : Judgment of the Court (Sixth Chamber) of 20 January 1994, Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA.**

European Court reports 1994 page I-00117.

Brussels Convention - Interpretation of Articles 21, 22 and 23 - Recognition and enforcement of judgments given in non-contracting States

The Convention (...) and, in particular, Articles 21, 22 and 23 thereof do not apply to proceedings, or to issues arising in proceedings, in Contracting States for the recognition and enforcement of judgments given in civil and commercial matters in non-contracting States.

First, it follows from Articles 26 and 31 of the Convention, which are to be read in conjunction with Article 25, that the procedures provided for in Title III of the Convention, which concerns recognition and enforcement, apply only to judgments given by the courts of Contracting States. Secondly, the rules on jurisdiction contained in Title II of the Convention do not establish the forum in which proceedings for the recognition and enforcement of judgments given in non-contracting States are to take place, having regard to the fact that Article 16(5), which provides that in proceedings concerned with the enforcement of judgments the courts of the Contracting State in which the judgment has been or is to be enforced are to have exclusive jurisdiction, is also to be read in conjunction with the definition of "judgment" contained in Article 25. No distinction can be drawn in that regard between an order for enforcement simpliciter and a judgment of a court of a Contracting State ruling on an issue arising in proceedings for the enforcement of a judgment given in a non-contracting State, since if the subject-matter of such a dispute is such that it falls outside the scope of the Convention, the existence of a preliminary issue on which the court has to give a ruling in order to decide the dispute cannot justify the application of the Convention, whatever the nature of that issue may be.

3. Case C-190/89 : Judgment of the Court of 25 July 1991, Marc Rich & Co. AG v Società Italiana Impianti PA.

European Court reports 1991 page I-03855.

Brussels Convention - Article 1 (4) - Arbitration.

By excluding arbitration from the scope of the Convention (...), by virtue of Article 1(4) thereof, on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.

Consequently, the abovementioned provision must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.

b) Article 2 of the Convention / Regulation (jurisdiction of the domicile of the defendant)

4. Case C-281/02 : Judgment of the Court (Grand Chamber) of 1 March 2005, Andrew Owusu v N. B. Jackson, trading as « Villa Holidays Bal-Inn Villas » and others.

European Court reports 2005 page I-01383.

Brussels Convention – Territorial scope of the Brussels Convention – Article 2 – Jurisdiction – Accident which occurred in a non-Contracting State – Personal injury – Action brought in a Contracting State against a person domiciled in that State and other defendants domiciled in a non-Contracting State – Forum non conveniens – Incompatibility with the Brussels Convention.

1. Article 2 of the Convention (...) is applicable in proceedings where the parties before the courts of a Contracting State are domiciled in that State and the litigation between them has certain connections with a third State but not with another Contracting State, that provision thus covering relationships between the courts of a single Contracting State and those of a non-Contracting State, rather than relationships between the courts of several Contracting States.

Although, for the jurisdiction rules of the Convention to apply at all, the existence of an international element is required, the international nature of the legal relationship at issue need not necessarily derive, for the purposes of the application of that provision, from the involvement, either because of the subject-matter of the proceedings or the respective domiciles of the parties, of a number of Contracting States. The involvement of a Contracting State and a non-Contracting State, for example because the claimant and one defendant are domiciled in the first State and the events at issue occurred in the second, would also make the legal relationship at issue international in nature.

Moreover, the designation of the court of a Contracting State as the court having jurisdiction on the ground of the defendant's domicile in that State, even in proceedings which are, at least in part, connected, because of their subject-matter or the claimant's domicile, with a non-Contracting State, is not such as to impose an obligation on that State so that the principle of the relative effect of treaties is not affected.

2. The Convention (...) precludes a court of a Contracting State from declining to exercise jurisdiction on the ground that a court in a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.

No exception on the basis of the forum non conveniens doctrine was provided for by the authors of the Convention and application of the doctrine is liable to undermine the predictability of the rules of jurisdiction laid down by the Convention, and consequently to undermine the principle of legal certainty, which is the basis of the Convention. Moreover, allowing forum non conveniens would be likely to affect the uniform application of the rules of jurisdiction contained in the Convention and the legal protection of persons established in the Community.

5. **Case C-412/98 : Judgment of the Court (Sixth Chamber) of 13 July 2000, Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC).**
European Court reports 2000 page I-05925.

Brussels Convention - Personal scope - Plaintiff domiciled in a non-Contracting State - Material scope - Rules of jurisdiction in matters relating to insurance - Dispute concerning a reinsurance contract.

1. Title II of the Convention (...) is in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country. It would be otherwise only in exceptional cases where an express provision of the Convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Contracting State. Such is the case where the plaintiff exercises the option open to him under Article 5(2), point 2 of the first paragraph of Article 8 and the first paragraph of Article 14 of the Convention, and also in matters relating to prorogation of jurisdiction under Article 17 of the Convention, solely where the defendant's domicile is not situated in a Contracting State.

c) Article 6 of the Convention / Regulation (alternative jurisdictions)

6. **Case C-462/06 : Judgment of the Court (First Chamber) of 22 May 2008, Glaxosmithkline and Laboratoires Glaxosmithkline v Jean-Pierre Rouard.**
European Court reports 2008 page I-03965.

Regulation (EC) No 44/2001 - Section 5 of Chapter II - Jurisdiction over individual contracts of employment - Section 2 of Chapter II - Special jurisdiction - Article 6, point 1 - More than one defendant.

The rule of special jurisdiction provided for in Article 6(1) of Regulation No 44/2001 (...) cannot be applied to a dispute falling under Section 5 of Chapter II of that regulation concerning the jurisdiction rules applicable to individual contracts of employment.

It is apparent from Article 18(1) of that regulation and, moreover, from a literal interpretation of Section 5, supported by the ‘travaux préparatoires’ relating to the regulation, that the court having jurisdiction in proceedings concerning an individual contract of employment must be designated in accordance with the jurisdiction rules laid down in that section, rules which, on account of their specific and exhaustive nature, cannot be amended or supplemented by other rules of jurisdiction laid down in that regulation unless specific reference is made thereto in Section 5.

As regards the possibility that only an employee may rely on Article 6(1) of the regulation, that would run counter to the wording of both that provision and Section 5 of Chapter II of that regulation. The transformation by the Community courts of the rules of special jurisdiction, aimed at facilitating sound administration of justice, into rules of unilateral jurisdiction protecting the party deemed to be weaker would go beyond the balance of interests which the Community legislature has established in the law as it currently stands. Furthermore, such an interpretation would be difficult to reconcile with the principle of legal certainty, which is one of the objectives of the regulation and which requires, in particular, that rules of jurisdiction be interpreted in such a way as to be highly predictable.

7. Case C-98/06 : Judgment of the Court (Third Chamber) of 11 October 2007, Freeport plc v Olle Arnoldsson.
European Court reports 2007 page I-08319.

Regulation (EC) No 44/2001 - Article 6(1) - Special jurisdiction - More than one defendant - Legal bases of the actions - Abuse - Likelihood of success of an action brought in the courts for the place where one of the defendants is domiciled.

Article 6(1) of Regulation No 44/2001 (...) is to be interpreted as meaning that the fact that claims brought against a number of defendants have different legal bases does not preclude application of that provision.

Although the wording of that provision does not show that the conditions laid down for its application include a requirement that the actions brought against different defendants should have identical legal bases, it must however be ascertained whether, between various claims brought by the same plaintiff against different defendants, there is a connection of such a kind that it is expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. For decisions to be regarded as contradictory, it is not sufficient for there to be a divergence in the outcome of the dispute.

