THE BRUSSELS CONVENTION: A STILL BORN CHILD?

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INTRODUCTION

At first sight the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels 1968, (more commonly known as, and hereinafter referred to as, the Brussels Convention) has all the appearances of being just another piece of EC law, dreamt up in Brussels by the vast European Union machinery pursuant to the Treaty of Rome as amended. Upon further examination, however, it becomes apparent that this document does not fall into any of the tidy boxes, of Regulation, Directive or Decision, that usually account for the emanations from Brussels. This piece is not the product of the Council or the Commission. It is, in fact, an international treaty between the then Member States of the European Economic Community in 1968, as independent and sovereign states, to be subsequently amended and endorsed by each of the new Member States upon accession to what is now known as the European Union.

The Brussels Convention[1] was updated as new members joined the EEC,[2] as it was then known.[3] Reports were also drawn up upon each accession.[4] The European Court of Justice (the ECJ) was granted jurisdiction to interpret the Convention under the Luxembourg Protocol,[5] which was signed on the 3 June 1971, but which only came into force on the 1 September 1975. The 1971 Protocol gives the ECJ power, negotiated on the basis on Article 220(4) EC and Article 3(2) of each Act of Accession,[6] to give preliminary rulings on interpretation of the Convention at the request of the final appeal courts of each Member State.

It is the argument of this article that because the Brussels Convention[7] is not EU law it lacks potency and potential. By virtue of its International

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1 OJ No L 229 31.12.72. All references to the EC Treaty in this article are to the pre-Amsterdam Treaty numbering.

2 Luxembourg Convention 9th October 1978 re accession of Denmark, Ireland and the United Kingdom, (OJ No. L 304, 30.10.1978). Luxembourg Convention 25 October 1982 re accession of Greece, (OJ No. L388, 31.12.1982). San Sebastian Convention on the accession of Spain and Portugal, (OJ 1989 L285/1). The updated and consolidated Brussels Convention, upon the accession of Sweden, Finland and Austria, (OJ No. C 15, 15.1.97, page 1).

3 It was also used as a model for the Lugano Convention, OJ No L 319, 25.11.1988.

4 Jenard-Moller Report, (OJ No. L 319, 25.11.1988). Jenard Report, (OJ No. C 59, 5.3.1979). Schlosser Report, (OJ 1979 C59). Evrigenis and Kerameus Report, (OJ 1986 C289/1). Almedia Cruz, Desantes Real, Jenard Report, (OJ 1990 C189/6). (There appears to be no report published as yet upon the accession of Sweden, Finland and Austria).

5 [1990] OJ C No. 189/2.

6 Peter Stone, *The Conflict of Laws*, Longmans, 1995, p 155.

7 Along with the subsequent Rome Convention on the Law applicable to Contractual Obligations, Rome 1980, OJ L 1980 No. 266/1 and the European Insolvency Convention EU Convention on International Insolvency Proceedings, Brussels November 23, 1995 35 ILM 1236 (1996).

Law status the role of the ECJ is fundamentally different, and the potential for the Convention to govern the free movement of judgments from one jurisdiction to another, (a necessary corollary to the free movement of goods, establishment, services, workers and capital), is limited, thus adversely affecting the further development of the Single Market.

THE IDENTITY OF THE BRUSSELS CONVENTION.

The issue of the identity of the Brussels Convention was brought sharply into focus in the case of *Kongress Agentur Hagen* v *Zeehahgen*[8] when the Commission, in making its submissions to the ECJ, engaged in an amazing dichotomy of argument,[9] which perhaps reflected its own ambivalence towards the exact nature of the Brussels Convention. The Commission's oral and written presentations to the Court in this case were completely at odds. The first of the arguments was to the effect that the Brussels Convention was recognized as a framework document and that other sources of law, such as national procedural rules, should be used to supplement it.

The second argument envisaged the Brussels Convention as a supreme law, to which national rules of jurisdiction should be subordinate. This argument reflects the view that laws based on the Treaty of Rome take precedence to national law, that the Convention forms "an integral part of the Community legal order". It also recognizes that reference to national rules for supplemental purposes, (as required by the first argument), would lead to an uneven application of the provisions of the Convention, militating against its uniform application.