In addition, that provision applies where claims brought against different defendants are connected when the proceedings are instituted, to avoid the risk of irreconcilable judgments resulting from separate proceedings, without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled.

8. **Case C-539/03 : Judgment of the Court (First Chamber) of 13 July 2006, Roche Nederland BV and others v Frederick Primus and Milton Goldenberg.**
European Court reports 2006 page I-06535.

Brussels Convention - Article 6(1) - More than one defendant - Jurisdiction of the courts of the place where one of the defendants is domiciled - Action for infringement of a European patent - Defendants established in different Contracting States - Infringements committed in a number of Contracting States.

Article 6(1) of the Convention (...) must be interpreted as meaning that it does not apply in European patent infringement proceedings involving a number of companies established in various Contracting States in respect of acts committed in one or more of those States even where those companies, which belong to the same group, may have acted in an identical or similar manner in accordance with a common policy elaborated by one of them. Since neither the patent infringements of which the various defendants are accused nor the national law in relation to which those acts are assessed are the same there is no risk of irreconcilable decisions being given in European patent infringement proceedings brought in different Contracting States, since possible divergences between decisions given by the courts concerned would not arise in the context of the same factual and legal situation.

It follows that the connection required for Article 6(1) of the Brussels Convention to apply cannot be established between such actions

9. **Case C-77/04 : Judgment of the Court (First Chamber) of 26 May 2005, Groupement d'intérêt économique (GIE) Réunion européenne and others v Zurich España and Société pyrénéenne de transit d'automobiles (Soptrans).**
European Court reports 2005 page I-04509.

Brussels Convention - Request for interpretation of Article 6(2) and the provisions of Section 3, Title II - Jurisdiction in matters relating to insurance - Third-party proceedings between insurers - Multiple insurance situation.

Article 6(2) of the Convention (...) is applicable to third-party proceedings between insurers based on multiple insurance, in so far as there is a sufficient connection between the original proceedings and the third-party proceedings to support the conclusion that the choice of forum does not amount to an abuse.

It is for the national court seised of the original claim to verify the existence of such a connection, in the sense that it must satisfy itself that the third-party proceedings do not seek to remove the defendant from the jurisdiction of the court which would be competent in the case.

- 10. Case C-365/88 : Judgment of the Court (First Chamber) of 15 May 1990, Kongress Agentur Hagen GmbH v Zeehaghe BV.**
European Court reports 1990 page I-01845.

Brussels Convention - Article 6 (2) - Action on a warranty or guarantee.

Where a defendant domiciled in a Contracting State is sued in a court of another Contracting State pursuant to Article 5(1) of the Brussels Convention (...), that court also has jurisdiction by virtue of Article 6(2) of the Convention to entertain an action on a warranty or guarantee brought against a person domiciled in a Contracting State other than that of the court seised of the original proceedings. To enable the entire dispute to be heard by a single court, Article 6(2) simply requires there to be a connecting factor between the main action and the action on a warranty or guarantee, irrespective of the basis on which the court has jurisdiction in the original proceedings.

Article 6(2) must be interpreted as meaning that it does not require the national court to accede to the request for leave to bring an action on a warranty or guarantee and that the national court may apply the procedural rules of its national law in order to determine whether that action is admissible, provided that the effectiveness of the Convention in that regard is not impaired and, in particular, that leave to bring the action on the warranty or guarantee is not refused on the ground that the third party resides or is domiciled in a Contracting State other than that of the court seised of the original proceedings.

- 11. Case 189/87 : Judgment of the Court (Fifth Chamber) of 27 September 1988, Athanasios Kalfelis v Banque Schröder, Münchmeyer, Hengst and Cie and others.**
European Court reports 1988 page 05565.

Articles 5 (1) and 6 (3) of the Brussels Convention - More than one defendant - Concept of tort, delict and quasi-delict.

For Article 6 (1) of the Convention (...) to apply, a connection must exist between the various actions brought by the same plaintiff against different defendants. That connection, whose nature must be determined independently, must be of such a kind that it is expedient to determine the actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.

d) Article 17 of the Convention / article 23 of the Regulation (prorogation of jurisdiction)

12. Case C-387/98 : Judgment of the Court (Fifth Chamber) of 9 November 2000, Coreck Maritime GmbH v Handelsveem BV and others.

European Court reports 2000 page I-09337.

Brussels Convention - Article 17 - Clause conferring jurisdiction - Formal conditions - Effects.

1. The words have agreed in the first sentence of the first paragraph of Article 17 of the Convention (...) cannot be interpreted as meaning that it is necessary for a jurisdiction clause to be formulated in such a way that the competent court can be determined on its wording alone. It is sufficient that the clause state the objective factors on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen or which may arise between them. Those factors, which must be sufficiently precise to enable the court seised to ascertain whether it has jurisdiction, may, where appropriate, be determined by the particular circumstances of the case.

2. Article 17 of the Convention (...) only applies if, first, at least one of the parties to the original contract is domiciled in a Contracting State and, secondly, the parties agree to submit any disputes to a court or the courts of a Contracting State.

A court situated in a Contracting State must, if it is seised notwithstanding a jurisdiction clause designating a court in a third country, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits.

3. The first paragraph of Article 17 of the Convention (...) must be interpreted as meaning that a jurisdiction clause agreed between a carrier and a shipper which appears in a bill of lading is enforceable against a third party bearer of the bill of lading if he succeeded to the rights and obligations of the shipper under the applicable national law when he acquired the bill of lading. If he did not, it must be ascertained whether he accepted that clause having regard to the requirements laid down in that provision.

13. Case C-159/97 : Judgment of the Court of 16 March 1999, Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA.

European Court reports 1999 page I-01597.

Brussels Convention - Article 17 - Agreement conferring jurisdiction - Form according with usages in international trade or commerce.

1 Whilst the mere fact that a clause conferring jurisdiction is printed on the reverse of a contract drawn up on the commercial paper of one of the parties does not of itself satisfy the requirements as to written form laid down in Article 17 of the Convention (...), it is otherwise where the text of the contract signed by both parties itself contains an express reference to general conditions which include a clause conferring jurisdiction.

2. (...)

3 The third case mentioned in the second sentence of the first paragraph of Article 17 of the Convention (...) is to be interpreted as follows:

- The contracting parties' consent to the jurisdiction clause is presumed to exist where their conduct is consistent with a usage which governs the area of international trade or commerce in which they operate and of which they are, or ought to have been, aware.

- The existence of such a usage, which must be determined in relation to the branch of trade or commerce in which the parties to the contract operate, is established where a particular course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type. It is not necessary for such a course of conduct to be established in specific countries or, in particular, in all the Contracting States. In addition, in establishing the existence of a usage, although any publicity which might be given in associations or specialised bodies to the standard forms on which a jurisdiction clause appears may help to prove that a practice is generally and regularly followed, such publicity cannot be a requirement. Furthermore, a course of conduct satisfying the conditions indicative of a usage does not cease to be a usage because it is challenged before the courts, whatever the extent of the challenges, provided that it still continues to be generally and regularly followed in the trade with which the type of contract in question is concerned.

- The specific requirements covered by the expression 'form which accords' must be assessed solely in the light of the commercial usages of the branch of international trade or commerce concerned, without taking into account any particular requirements which national provisions might lay down.

- Awareness of the usage must be assessed with respect to the original parties to the agreement conferring jurisdiction, their nationality being irrelevant in this regard. Awareness of the usage will be established when, regardless of any specific form of publicity, in the branch of trade or commerce in which the parties operate a particular course of conduct is generally and regularly followed in the conclusion of a particular type of contract, so that it may be regarded as an established usage.

4 The choice of court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down in Article 17 of the Convention (...). Considerations about the links between the court designated and the relationship at issue, about the validity of the clause, or about the substantive rules of liability applicable before the chosen court are unconnected with those requirements.

14. **Case C-106/95 : Judgment of the Court (Sixth Chamber) of 20 February 1997, Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL.**
European Court reports 1997 page I-00911.

Brussels Convention - Agreement on the place of performance of the obligation in question - Agreement conferring jurisdiction.

The third hypothesis in the second sentence of the first paragraph of Article 17 of the Convention (...) must be interpreted as meaning that, under a contract concluded orally in international trade or commerce, an agreement conferring jurisdiction will be deemed to have been validly concluded under that provision by virtue of the fact that one party to the contract did not react to a commercial letter of confirmation sent to it by the other party to the contract or repeatedly paid invoices without objection where those documents contained a pre-printed reference to the courts having jurisdiction, provided that such conduct is consistent with a practice in force in the field of international trade or commerce in which the parties in question operate and the latter are aware or ought to have been aware of the practice in question.

In this regard, a practice exists in a branch of international trade or commerce in particular where a particular course of conduct is generally followed by contracting parties operating in that branch when they conclude contracts of a particular type. The fact that the contracting parties were aware of that practice is made out in particular where they had previously had trade or commercial relations between themselves or with other parties operating in the branch of trade or commerce in question or where, in that branch, a particular course of conduct is generally and regularly followed when concluding a certain type of contract, with the result that it may be regarded as being a consolidated practice.

4 The Convention must be interpreted as meaning that an oral agreement on the place of performance which is designed not to determine the place where the person liable is actually to perform the obligations incumbent upon him, but solely to establish that the courts for a particular place have jurisdiction, is not governed by Article 5(1) of the Convention, but by Article 17, and is valid only if the requirements set out therein are complied with. Whilst the parties are free to agree on a place of performance for contractual obligations which differs from that which would be determined under the law applicable to the contract, without having to comply with specific conditions as to form, they are nevertheless not entitled, having regard to the system established by the Convention, to designate, with the sole aim of specifying the courts having jurisdiction, a place of performance having no real connection with the reality of the contract at which the obligations arising under the contract could not be performed in accordance with the terms of the contract.

15. **Case C-214/89 : Judgment of the Court of 10 March 1992, Powell Duffryn plc v Wolfgang Petereit.**
European Court reports 1992 page I-01745.

Brussels Convention - Agreement conferring jurisdiction - Clause in the statutes of a company limited by shares.

1. The concept of "agreement conferring jurisdiction" in Article 17 of the Convention (...) must be regarded as an independent concept.

A clause contained in the statutes of a company limited by shares and adopted in accordance with the provisions of the applicable national law and those statutes themselves conferring jurisdiction on a court of a Contracting State to settle disputes between that company and its shareholders constitutes an agreement conferring jurisdiction.

The formal requirements laid down in Article 17 of the Convention must be considered to be complied with in regard to any shareholder, irrespective of how the shares were acquired, if the clause conferring jurisdiction is contained in the statutes of the company and those statutes are lodged in a place to which the shareholder may have access or are contained in a public register.

2. The requirement that a dispute arise in connection with a particular legal relationship, for the solution of which Article 17 of the Convention permits the assignment of jurisdiction by agreement, is satisfied if the clause conferring jurisdiction contained in the statutes of a company may be interpreted by the national court, which has exclusive competence in that regard, as referring to the disputes between the company and its shareholders as such.

16. Case 313/85 : Judgment of the Court (Fifth Chamber) of 11 November 1986, SpA Iveco Fiat v Van Hool NV.

European Court reports 1986 page 03337.

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters - Application of a jurisdiction clause which has expired.

Article 17 of the convention (...) must be interpreted as meaning that where a written agreement containing a jurisdiction clause and stipulating that the agreement can be renewed only in writing has expired but has continued to serve as the legal basis for the contractual relations between the parties, the jurisdiction clause satisfies the formal requirements in article 17 if, under the law applicable, the parties could validly renew the original agreement otherwise than in writing, or if, conversely, one of the parties has confirmed in writing either the jurisdiction clause or the set of terms which has been tacitly renewed and of which the jurisdiction clause forms part, without any objection from the other party to whom such confirmation has been notified.

17. Case 22/85 : Judgment of the Court (Fifth Chamber) of 24 June 1986, Rudolf Anterist v Crédit lyonnais.

European Court reports 1986 page 01951.

Brussels Convention of 27 September 1968 - Article 17, third paragraph.

Since article 17 of the convention (...) embodies the principle of the parties ' autonomy to determine the court or courts with jurisdiction, the third paragraph of that provision must be interpreted in such a way as to respect the parties ' common intention when the contract was concluded. Therefore, if an agreement conferring jurisdiction is to be regarded as having been ' concluded for the benefit of only one of the parties ', the common intention to confer an advantage on one of the parties must be clear from the terms of the jurisdiction clause or from all the evidence to be found therein or from the circumstances in which the contract was concluded.

It follows that an agreement conferring jurisdiction is not to be regarded as falling within the third paragraph of article 17 of the convention where all that is established is that the parties have agreed that a court or the courts of the contracting state in which that party is domiciled are to have jurisdiction.

- 18. Case 221/84 : Judgment of the Court (Fifth Chamber) of 11 July 1985, F. Berghoefer GmbH & Co. KG v ASA SA.**
European Court reports 1985 page 02699.

Brussels Convention - Interpretation of Article 17 - Validity of an oral jurisdiction agreement confirmed in writing by one party only.

The first paragraph of article 17 of the convention (...) must be interpreted as meaning that the formal requirements therein laid down are satisfied if it is established that jurisdiction was conferred by express oral agreement, that written confirmation of that agreement by one of the parties was received by the other and that the latter raised no objection.

- 19. Case 71/83 : Judgment of the Court of 19 June 1984, Partenreederei ms. Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout.**
European Court reports 1984 page 02417.

Brussels Convention of 27 September 1968 - Article 17 - Jurisdiction clause in a bill of lading.

A jurisdiction clause contained in the printed conditions on a bill of lading satisfies the conditions laid down by article 17 of the convention :

If the agreement of both parties to the conditions containing that clause has been expressed in writing ; or

If the jurisdiction clause has been the subject-matter of a prior oral agreement between the parties expressly relating to that clause, in which case the bill of lading, signed by the carrier, must be regarded as confirmation in writing of the oral agreement ; or

If the bill of lading comes within the framework of a continuing business relationship between the parties, in so far as it is thereby established that the relationship is governed by general conditions containing the jurisdiction clause.

As regards the relationship between the carrier and a third party holding the bill of lading, the conditions laid down by article 17 of the convention are satisfied if the jurisdiction clause has been adjudged valid as between the carrier and the shipper and if, by virtue of the relevant national law, the third party, upon acquiring the bill of lading, succeeded to the shipper ' s rights and obligations.

20. Case 201/82 : Judgment of the Court (Third Chamber) of 14 July 1983, Gerling Konzern Speziale Kreditversicherungs-AG and others v Amministrazione del Tesoro dello Stato.