If the first argument (that the Brussels Convention is to be interpreted as a framework document to be supplemented by national procedural rules) prevails, then the Convention becomes merely a conduit through which fifteen or more diverse and varied national rules of law and procedures can, in computer parlance, interface. There is no attempt to harmonize or co-ordinate existing law and procedure. Any attempt to move a judgment from one jurisdiction to another requires knowledge of three sets of laws and procedures, those of the originating jurisdiction, of the destination jurisdiction, and those of the Brussels Convention as the interjurisdictional conduit. The national and jurisdictional boundaries remain, imposing a barrier to the free movement of jurisdiction, thus delaying and hindering their pursuit of assets or persons, who enjoy the benefits of the free movement provisions of the EC Treaty. The European Single Market is thereby flawed, and business people operating in a flawed market will always be conscious of the added burden of enforcing a judgment on a transnational basis.

If the argument that the Convention is to take precedence over national law prevails, then new procedures for the implementation of the Convention would have to be developed by the ECJ. The end result of this would be one European-wide substantive and procedural system for the movement of judgments from one Member State to another. That system would be applied in a similar manner within each of the Member States. European procedural rules would operate in addition to or instead of existing national systems for enforcing judgments. Thus, normally, lawyers in each member state would be fully familiar with the procedures to be applied from the instigation of the action to its final execution. This

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[8] Case C-365/88, *Kongress Agentur Hagen* v *Zeehaghen*[1990] ECR 1-1845 at 1865.

[9] *Op cit*, n 6.

certainty and clarity of law and procedure would provide a smooth running and a fully coordinated pan-European system, where judgments could move as freely as the persons or assets that they are pursuing through the Member States, thus contributing to a true European Single Market.

This scenario would reflect the ideal situation, although it might encounter some initial objection from traditionalists, as it would require root and branch reform of the judgment enforcement procedures in each Member State. Such opposition has not, however, prevented the promulgation of European law before. This hypothesis of the Brussels Convention taking precedence over national law is based on the premise that the Convention can be regarded as law enacted pursuant to the Treaty of Rome. This is not in fact the case. The status of the Convention as an international document is reflected in the restricted access of litigants to the ECJ, and the limited competence of the ECJ on issues deriving from the Convention, in contrast to exclusive competence on EC law issues.

Francesco Capotorti[10] is of the opinion that the similarities between Article 177 referrals and Brussels Convention referrals are greater than the differences. The two systems are after all being administered by the same court, for the same Member States. The differences in the two schemes, however, become all the more important given the above facts. Capotorti does acknowledge however that "a Convention between Member States cannot be classified as a Community Measure" and "cannot be classified as an actual source of Community law".[11]

Trevor C. Hartley appears to take a different view.[12] He makes specific reference to the case of *Peters* v *ZNAV*,[13] which stated that "the concepts of matters relating to a contract" in the Article 5(1) of the Brussels Convention should be determined by the ECJ, rather than the laws of one of the Contracting States.[14] At issue in this case was the payment of money on the basis of an association / member relationship.[15] Rather than arguing, as Hartley does, with reference to this case, that the ECJ does not exercise an undue restraining influence on the national courts through "unnecessary Europeanisation", it is a more tenable proposition to state that the national courts are given excessive competence (to the detriment of the ECJ) in the

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[10] Fransco Capotorti: "Tasks of the Court of Justice and the System of the Brussels Convention"; *European Court of Justice: Civil Jurisdiction and Judgments in Europe, Proceedings of the Colloquium on the Interpretation of the Brussels Convention by the Court of Justice considered in the context of the European Judicial Area*. Luxembourg, 11 and 12 March 1991, Butterworths 1992, p 14.

[11] *ibid.* at p 15.

[12] In his article entitled "Unnecessary Europeanisation under the Brussels Jurisdiction and Judgments Convention: the Case of the Dissatisfied Sub-Purchaser" *ELR* 1994, 18(6), 506-516. Hartley defines "Europeanisation" as denoting the "process whereby a given question becomes a matter for determination by Community law, rather than by national law".

[13] (*Reference for a preliminary ruling from the Hoge Radd der Nederlanden*) Case 34/82, *Peters* v *ZNAV* [1983] ECR 987.

[14] At point 9 of the judgment.

[15] And whether obligations in question arose from membership, or whether it was necessary for such membership to be in conjunction with one or more decisions made by the organs of the association. He goes on to argue that this appears to breach the principle of subsidiarity. However, as subsidiarity is enshrined in Article 3b it would appear to cover EC law only, and not International Treaties such as the Brussels Convention.

operation and interpretation of the Brussels Convention. This can result in an uneven approach to the interpretation and application of the Convention.[16]

Substantial differences exist between Article 177 referrals and those under the Brussels Convention. These include;

1. A greater reliance upon the national judiciary for applying and interpreting the law;

2. A more restricted access to the ECJ under the Brussels Convention than under Article 177 referrals;

3. An unwillingness of the ECJ to take a more proactive and constitutional style approach to the application of the Brussels Convention, as evidenced in the case of *Industrie Tessili Italiana* v *Dunlop PG*.[17]

National Judiciary and Restricted Access to ECJ.

One of the causes for the undue reliance upon the national judiciary is the much more restricted access to the ECJ under the Brussels Convention than under the EC Treaty. Only the courts listed in Article 2 of the Luxembourg Protocol of 1971 can request the ECJ to give rulings under the Brussels Convention. When a matter is referred to it, the ECJ can only interpret the Convention by way of a preliminary ruling.[18] The ECJ is not engaged in the application of law to specific cases, unlike in some instances under the EC Treaty. The ECJ itself has stated that its function, as envisaged in the Protocol of 3 June 1971, "is to give interpretative rulings on the provisions of the Brussels Convention which are binding on the national courts which put questions to it"[19] and is (as a result) reluctant to give merely advisory rulings, particularly if they appear to pertain to matters which are outwith the constraints of a rigid interpretation of the Convention and, as a result, fall to be dealt with under national law.

Lack of Constitutional Style.

In the case of *Industrie Tessili Italiana* v. *Dunlop PG*,[20] where there were differences in the rules of Contracting States concerning the place of performance of a contract, the ECJ decided that it was not in a position to provide a definition. In issues arising under the EC Treaty the ECJ has acted in the capacity of a Supreme Court[21] developing law to strengthen

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16 The assumption of control exercised by the ECJ in the case of *Peters* should be interpreted as an attempt by the Court to mitigate the damage caused by undue reliance on national legal systems, where the underlying assumption of the Convention, (that all jurisdictions had a similar understanding of the term "contract") had been undermined.

17 Case 12/76 *Industrie Tessili Italiana* v *Dunlop PG* [1976] ECR 1473.

18 Marco Darmon Advocate General: "The Task of the Court of Justice and the System of the Brussels Convention"; *European Court of Justice: Civil Jurisdiction and Judgments in Europe, Proceedings of the Colloquium on the Interpretation of the Brussels Convention by the Court of Justice considered in the context of the European Judicial Area*. Luxembourg, 11 and 12 March 1991, Butterworths 1992, p 3.

19 Case C-346/93 *Kleinwort Benson Ltd*. v *City of Glasgow District Council* [1995]ECR I-615.

20 Case 12/76, *Industrie Tessili Italiana* v *Dunlop PG* [1976] ECR 1473.

21 In defence of the constitutional status that it appears at times to confer on the EC treaty. See S. Weatherill, "The Constitutional Court", Chapter 6 in *Law and Integration in the European Union*, 1995; van Gerven "The Role and Structure

the provisions of the EC Treaty. The ECJ cannot, in its role as arbiter of the Brussels Convention, develop the Convention in order to fill in the gaps left by its drafters. The ECJ is equally unwilling to assume powers to itself under the Convention that it was not otherwise given,[22] an approach in complete variance with its much more proactive approach for issues arising under the EC Treaty.[23]

The difference in the role of the ECJ under the two regimes can also be seen as a result of the fact that under Article 177 EC Treaty a ruling may be requested (optionally) by any court or tribunal of a Member State (provided it considers that a decision on the question is necessary to enable it to give judgment), with obligatory referral of the case by the final appellate court. Under Article 3(1) of the Brussels Convention, however, preliminary rulings or interpretations on any aspect of the Convention may be sought by the national courts only "when they are sitting in an appellate capacity" and by the courts granted jurisdiction to hear appeals against decisions authorizing enforcement by Article 37 of the Brussels Convention. First instance courts may not refer a matter on the Brussels Convention to the ECJ.[24]