European Court reports 1983 page 02503.

Interpretation of Articles 17 and 18 of the Brussels Convention of 27 September 1968 - Insurance contract containing a stipulation in favour of a third party.

1. The first paragraph of article 17 of the convention (...) must be interpreted as meaning that where a contract of insurance, entered into between an insurer and a policy-holder and stipulated by the latter to be for his benefit and to enure for the benefit of third parties to such a contract, contains a clause conferring jurisdiction relating to proceedings which might be brought by such third parties, the latter, even if they have not expressly signed the said clause, may rely upon it provided that, as between the insurer and the policy-holder, the condition as to writing laid down by article 17 of the convention has been satisfied and provided that the consent of the insurer in that respect has been clearly manifested.

2. Article 18 of the convention (...) must be interpreted as meaning that it allows a defendant not merely to contest jurisdiction but at the same time to submit, in the alternative, a defence on the substance of the case without thereby losing the right to raise an objection of want of jurisdiction.

21. Case 150/80 : Judgment of the Court of 24 June 1981, Elefanten Schuh GmbH v Pierre Jacqmain.

European Court reports 1981 page 01671.

Brussels Convention – Prorogation of jurisdiction.

Since the aim of article 17 of the convention is to lay down the formal requirements which agreements conferring jurisdiction must meet, contracting states are not free to lay down formal requirements other than those contained in the convention. When those rules are applied to provisions concerning the language to be used in an agreement conferring jurisdiction they imply that the legislation of a contracting state may not allow the validity of such an agreement to be called in question solely on the ground that the language used is not that prescribed by that legislation.

22. **Case 784/79 : Judgment of the Court (Third Chamber) of 6 May 1980, Porta-Leasing GmbH v Prestige International SA.**
European Court reports 1980 page 01517.

Convention on jurisdiction - persons domiciled in Luxembourg.

The second paragraph of article i of the protocol annexed to the convention (...) must be interpreted as meaning that a clause conferring jurisdiction within the meaning of that provision may not be considered to have been expressly and specifically agreed to by a person domiciled in Luxembourg unless that clause, besides being in writing as required by article 17 of the convention, is mentioned in a provision specially and exclusively meant for this purpose and which has been specifically signed by the party domiciled in Luxembourg ; in this respect the signing of the contract as a whole does not in itself suffice. It is not however necessary for that clause to be mentioned in a document separate from the one which constitutes the written instrument of the contract.

23. **Case 25/76 : Judgment of the Court of 14 December 1976, Galeries Segoura SPRL v Société Rahim Bonakdarian.**
European Court reports 1976 page 01851.

Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters - Article 17 (jurisdiction by consent).

1. The way in which article 17 of the convention (...) is to be applied must be interpreted in the light of the effect of the conferment of jurisdiction by consent, which is to exclude both the jurisdiction determined by the general principle laid down in article 2 and the special jurisdictions provided for in articles 5 and 6 of the convention. In view of the consequences that such an option may have on the position of the parties to the action, the requirements set out in article 17 governing jurisdiction must be strictly construed. By making such validity subject to the existence of an ' agreement ' between the parties, article 17 imposes upon the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated, the purpose of the formal requirements imposed by article 17 being to ensure that the consensus between the parties is in fact established.

2. In the case of an orally concluded contract, the requirements of the first paragraph of article 17 of the convention (...) as to form are satisfied only if the vendor ' s confirmation in writing accompanied by notification of the general conditions of sale has been accepted in writing by the purchaser. The fact that the purchaser does not raise any objections against a confirmation issued unilaterally by the other party does not amount to acceptance on his part of the clause conferring jurisdiction, unless the oral agreement comes within the framework of a continuing trading relationship between the parties which is based on the general conditions of one of them, and those conditions contain a clause conferring jurisdiction.

24. **Case 24/76 : Judgment of the Court of 14 December 1976, Estasis Salotti di Colzani Aimo and Gianmario Colzani v Rüwa Polstereimaschinen GmbH.**
European Court reports 1976 page 01831.

Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters - Article 17 (jurisdiction by consent).

1. The way in which article 17 of the convention (...) is to be applied must be interpreted in the light of the effect of the conferment of jurisdiction by consent, which is to exclude both the jurisdiction determined by the general principle laid down in article 2 and the special jurisdictions provided for in articles 5 and 6 of that convention. In view of the consequences that such an option may have on the position of the parties to the action, the requirements set out in article 17 governing the validity of clauses conferring jurisdiction must be strictly construed.

By making the validity of clauses conferring jurisdiction subject to the existence of an ' agreement ' between the parties, article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated, for the purpose of the formal requirements imposed by article 17 is to ensure that the consensus between the parties is in fact established.

2. In the case of a clause conferring jurisdiction, which is included among the general conditions of sale of one of the parties, printed on the back of the contract, the requirement of a writing under the first paragraph of article 17 of the convention (...) is only fulfilled if the contract signed by the two parties includes an express reference to those general conditions.

3. In the case of a contract concluded by reference to earlier offers, which were themselves made with reference to the general conditions of one of the parties including a clause conferring jurisdiction, the requirement of a writing under the first paragraph of article 17 of the convention (...) is satisfied only if the reference is express and can therefore be checked by a party exercising reasonable care.

e) Article 21 of the Convention / article 27 of the Regulation (*lis pendens*)

25. **Case C-39/02: Judgment of the Court (Third Chamber) of 14 October 2004, Mærsk Olie & Gas A/S v Firma M. de Haan en W. de Boer.**
European Court reports 2004 page I-09657.

Brussels Convention - Proceedings to establish a fund to limit liability in respect of the use of a ship - Action for damages - Article 21 - Lis pendens - Identical parties - Court first seised - Identical subject-matter and cause of action - None - Article 25 - 'Judgment' - Article 27(2) - Refusal to recognise.

An application to a court of a Contracting State by the owner of a ship for the establishment of a liability limitation fund, as provided for under the International Convention of 10 October 1957 relating to the Limitation of the Liability of Owners of Sea-Going Ships, in which the potential victim of the damage is indicated, and an action for damages brought before a court of another Contracting State by that victim against the owner of the ship do not have the same subject-matter or involve the same cause of action and therefore do not create a situation of *lis pendens* within the terms of Article 21 of the Convention (...).

- 26. Case C-159/02 : Judgment of the Court (Full Court) of 27 April 2004, Gregory Paul Turner v Felix Fareed Ismail Grovit and others**
European Court reports 2004 page I-03565.

Brussels Convention - Proceedings brought in a Contracting State - Proceedings brought in another Contracting State by the defendant in the existing proceedings - Defendant acting in bad faith in order to frustrate the existing proceedings - Compatibility with the Brussels Convention of the grant of an injunction preventing the defendant from continuing the action in another Member State.

The Convention (...) is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.

Such an injunction constitutes interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention. That interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the party concerned, because the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member State, which runs counter to the principle of mutual trust which underpins the Convention and prohibits a court, except in special cases occurring only at the stage of the recognition and enforcement of foreign judgments, from reviewing the jurisdiction of the court of another Member State.

- 27. Case C-116/02 : Judgment of the Court of 9 December 2003, Erich Gasser GmbH v MISAT Srl**
European Court reports 2003 page I-14693

Brussels Convention - Article 21 - Lis pendens - Article 17 - Agreement conferring jurisdiction - Obligation to stay proceedings of court second seised designated in an agreement conferring jurisdiction - Excessive duration of proceedings before courts in the Member State of the court first seised.