A further difference refers to an unusual further jurisdiction arises under Article 4 of the Protocol of the Convention whereby a ruling on interpretation may be sought from the Court by authorities other than the courts specified in Article 2 of the Protocol. This jurisdiction only arises where a matter is already *res judicata* and one or more decisions given by the Courts of the Contracting States conflict with a previous interpretation given either by the Court of Justice or by a Court of Appeal of another Contracting State. This final form of referral is for the future reference of the relevant jurisdiction only, as any judgment by the ECJ will have no impact whatsoever on the facts of the case originally in question. This, as stated by Francesco Capotorti,[25] despite the provision's lack of use, is a substantial departure from the procedures set out by the Treaty of Rome for its own application. The above factors would appear to militate strongly against the "Supreme Law" argument, whereby national rules of jurisdiction should be subordinated, proposed by the Commission is its

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of the European Judiciary now and in the future," 1996 21(6) *ELR* 221-223; and Cappellitti: "Is the European Court of Justice "Running Wild?", (1987) 12 *ELR* 1.

22 As stated by Pieri in *CMRL* 34 867-893, 1997, "The 1969 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters: the Evolution of Case Law of the Court of Justice 1992-1996:" "Any special jurisdiction had an exceptional character, and may not be extended if the norm does not specifically allow for", referring to case of Case 32/88, *Six Constructions Ltd*. v *Humbert* [1989] ECR 341.

23 As evidenced in *J.J. Zwartveld and others*, Case C-2Imm[1990] ECR 3365, and *Cordoniu SA* v *E.C. Council,* Case C-309/89, [1994] ECR I-1853. The development of the concept of procedural fairness beyond the basic Article 190 duty to give reasons in the joined Cases C-6 9/90, *Andrea Francovich and Dinila Bonifaci and others* v *Italian Republic* [1991] ECR 5357 and the progressive adoption of Human Rights into EC law, in the cases of Case 11/70 *Internationale Handelsgesellschaft* v *Einfuhr- und Vorrasstelle fur Getreide und Futtermittel* [1970] ECR 1125, and Case 46/87, *Hoechst* v *Commission* [1989] ECR 2859, as subsequently followed by Article F(2) of the Treaty on European Union, all evidence the proactive approach of the ECJ to EC Law.

24 Case 80/83 *Habourdin* v. *Italocremona* [1983] ECR 3639.

25 *Op cit*., n 10.

written submission in *Kongress Agentur Hagen* v *Zeehaghen*,[26] and to favour the framework argument.

Where the Convention prescribes a legal position[27] or procedure[28] (that is, rights of appeal)[29] the Convention does takes precedence over national provisions.[30] There are many issues, however, not addressed at all by the Convention, thus leading to an undue reliance on national law,[31] and thus supporting the framework argument. Such matters include problems arising from the defective service of the document instituting proceedings[32] and issues dealing with the assessment of the quantum of damages.[33] Here national law is utilized on condition that its application does not impair the "effectiveness" of the Convention."[34] Other issues are dealt with by specific reference to the national laws of the court seized, such as the law applicable to the legal relationship in question. National laws are also used to determine the place of performance of the contractual obligation.[35] "As there is no uniformity among the laws of the contracting parties permitting a standard determination of the 'place of performance', there is no alternative but to let the court seized interpret this rule, according to the international private law of the *lex fori*".[36] Another example of reliance on national law arises under Article 21, which refrains from introducing any procedures for the automatic consolidation of cases. This is evidenced in the case of *Tarty* v *Maciej Rataj*.[37] In the earlier case of *Deutsche Genossenschaftsbank* v *SA Brasserie du Pecheur*[38] Advocate General Lenz, adopting the stance of the German authorities, accepted

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[26] *Op cit*., n 8.

[27] As in the case of Article 39 which deals with enforcement matters; *Capelloni & Aquilini* v. *Pelkmans* (Case 119/84), [1985] ECR 3147.

[28] Case 42/76, *De Wolf* v. *Cox* [1976] ECR 1759.

[29] The Convention itself "constitutes an autonomous and complete system of appeals" according to the Court in paragraph 17 of its judgment in the case of *Deutsche Genossenschaftsbank* v *S.A. Brasserie du Pecheur*, Case 148/84, [1985] ECR 1981.

[30] In the case of *Duijnstee* v *Lodewijk Gorerbauer* Case 288/82, [1983] ECR 3663, (reference for a preliminary ruling from the Hoge Raad der Nederlanden), the Court held at point 15 of its judgment that the Convention "which seeks to determine the jurisdiction of the courts of the Contracting States in civil matters must override national provisions which are incompatible with it".

[31] To include an Action Paulienne, Case C-261/90, *Reichert and Kockler* v *Dresdner Bank* [1992] ECR 2175, and non enforcement of settlements, Case C-414/92, *Solo Kleinmotoren GmbH* v. *Boch* [1994] ECR I-2237.

[32] Which are governed by the *lex fori*, including, where applicable, relevant international agreements Case C 305/88 *Isabelle Lancray S.A.* v *Peters und Sickert* [1990] ECR I-2725.

[33] Case C-68/93 *Fiona Shevill* v *Press Alliance* [1995] ECR 1-450.

[34] "The 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in civil and commercial matters: The Evolution of the Text and the case law of the court of Justice over the last four years" S. Pieri *CMLR* (29) 537-555.

[35] C-288/92, *Custom Made Commercial* v *Stawa Metallbau*, [1994] ECR 1-2949, confirming (Case 12/76 *Industrie Tessili Italiana* v *Dunlop AG* [1976]ECR 1473, and Case 266/85, *Shenavai* v *Kreischer* [1987] ECR 239.

[36] See n 34 *supra.*

[37] Case C-406/92, *Tarty* v *Maciej Rataj* [1994] ECR 1-5460.

[38] Case 148/84, *Deutsche Genossenschaftsbank* v *SA Brasserie du Pecheur* [1984] ECR 1981.

that, where procedures are circumscribed in the Brussels Convention, they are applicable exclusively. It must be noted that the exclusion of procedures under national laws "does not extend beyond the field of application of the uniform rules provided for in the Convention": it is for national law to determine any extraneous matters.[39]

Renhold Geimer points out[40] that, not only do many procedural requirements fall under national laws, but so do questions of substantive law, as evidenced above in *Industrie Tessili Italiana* v *Dunlop A.G.*[41] The ECJ itself stated in the case of *Sanicentral GmbH* v *Collin* that "the Convention does not affect rules of substantive law", but rather the role of the Convention is to "determine the jurisdiction of the courts of the contracting states in the intra-Community legal order".[42]

Matters relating to execution on foot of a judgment are also to be determined according to national law. In his opinion on the case of *Hoffmann* v. *Kreig*,[43] Advocate General Darmon stated that, despite the fact that the Convention laid down an exhaustive list of the rights of appeal available,[44] "the Convention merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments" and that its execution is to be governed by the domestic law of the court where the execution is sought.

As the whole purpose of the Brussels Convention is the enforcement of judgments in other EU Member States this is a very significant area of substantive and procedural law which the Brussels Convention does not even attempt to address. However, problems do not end here. Other problems that may be encountered in the enforcement of judgments include issues pertaining to family or divorce matters,[45] or to the enforceability of some cases in the country of enforcement for national reasons.[46]

PLURALITY OF INTERPRETATION

One of the consequences of the Framework construct of the Brussels Convention (with the consequence lack of a Supreme Court approach on the part of the ECJ) is plurality of interpretation. This may arise with regard to the Brussels Convention to an extent not possible under the EC Treaty. This is demonstrated in the case of *De Bloos* v. *Bouyer*,[47] which involved language problems in the interpretation of the phrase "the place where the obligation has been or should be performed".[48] The case turned on the term "obligation" with Belgian commentators (the referring

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39 Interested third parties were prevented from challenging enforcement orders in this case.

40 "Right of Access to the courts under the Brussels Convention": in *supra*, n 34 at p 40.

41 Case 12/76, *Industrie Tessili Italiana* v *Dunlop A.G* [1976] ECR 1473.

42 Case 25/79, *Sanicentral GmbH* v *Collin* [1972] ECR 3423, (preliminary ruling requested by the Cour de Cassation of France), at point 6 of its judgment.