(...)

2. Article 21 of the (...) Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction. That fact is not such as to call in question the application of the procedural rule contained in Article 21 of the Convention, which is based clearly and solely on the chronological order in which the courts involved are seised. see paras 47, 54, operative part 2

3. Article 21 of the (...) Convention (...) must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long. An interpretation whereby the application of that article should be set aside in such a situation would be manifestly contrary both to the letter and spirit and to the aim of the Convention. see paras 70, 73, operative part 3.

28. Case C-315/01 : Judgment of the Court (Sixth Chamber) of 19 June 2003, Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) v Österreichische Autobahnen und Schnellstraßen AG (ÖSAG).

European Court reports 2003 page I-06351.

Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Power of the body responsible for review procedures to consider infringements of its own motion - Directive 93/36/EEC- Procedures for the award of public supply contracts - Selection criteria - Award criteria.

Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 92/50 relating to the coordination of procedures for the award of public service contracts, does not preclude the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer. On the other hand, the directive does preclude the court from dismissing an application by a tenderer on the ground that, owing to the unlawfulness raised of its own motion, the award procedure was in any event unlawful and that the harm which the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

29. Case C-111/01 : Judgment of the Court (Fifth Chamber) of 8 May 2003, Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV.

European Court reports 2003 page I-04207.

Brussels Convention - Article 21 - Lis pendens - Setoff.

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

30. **Case C-351/96 : Judgment of the Court (Fifth Chamber) of 19 May 1998, Drouot assurances SA v Consolidated metallurgical industries (CMI industrial sites) and others**
European Court reports 1998 page I-03075.

Brussels Convention - Interpretation of Article 21 - Lis alibi pendens - Definition of "same parties" - Insurance company and its insured.

An insurer and its insured must be considered to be one and the same party for the purposes of the application of Article 21 of the Convention (...), where there is such a degree of identity between their interests that a judgment delivered against one of them would have the force of res judicata as against the other. On the other hand, application of the said article cannot have the effect of precluding the insurer and its insured, where their interests diverge, from asserting their respective interests before the courts as against the other parties concerned.

Thus, Article 21 of the Convention is not applicable in the case of two actions for contribution to general average, one brought by the insurer of the hull of a vessel which has foundered against the owner and the insurer of the cargo which the vessel was carrying when it sank, the other brought by the latter two parties against the owner and the charterer of the vessel, unless it is established that, with regard to the subject-matter of the two disputes, the interests of the insurer of the hull of the vessel are identical to and indissociable from those of its insured, the owner and the charterer of that vessel.

31. **Case C-406/92 : Judgment of the Court of 6 December 1994, The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj".**
European Court reports 1994 page I-05439.

Brussels Convention - Lis pendens - Related actions - Relationship with the international convention relating to the arrest of seagoing ships.

1. On a proper construction, Article 57 of the Brussels Convention (...) means that, where a Contracting State is also a contracting party to another convention on a specific matter containing rules on jurisdiction, that specialized convention precludes the application of the provisions of the (...) Convention only in cases governed by the specialized convention and not in those to which it does not apply. Where a specialized convention contains certain rules of jurisdiction but no provision as to lis pendens or related actions, Articles 21 and 22 of the (...) Convention accordingly apply.

2. On a proper construction of Article 21 of the Convention, where it requires, as a condition of the obligation of the second court seised to decline jurisdiction, that the parties to the two actions be identical, that cannot depend on the procedural position of each of them in the two actions. Where some but not all of the parties to the second action are the same as the parties to the action commenced earlier in another Contracting State, that article requires the second court seised to decline jurisdiction only to the extent to which the parties to the proceedings before it are also parties to the action previously commenced; it does not prevent the proceedings from continuing between the other parties.

3. For the purposes of Article 21 of the Convention, the "cause of action" comprises the facts and the rule of law relied on as the basis of the action and the "object of the action" means the end the action has in view. An action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object within the meaning of that article as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss. A subsequent action does not cease to have the same cause of action and the same object and to be between the same parties as a previous action where the latter, brought by the owner of a ship before a court of a Contracting State, is an action in personam for a declaration that that owner is not liable for alleged damage to cargo transported by his ship, whereas the subsequent action has been brought by the owner of the cargo before a court of another Contracting State by way of an action in rem concerning an arrested ship, and has subsequently continued both in rem and in personam, or solely in personam, according to the distinctions drawn by the national law of that other Contracting State.

- 32. Case C-351/89 : Judgment of the Court (Sixth Chamber) of 27 June 1991, Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company.**
European Court reports 1991 page I-03317.

Brussels Convention - Lis alibi pendens - Taking into account the domicile of the parties - Powers of the court second seised - Jurisdiction in matters relating to insurance - Re-insurance

Article 21 of the Convention (...) must be interpreted as meaning that the rules applicable to *lis alibi pendens* set out therein must be applied irrespective of the domicile of the parties to the two sets of proceedings.

Without prejudice to the case where the court second seised has exclusive jurisdiction under the Convention and in particular under Article 16 thereof, Article 21 of the Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seised.

- 33. Case 144/86 : Judgment of the Court (Sixth Chamber) of 8 December 1987, Gubisch Maschinenfabrik KG v Giulio Palumbo.**
European Court reports 1987 page 04861.

Brussels Convention - Concept of Lis pendens.

The terms used in article 21 of the convention (...) in order to determine whether a situation of *lis pendens* arises must be regarded as independent.

Lis pendens within the meaning of that article arises where a party brings an action before a court in a contracting state for the rescission or discharge of an international sales contract whilst an action by the other party to enforce the same contract is pending before a court in another contracting state.

34. **Case 129/83 : Judgment of the Court (Fourth Chamber) of 7 June 1984, Siegfried Zelger v Sebastiano Salinitri.**
European Court reports 1984 page 02397.

Brussels Convention - Article 21 - Bringing of proceedings before a court.

Article 21 of the convention (...) must be interpreted as meaning that the court 'first seised' is the one before which the requirements for proceedings to become definitively pending are first fulfilled, such requirements to be determined in accordance with the national law of each of the courts concerned.

f) Article 22 of the Convention / article 28 of the Regulation (related actions)

35. **Case C-406/92 : Judgment of the Court of 6 December 1994, The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj".**
European Court reports 1994 page I-05439.

Brussels Convention - Lis pendens - Related actions - Relationship with the international convention relating to the arrest of seagoing ships.

The concept of "related actions" defined in the third paragraph of Article 22 of the Convention, which must be given an independent interpretation, must be interpreted broadly and, without its being necessary to consider the concept of irreconcilable judgments in Article 27(3) of the Convention, must cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive. It is accordingly sufficient, in order to establish the necessary relationship between, on the one hand, an action brought in a Contracting State by one group of cargo owners against a shipowner seeking damages for harm caused to part of the cargo carried in bulk under separate but identical contracts, and, on the other, an action in damages brought in another Contracting State against the same shipowner by the owners of another part of the cargo shipped under the same conditions and under contracts which are separate from but identical to those between the first group and the shipowner, that separate trial and judgment would involve the risk of conflicting decisions, without necessarily involving the risk of giving rise to mutually exclusive legal consequences.

g) Article 24 of the Convention / article 31 of the Regulation (provisional measures)

36. **Case C-104/03 : Judgment of the Court (First Chamber) of 28 April 2005, St. Paul Dairy Industries NV v Unibel Exser BVBA.**
European Court reports 2005 page I-03481.

Brussels Convention - Provisional, including protective, measures - Hearing of witnesses.