43 Case 145/86, [1988] ECR 645, (reference for a preliminary ruling from the Hoge Radd der Nederlanden).

44 See Case 148/84, *Deutsche Genossenschaftsbank* v *S.A. Brasserie du Pecheur* SA [1985] ECR 1981.

45 Case 145/86, *Hoffman* v *Kreig* [1988] ECR 645.

46 Case 42/76, *de Wolf* v *Harry Cox* [1976] ECR 1759.

47 Case 14/76, *De Bloos* v *Bouyer* [1976] ECR 1497.

48 *Op cit*, n 36.

jurisdiction) unable to provide a satisfactory definition of same.[49] Different language versions of the Brussels Convention provided different interpretations of the term, with the ECJ eventually determining that "obligation" referred to the contractual obligation forming the basis of the legal proceedings, reflecting the Italian and German version of the Convention. This situation, where the ECJ feels itself constrained by the language of the Convention with the result that it tries to stick rigidly to its wording, is less likely to occur in the context of the application of the EC Treaty, particularly when the Court operates in a Supreme Court style mode, as in the case of *Parti Ecologiste Les Verts* v *European Parliament*,[50] where the Court went so far as to insert the word "Parliament" into Article 173 EEC.

CONCLUSION

As has been evidenced by the aforementioned cases of *Francovich*[51] and *Zwartveld*,[52] the very issue of the "international" recognition of judgments is also uncharacteristic of the general tenor of EC law developments over the past number of years. The international treaty status of the Brussels Convention is based upon a vision of the EU as being composed of independent states, coming together for a limited purpose. The increasing emphasis on unity has been negated in this important area of law. This Convention emphasizes the disparities within the Member States in the process for enforcement of judgments, and makes no effort whatsoever to harmonize them. The case of *Kongress Agentur Hagen* v *Zeehaghen*[53] was decided against the backdrop of the above cases, and at the hearing was the subject matter of two conflicting submissions of the Commission:

1. That the Convention could be supplemented by procedural rules, and

2. The Convention was part of the integral legal order of the Community, and all emphasis should be placed on uniform application of the Convention. After considering the arguments, the Court held in its judgment, at paragraph 17 thereof, that the object of the Convention "is not to unify procedural rules but to determine which court has jurisdiction in disputes relating to civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments".[54]

Echoing the opinion of Droz,[55] the Convention is an entirely original, dynamic and effective legal entity, and as Advocate General Marco Darmon has pointed out: "The Brussels Convention constitutes the Community's first achievement in the field of international private law",[56] but as such, regard must be had to the fact that the purpose of the Brussels Convention on Jurisdiction and Enforcement of Judgments 1968 is not to

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[49] The choice presented to the court was whether the term "obligation" referred to the obligation to compensate or the obligation to perform the contract in question.

[50] Case 294/83, *Parti Ecologiste Les Verts* v *European Parliament* [1986] ECR 1339.

[51] Joined Cases C-6 9/90, *Andrea Francovich and Dinila Bonifaci and others* v *Italian Republic* [1991] ECR 5357.

[52] Case C-2Imm, *J.J.Zwartveld and others* [1990] ECR 3365.

[53] *Op cit*, n 8.

[54] The Court went on to state that there was a necessity to clearly distinguish between jurisdiction and the conditions governing admissibility.

[55] Competence Judicaire et Effects des Jugments dans le Marche Commun, (1972), referred to in Anton & Beaumonts *Civil Jurisdiction in Scotland*.

[56] *Op cit*, n 18.

unify the procedural rules, as stated by the ECJ in the judgment in the case of *Kongress Agentur Hagen* v. *Zeehaghen*,[57] nor in certain situations, the substantive rules.

This international trend[58] introduces a note of tension into the European legal order. We are no longer all progressing along the same road, but we have shown a willingness, not only to slow down, but to turn around and go backwards. This move is reinforcing the concept of "a Europe of bits and pieces",[59] a move that has also been noted in other areas of European law. While the Convention might have been the product of a more realistic approach to solving the particular problem posed at the time, avoiding the thornier issues of approximation or unification of national laws, it may prove to be, in time, a stumbling block in the quest for the development of a true European Union. The United Kingdom recognizing the inherent rigidity of the Brussels Convention had advocated the need for greater flexibility along the lines of the common law doctrine of *forum non conveniens* at the 1978 accession negotiations, but to no avail.[60]

The Brussels Convention has a very potent effect, as every court in a Contracting State is required to apply it. This is the case, according to the Jenard report,[61] whether or not the Convention is pleaded by the parties. This report was granted the status of an interpretative document, as evidenced by section 3(3) of the United Kingdom's enacting legislation, the Civil Jurisdiction and Judgments Act 1982,[62] which provides that the separate reports accompanying each of the Accession Conventions are to be considered by the English courts in cases requiring the application of the Convention.