Article 24 to the Convention (...) must be interpreted as meaning that a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard is not covered by the notion of ‘provisional, including protective, measures’.

In the absence of any justification other than that interest of the applicant, the grant of such a measure does not pursue the aim of the jurisdiction laid down by way of derogation by Article 24 of the Convention, which is to avoid causing loss to the parties as a result of the long delays inherent in any international proceedings and to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case.

37. **Case C-99/96 : Judgment of the Court of 27 April 1999, Hans-Hermann Mietz v Intership Yachting Sneek BV.**
European Court reports 1999 page I-02277.

Brussels Convention - Concept of provisional measures - Construction and delivery of a motor yacht.

1. (...)

2 A judgment cannot be the subject of an enforcement order under Title III of the Convention of 27 September 1968 in a case where

- it was delivered at the end of proceedings which were not, by their very nature, proceedings as to substance, but summary proceedings for the granting of interim measures;

- the defendant was not domiciled in the Contracting State of the court of origin and it does not appear from the judgment that, for other reasons, that court had jurisdiction under the Convention as to the substance of the matter;

- it does not contain any statement of reasons designed to establish the jurisdiction of the court of origin as to the substance of the matter

and

- it is limited to ordering the payment of a contractual consideration, without, on the one hand, repayment to the defendant of the sum awarded being guaranteed if the plaintiff is unsuccessful as regards the substance of his claim or, on the other, the measure sought relating 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.

In such a case, the court to which application for enforcement is made must conclude that the measure ordered is not a provisional measure within the meaning of Article 24 of the Convention.

3 The fact that the defendant appears before the court dealing with interim measures in the context of fast procedures intended to grant provisional or protective measures in case of urgency and which do not prejudice the examination of the substance cannot, by itself, suffice to confer on that court, by virtue of Article 18 of the Convention of 27 September 1968, unlimited jurisdiction to order any provisional or protective measure which the court might consider appropriate if it had jurisdiction under the Convention as to the substance of the matter.

- 38. Case C-391/95 : Judgment of the Court of 17 November 1998, Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and others**
European Court reports 1998 page I-07091.

Brussels Convention - Arbitration clause - Interim payment - Meaning of 'provisional measures'.

The granting of provisional or protective measures on the basis of Article 24 of the Convention (...) 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. A measure ordering interim payment of a contractual consideration does not constitute a provisional measure within the meaning of that article 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.

- 39. Case C-261/90 : Judgment of the Court (Fifth Chamber) of 26 March 1992, Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG.**
European Court reports 1992 page I-02149.

Brussels Convention of 27 September 1968 - Action paulienne - Articles 5 (3), 16 (5) and 24 of the Convention.

Provisional or protective measures within the meaning of Article 24 must be understood as being measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.

Whilst an action such as the action paulienne enables the creditor's security to be protected by preventing the dissipation of his debtor's assets, its purpose is that the court may vary the legal situation of the assets of the debtor and that of the beneficiary of the disposition effected by the debtor, and it cannot be described as a provisional or protective measure

40. **Case 125/79 : Judgment of the Court of 21 May 1980, Bernard Denilauler v SNC Couchet Frères.**
European Court reports 1980 page 01553.

Convention on Jurisdiction - Provisional measures authorized in the absence of one party.

The conditions imposed by title III of the convention (...) are not fulfilled in the case of provisional or protective measures which are ordered or authorized by a court without the party against whom they are directed having been summoned to appear and which are intended to be enforced without prior service on that party. It follows that this type of judicial decision is not covered by the system of recognition and enforcement provided for by title III of the convention.

h) Article 27 of the Convention / article 34 of the Regulation (non recognition grounds)

41. **Case C-394/07 : Judgment of the Court (First Chamber) of 2 April 2009, Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company.**
Not yet published.

Brussels Convention - Recognition and enforcement of judgments - Grounds for refusal - Infringement of public policy in the State in which enforcement is sought - Exclusion of the defendant from the proceedings before the court of the State of origin because of failure to comply with a court order.

The court of the State in which enforcement is sought may take into account, with regard to the public policy clause referred to in that article, the fact that the court of the State of origin ruled on the applicant's claims without hearing the defendant, who entered appearance before it but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings, if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard.

42. **Case C-283/05 : Judgment of the Court (First Chamber) of 14 December 2006, ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS).**
European Court reports 2006 page I-12041.

Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters - Regulation (EC) No 44/2001 - Recognition and enforcement - Article 34(2) - Judgment given in default of appearance - Ground for refusal - Meaning of the requirement that it must be "possible" for a defendant in default of appearance to commence proceedings to challenge the judgment - Failure to serve the judgment.

Article 34(2) of Regulation No 44/2001 (...) is to be interpreted as meaning that it is 'possible' for a defendant to bring proceedings to challenge a default judgment against him only if he was in fact acquainted with its contents, because it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given.

In order for the defendant to have the opportunity to mount a challenge, he should be able to acquaint himself with grounds of the default judgment in order to challenge them effectively, the mere fact that the person concerned is aware of the existence of that judgment being insufficient in that regard.

However, due service of a default judgment, that is to say, compliance with all the rules applicable to those formalities, does not constitute a necessary condition in order to justify the conclusion that it was possible for the defendant to bring proceedings. In that regard, the broad logic of Regulation No 44/2001 does not require service of a default judgment to be subject to conditions more stringent than those provided for as regards service of the document instituting proceedings. It is service of the document instituting proceedings and the default judgment, as in sufficient time and in such a way as to enable the defendant to arrange for his defence which afford him the opportunity to ensure that his rights are respected before the courts of the State in which the judgment was given. As far as concerns the document instituting proceedings, Article 34(2) of Regulation No 44/2001 removes the necessary condition for due service laid down in Article 27(2) of the Brussels Convention. Therefore, a mere formal irregularity, which does not adversely affect the rights of defence, is not sufficient to prevent the application of the exception to the ground justifying non-recognition and non-enforcement.

43. **Case C-522/03 : Judgment of the Court (First Chamber) of 13 October 2005, Scania Finance France SA v Rockinger Spezialfabrik für Anhängerkupplungen GmbH & Co.**
European Court reports 2005 page I-08639.

Brussels Convention - Recognition and enforcement - Grounds for refusal - Meaning of 'duly served'.

Article 27(2) of the Convention (...) and the first paragraph of Article IV of the Protocol annexed to that convention, must be interpreted as meaning that, where a relevant international convention, such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, is applicable between the State in which the judgment is given and the State in which recognition is sought, the question whether the document instituting the proceedings was duly served on a defendant in default of appearance must be determined in the light of the provisions of that convention, without prejudice to the use of direct transmission between public officers, where the State in which recognition is sought has not officially objected, in accordance with the second paragraph of Article IV of the Protocol. The two methods of transmitting documents provided for by Article IV of the Protocol annexed to the Convention are exhaustive, in the sense that it is solely where neither of those two options is usable that transmission may be effected in accordance with the law applicable in the court in the State in which the judgment was given.

44. **Case C-39/02 : Judgment of the Court (Third Chamber) of 14 October 2004, Mærsk Olie & Gas A/S v Firma M. de Haan en W. de Boer.**
European Court reports 2004 page I-09657.

Brussels Convention - Proceedings to establish a fund to limit liability in respect of the use of a ship - Action for damages - Article 21 - Lis pendens - Identical parties - Court first seised - Identical subject-matter and cause of action - None - Article 25 - 'Judgment' - Article 27(2) - Refusal to recognise.

In order for the decision by a court of a Contracting State establishing a liability limitation fund, as provided for under the International Convention of 10 October 1957 relating to the Limitation of the Liability of Owners of Sea-Going Ships, to be recognised in accordance with the Convention (...) the document instituting the proceedings for the establishment of such a fund must have been duly served on or notified to the claimant in good time, even where the latter has appealed against that decision in order to challenge the jurisdiction of the court which delivered it.

Where, however, regard being had to the special features of the national law applicable, that decision is to be treated as a document that is equivalent to a document instituting proceedings, it cannot, notwithstanding the fact that it was not previously served on the claimant, be refused recognition in another Contracting State pursuant to Article 27(2) of the Convention (...), on condition that it was itself duly notified to or served on the defendant in good time.

It is for the court of the State in which enforcement is sought to determine whether notification of the document instituting proceedings by way of registered letter within the context of proceedings for the establishment of a liability limitation fund, which is regarded as due and proper for purposes of the law of the original court and of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, was effected in the due and proper manner and in sufficient time to enable the defendant effectively to arrange its defence.

45. **Case C-80/00 : Judgment of the Court (Fifth Chamber) of 6 June 2002, Italian Leather SpA v WECO Polstermöbel GmbH & Co.**
European Court reports 2002 page I-04995.

Brussels Convention - Article 27(3) - Irreconcilability - Enforcement procedures in the State where enforcement is sought.

1. On a proper construction of Article 27(3) of the Convention (...), a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought.

2. Where a court of the State in which recognition is sought finds that a judgment of a court of another Contracting State is irreconcilable with a judgment given by a court of the former State in a dispute between the same parties, it is required to refuse to recognise the foreign judgment.

46. **Case C-38/98 : Judgment of the Court (Fifth Chamber) of 11 May 2000, Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento.**
European Court reports 2000 page I-02973.

Brussels Convention - Enforcement of judgments - Intellectual property rights relating to vehicle body parts - Public policy.

1. (...)

2. While the Contracting States remain free in principle, by virtue of the proviso in Article 27, point 1, of the Convention (...), to determine according to their own conception what public policy requires, the limits of that concept are a matter of interpretation of the Convention. 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 of a judgment emanating from another Contracting State.

3. Recourse to the clause on public policy in Article 27, point 1, of the Convention (...) can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.

4. The court of the State in which enforcement is sought cannot, without undermining the aim of the Convention (...), refuse recognition of a decision emanating from another Contracting State solely on the ground that it considers that national or Community law was misapplied in that decision. On the contrary, it must be considered whether, in such cases, the system of legal remedies in each Contracting State, together with the preliminary ruling procedure provided for in Article 177 of the Treaty (now Article 234 EC), affords a sufficient guarantee to individuals.

5. Article 27, point 1, of the Convention (...) must be interpreted as meaning that a judgment of a court or tribunal of a Contracting State recognising the existence of an intellectual property right in body parts for cars, and conferring on the holder of that right protection by enabling him to prevent third parties trading in another Contracting State from manufacturing, selling, transporting, importing or exporting in that Contracting State such body parts, cannot be considered to be contrary to public policy.

47. **Case C-7/98 : Judgment of the Court of 28 March 2000, Dieter Krombach v André Bamberski.**
European Court reports 2000 page I-01935.

Brussels Convention - Enforcement of judgments - Public policy.

1. While the Contracting States in principle remain free, by virtue of the proviso in Article 27, point 1, of the Convention (...), to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention. 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.
2. The court of the State in which enforcement is sought cannot, with respect to a defendant domiciled in that State, take account, for the purposes of the public-policy clause in Article 27, point 1, of the Convention (...), of the fact, without more, that the court of the State of origin based its jurisdiction on the nationality of the victim of an offence.
3. Recourse to the public-policy clause in Article 27, point 1, of the Convention (...) can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.
4. Recourse to the public-policy clause in Article 27, point 1, of the Convention (...) must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the European Convention on Human Rights. Consequently, Article II of the Protocol annexed to the Convention, which recognizes the right of persons domiciled in one Contracting State, who are being prosecuted in the criminal courts of another Contracting State of which they are not nationals, to have their defence presented even if they do not appear in person only where the offence in question was not intentionally committed, cannot be construed as precluding the court of the State in which enforcement is sought from being entitled, with respect to a defendant domiciled in that State and prosecuted for an intentional offence, to take account, in relation to the public-policy clause in Article 27, point 1, of the fact that the court of the State of origin refused to allow the defendant to have his defence presented unless he appeared in person.

48. **Case C-78/95 : Judgment of the Court (Fifth Chamber) of 10 October 1996, Bernardus Hendrikman and Maria Feyen v Magenta Druck & Verlag GmbH.**
European Court reports 1996 page I-04943.

Brussels Convention - Interpretation of Article 27(2) - Recognition of a judgment- Definition of a defendant in default of appearance.

Where proceedings are initiated against a person without his knowledge and a lawyer appears before the court first seised on his behalf but without his authority, such a person is quite powerless to defend himself and must be regarded as a defendant in default of appearance, within the meaning of Article 27(2) of the Convention (...), even if the proceedings before the court first seised became, in point of form, proceedings inter partes. That conclusion is not affected by the fact that the defendant may apply to have the judgment in question annulled on the ground of lack of representation, since the proper time for a defendant to have an opportunity to defend himself is the time at which proceedings are commenced.

Article 27(2) of the Convention therefore applies to judgments given against a defendant who was not duly served with, or notified of, the document instituting proceedings in sufficient time and who was not validly represented during those proceedings, albeit the judgments given were not given in default of appearance because someone purporting to represent the defendant appeared before the court first seised.

49. **Case C-474/93 : Judgment of the Court (Third Chamber) of 13 July 1995, Hengst Import BV v Anna Maria Campese.**
European Court reports 1995 page I-02113.

Brussels Convention - Article 27 (2) - Concept of document instituting the proceedings or equivalent document.

The term "document instituting the proceedings or equivalent document" within the meaning of Article 27(2) of the Convention (...), means the document or documents which must be duly and timeously served on the defendant in order to enable him to assert his rights before an enforceable judgment is given in the State of origin. The decreto ingiuntivo within the meaning of Book IV of the Italian Code of Civil Procedure (Articles 633 to 656), together with the application instituting the proceedings, must therefore be regarded as "the document which instituted proceedings or... an equivalent document" within the meaning of that provision, since their joint service starts time running for the defendant to oppose the order and since the plaintiff cannot obtain an enforceable order before the expiry of that time-limit.

50. **Case C-414/92 : Judgment of the Court (Sixth Chamber) of 2 June 1994, Solo Kleinmotoren GmbH v Emilio Boch.**
European Court reports 1994 page I-02237.

Brussels Convention - Article 27 (3) - Judgment given in a dispute between the same parties - Definition - Court settlement.

Article 27 of the Convention must be interpreted strictly, inasmuch as it constitutes an obstacle to the achievement of one of its fundamental objectives, which is to facilitate, to the greatest extent possible, the free movement of judgments by providing for a simple and rapid enforcement procedure. Hence Article 27(3) of the Convention is to be interpreted as meaning that an enforceable settlement reached before a court of the State in which recognition is sought in order to settle legal proceedings which are in progress does not constitute a "judgment" within the meaning of that provision, "given in a dispute between the same parties in the State in which recognition is sought" which, under the Convention, may preclude recognition and enforcement of a judgment given in another Contracting State.