The usefulness of the Brussels Convention can be determined by its day to day application in the courts of EU Member States. The processing of claims for monetary judgments and their subsequent enforcement is very much part of the day to day operations of regional courts in each Member State, with many of the claims emanating from the lowest courts. With the greater mobility of all sectors of society between countries the issue of the international recognition of judgments is no longer the preserve of big business, but encompasses every EU citizen.

Access to the ECJ to determine issues which might arise under the administration of the Brussels Convention is severely restricted, with (as referred to earlier), only Article 2 courts being given the right to refer matters to the ECJ. Appeals to a higher court in the land simply to facilitate such a referral to the ECJ is therefore adding unnecessary burden and expense to the plaintiff. Such an additional burden could restrict access to justice for many smaller claimants.

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[57] *Op cit*, n 8.

[58] Commenced by the Brussels Convention on the International Recognition and Enforcement of Judgments, OJ No. L 229, 31.12.72, and as subsequently developed by the EEC Convention on the Law applicable to Contractual Obligations, Rome 1980, OJ L 1980 No. 266/1, and the EU Convention on International Insolvency Proceedings, Brussels November 23, 1995, 35 ILM 1236 (1996), (which is due to come into force as soon as the last Member State signs it).

[59] Deirdre Curtin, "The Constitutional Structure of the Union, A Europe of bits and pieces" (1993) 30 CMLRev 17.

[60] *The Option of Litigating in Europe*. Edited by D.L.Carey Miller and Paul R. Beaumont. United Kingdom National Committee of Comparative Law. "The 1968 Brussels Convention and Subsequent Development" Karl M Newman.

[61] Jenard Report, (OJ No. C59, 5.3.1979).

[62] C 27.

The Convention, by relying on national law to the extent that it does, is held to ransom by the national courts and their domestic provisions dealing with judgments. A new EU system for recognition of judgments cannot be developed, as there is, (to date), no attempt to unify the substantive and procedural law in this area.[63] Every judgment has to be governed by two national laws, the law of the forum of the judgment, and that of the forum of enforcement. One lawyer is unlikely to be sufficiently proficient in two legal systems to prosecute any case to its conclusion. Two legal teams on one judgment case continues to make the international recognition and enforcement of judgments unwieldy and cumbersome, with the free movement of judgments lagging a long way behind the other freedoms, thereby handicapping the development of a true internal market.

This disjointed development of the European market makes it easy for a defendant to move himself, his assets, or even his entire business from one jurisdiction to another, without permitting those who seek to enforce a judgment against him an equal opportunity to avail of the lowering of the internal EU borders. Similarly, the full potential of pan-European commerce requires a seamless and effective method of enforcing contracts through judgments, such a system being a far cry from that currently available under the Brussels Convention.

Free movement of judgments, as with the other free movements, requires the supreme European court, the ECJ, to operate in a constitutional manner with full authority to develop and evolve the provisions of a judgment recognition system, as necessity demands, without issues falling outside the European law system, and relying on national laws and procedures, which have been developed for purposes other than pan-European enforcement of judgments. Problems arising from the strict interpretation of the Brussels Convention in its various language formats should never have been permitted to arise, and would have been less likely to have arisen had the Brussels Convention been developed within the EC legal system.

This lack of identity as EC law, deriving from the EC Treaty, stifles the Convention's potential. It is not an organic law capable of growth and development by the careful nurturing of the ECJ, under its more pro-active, Supreme Court style of judicial decisions, making it very much a legal document which operates as a "blunt instrument"[64] born fully developed. Any further progress to be made in this area will have to be done by way of a further international Convention,[65] while practitioners and public alike suffer from a system that is still, on many occasions, determined by national laws and procedures, with a true single commercial market in matters of European recognition of enforcement of judgments in civil matters a long way off.

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[63] There is a possibility that such unification may arise at some stage in the future under Article K1 point 6 of the Treaty of European Union.

[64] Adrian Briggs, "The Brussels Convention," Yearbook of International Law [1991] p 521.

[65] As in the case of the provisions for Consumer Contracts, which could have been developed from the original text of the treaty, and had to be introduced upon the accession of the United Kingdom, Ireland and Denmark to the treaty. See further: Pieri, *op cit*, n 22.