51. **Case C-172/91 : Judgment of the Court of 21 April 1993, Volker Sonntag v Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann.**
European Court reports 1993 page I-01963.

Brussels Convention of 27 September 1968 - Interpretation of Articles 1, 27 and 37.

Since non-recognition of a judgment given in another Contracting State for the reasons set out in Article 27(2) of the Convention is possible only where the defendant was in default of appearance in the original proceedings, that provision may not be relied upon where the defendant appeared. A defendant is deemed to have appeared for the purposes of Article 27(2) of the Convention where, in connection with a claim for damages made in the context of the criminal proceedings pending before the criminal court, the defendant, through defence counsel of his own choice, answered the criminal charges at the trial but did not express a view on the civil claim, on which oral argument was also submitted in the presence of his counsel.

52. **Case C-123/91 : Judgment of the Court (Fourth Chamber) of 12 November 1992, Minalmet GmbH v Brandeis Ltd.**
European Court reports 1992 page I-05661.

Brussels Convention of 27 September 1968 - Recognition of a judgment given in default of appearance - Article 27 (2).

Article 27(2) of the Brussels Convention (...) must be interpreted as precluding a judgment given in default of appearance in one Contracting State from being recognized in another Contracting State where the defendant was not duly served with the document which instituted the proceedings, even if he subsequently became aware of the judgment which was given and did not avail himself of the remedies provided for under the code of procedure of the State where the judgment was delivered.

53. **Case C-305/88 : Judgment of the Court (Sixth Chamber) of 3 July 1990, Isabelle Lancray SA v Peters und Sickert KG.**
European Court reports 1990 page I-02725.

Brussels Convention of 27 September 1968 - Recognition of default judgment - Article 27 (2).

1. The conditions laid down in Article 27(2) of the Convention (...), that a defendant who fails to appear must have been served with the document instituting the proceedings in due form and in sufficient time, must both be met in order for a foreign judgment given against that defendant to be recognized. That provision is therefore to be interpreted as meaning that a judgment given in default of appearance may not be recognized where the document instituting the proceedings was not served on the defendant in due form, even though it was served in sufficient time to enable him to arrange for his defence.

2. Article 27(2) of the Convention is to be interpreted as meaning that questions concerning the curing of defective service are governed by the law of the State in which judgment was given, including any relevant international agreements.

54. **Case 145/86 : Judgment of the Court of 4 February 1988, Horst Ludwig Martin Hoffmann v Adelheid Krieg.**
European Court reports 1988 page 00645.

Brussels Convention - Articles 26, 27, 31 and 36.

A foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his conjugal obligations to support her is irreconcilable within the meaning of article 27 (3) of the convention with a national judgment pronouncing the divorce of the spouses.

55. **Case 49/84 : Judgment of the Court (Fourth Chamber) of 11 June 1985, Leon Emile Gaston Carlos Debaecker and Berthe Plouvier v Cornelis Gerrit Bouwman.**
European Court reports 1985 page 01779.

Brussels Convention - Article 27(2) - Service of the document which instituted the proceedings in sufficient time.

The requirement, laid down in article 27 (2) of the convention (...), that service of the document which instituted the proceedings should have been effected in sufficient time is applicable where service was effected within a period prescribed by the court of the state in which the judgment was given or where the defendant resided, exclusively or otherwise, within the jurisdiction of that court or in the same country as that court.

In examining whether service was effected in sufficient time, the court in which enforcement is sought may take account of exceptional circumstances which arose after service was duly effected.

The fact that the plaintiff was apprised of the defendant ' s new address, after service was effected, and the fact that the defendant was responsible for the failure of the duly served document to reach him are matters which the court in which enforcement is sought may take into account in assessing whether service was effected in sufficient time.

- 56. Case 228/81 : Judgment of the Court (Second Chamber) of 15 July 1982, Pendency Plastic Products BV v Pluspunkt Handelsgesellschaft mbH.**
European Court reports 1982 page 02723.

Convention of 27 September 1968.

The court of the state in which enforcement is sought may, if it considers that the conditions laid down by article 27 (2) of the convention (...) are fulfilled, refuse to grant recognition and enforcement of a judgment even though the court of the state in which the judgment was given regarded it as proven, in accordance with the third paragraph of article 20 of that convention in conjunction with article 15 of the Hague convention of 15 November 1965, that the defendant, who failed to enter an appearance, had an opportunity to receive service of the document instituting the proceedings in sufficient time to enable him to make arrangements for his defence.

- 57. Case 166/80 : Judgment of the Court of 16 June 1981, Peter Klomps v Karl Michel.**
European Court reports 1981 page 01593.

Brussels Convention of 1968 - Service in sufficient time of the document which instituted the proceedings

(...)

4. Even if the court in which the judgment was given has held, in separate adversary proceedings, that service was duly effected, article 27, point 2, of the convention still requires the court in which enforcement is sought to examine whether service was effected in sufficient time to enable the defendant to arrange for his defence.

5. Article 27, point 2, of the convention does not require proof that the document which instituted the proceedings was actually brought to the knowledge of the defendant. As a general rule the court in which enforcement is sought may accordingly confine its examination to ascertaining whether the period reckoned from the date on which service was duly effected allowed the defendant sufficient time to arrange for his defence. Nevertheless the court must consider whether, in a particular case, there are exceptional circumstances which warrant the conclusion that, although service was duly effected, it was, however, inadequate for the purpose of causing time to begin to run.

i) Article 57 of the Convention / article 71 of the Regulation (relations with other instruments)

- 58. Case C-148/03: Judgment of the Court (Third Chamber) of 28 October 2004, Nürnberger Allgemeine Versicherungs AG v Portbridge Transport International BV.**
European Court reports 2004 page I-10327.

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

Article 57(2)(a) of the Convention (...) should be interpreted as meaning that the court of a Contracting State in which a defendant domiciled in another Contracting State is sued may derive its jurisdiction from a specialised convention to which the first State is a party as well and which contains specific rules on jurisdiction, even where the defendant, in the course of the proceedings in question, submits no pleas on the merits and formally contests the jurisdiction of the court seised.

In that connection, although it is true that according to Article 20 of the Convention (...), applicable by virtue of the second sentence of Article 57(2)(a), the court in question is required to declare of its own motion that it has no jurisdiction unless its jurisdiction was derived from the terms of that convention, the jurisdiction of that court must, however, be regarded as derived from the Convention, because Article 57 thereof specifically states that the rules of jurisdiction laid down by specialised conventions are not affected by that convention.

In those circumstances, when verifying of its own motion whether it has jurisdiction with respect to that convention, the court of a Contracting State in which a defendant domiciled in another Contracting State is sued and fails to enter an appearance must take account of the rules of jurisdiction laid down by specialised conventions to which the first Contracting State is also a party.

- 59. Case C-406/92 : Judgment of the Court of 6 December 1994, The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj".**
European Court reports 1994 page I-05439.

Brussels Convention - Lis pendens - Related actions - Relationship with the international convention relating to the arrest of seagoing ships.

On a proper construction, Article 57 of the (...) Convention (...) means that, where a Contracting State is also a contracting party to another convention on a specific matter containing rules on jurisdiction, that specialized convention precludes the application of the provisions of the (...) Convention only in cases governed by the specialized convention and not in those to which it does not apply. Where a specialized convention contains certain rules of jurisdiction but no provision as to *lis pendens* or related actions, Articles 21 and 22 of the (...) Convention accordingly apply.