

# THE FUTURE OF EUROPEAN CIVIL PROCEDURE

M. Freudenthal<sup>1</sup>

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## 1. Introduction

On the 1st of May 1999, the Treaty of Amsterdam entered into force. Since that time, European civil procedure has become one of the most important topics of private harmonisation within the Union. In exactly four years, several regulations on civil procedure were realised and more have been instigated, all based on Article 65 of the European Community Treaty. These procedural instruments aimed, in the first place, at the realisation and the improvement of legal cooperation in order to promote the well-functioning of the internal market. Although compatibility and harmonisation of the national rules of civil procedure did not constitute a target of these regulations, they nevertheless encroached upon the member states' domestic civil procedure; thus, these regulations provide an impetus to European harmonisation and, as a consequence, to the coming into being of a European law of civil procedure. This is certainly the main difference between the European regulations on civil procedure and the Hague Conventions on civil procedure, realised successively in 1904, 1954, 1965 and 1970,<sup>2</sup> since these Hague Conventions strictly regulate and simplify cross-border legal cooperation while guaranteeing the sovereignty of the contracting states.<sup>3</sup> The harmonisation of European civil procedure is not only contributed to by European legal instruments of civil procedure; an important contribution to that effect is also provided by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. Principles such as the right to be heard, the equality of both parties to a dispute and the right to proceedings within a reasonable time have become important issues which have been implemented in national law.<sup>4</sup>

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<sup>1</sup> The author is Senior Lecturer in Civil Procedure, Molengraaff Institute for Private Law, Utrecht University, The Netherlands. E-mail: M.Freudenthal@law.uu.nl.

<sup>2</sup> The Hague Conventions relating to civil procedure of 1905 and 1954; the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965 and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970.

<sup>3</sup> Especially the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965 resulted in changes in the Dutch law of civil procedure in the sense that the *Burgemeestertje* - the automatic service of documents upon the burgomaster if the domicile or residence was unknown - was abolished.

<sup>4</sup> The consequences of Article 6 of the ECHR will not be considered in this contribution.

In this contribution, I will not only discuss what has been developed up to now, but I will also try to look ahead and see what impact in particular the new European Convention, when accepted, may have on European civil procedure. A closer study of these new developments is necessary since, to date, European civil procedure has been developed in a way which is too incidental and without being based on a well-considered basic concept. It is becoming increasingly clear that such a basic concept is needed in order to realise a genuine harmonised/uniform European procedural system.<sup>5</sup> I will try to discover whether one can already speak of the emergence of such an independent European law of civil procedure, which distinguishes itself from national civil procedure as well as from international civil procedure.<sup>6</sup>

## 2. European civil procedure before the Treaty of Amsterdam

The increasing economic activities within the European Union have realised a growth in European cross-border transactions. Inherent in this growth is the growth of cross-border conflicts. The variety of laws of civil procedure in Europe has created an already long-existing problem by which effective access to the courts is seriously hampered.<sup>7</sup> The idea to solve this problem by harmonising part of the law of civil procedure has, however, only recently emerged. As a rule, the law of civil procedure was and still is considered to be closely connected to the forum and the forum state with its own cultural and traditional specific aspects, and therefore not fit for harmonisation. For this reason, even now the forum decides on the rules of civil procedure that will be applied,<sup>8</sup> which is almost always strictly national law. A first successful step towards partial harmonisation of the law of civil procedure within the European Union was made in 1968 by the acceptance of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, a convention which was created within the European Community common rules for jurisdiction, recognition and execution of judicial decisions.<sup>9</sup> In spite of the positive effects of this Convention - which were for an important part caused by its uniform interpretation by the Court of Justice in Luxembourg - it was only after 1990 that the harmonisation of civil

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<sup>5</sup> M. Freudenthal and F.J.A. van der Velden, *Europees procesrecht van het Verdrag van Amsterdam*, in: E.H. Hondius et al. (eds.), *Van Nederlands naar Europees Procesrecht? Liber Amicorum Paul Meijknecht*, Kluwer 2000, pp. 81-98; see also footnote 40 there.

<sup>6</sup> B. Hess, *Der Binnenmarktprozess*, JZ 1998, pp. 1021-1032.

<sup>7</sup> At this moment, seventeen different systems of civil procedure exist. The U.K. already has three different systems: one in England and Wales, one in Scotland and one in Northern Ireland; see T. Drappatz, *Die Überführung des internationalen Zivilverfahrensrechts in eine Gemeinschaftskompetenz nach art. 65 EGV*, Max-Planck-Institut, 2002, p. 3.

<sup>8</sup> K.D. Kearmeus, *Angleichung des Zivilprozessrechts in Europa*, *RabelsZ*, Bd 66, 2002, p. 5; C.H. van Rhee, *Civil Procedure: A European Ius Commune?*, ERPL, 2000, pp. 589-611.

<sup>9</sup> The legal basis is Art. 293 (ex Art. 220) of the Treaty establishing the European Community. The EU Convention on Insolvency Proceedings of 23 November 1995 was created using the same legal basis. Because, due to the BSE crisis, the United Kingdom failed to sign the Convention before the deadline, the Convention never entered into force.

procedure gained momentum.

The Treaty of Maastricht of 1992 opened the door for European cooperation and legislation in matters of civil procedure. In Title VI, the Treaty brought judicial cooperation in civil matters within the then created third pillar of the Community, the intergovernmental tasks of the European Union.<sup>10</sup> Under the third pillar three conventions were realised, namely a convention on the accession of Austria, Finland and Sweden to the Brussels I convention 1968, a convention on jurisdiction and enforcement of judgments in family matters and a convention on the service of documents. Of these three, only the accession convention has entered into force.<sup>11</sup>

Despite the positive wording of Title VI of the Treaty of Maastricht of 1992, Member States still showed a clear disinclination to harmonise civil procedure. This can be illustrated by the way in which the directive on the combating of late payments in commercial transactions came into existence. Originally the proposal for this directive included a special debt-collection procedure,<sup>12</sup> like the German *Mahnverfahren*, which was simple, inexpensive and expeditious. However, such far-reaching procedural harmonisation was declared unacceptable as a result of the general resistance within the Council against the harmonisation of civil law and the law of civil procedure. Even the competence to take far-reaching measures on civil procedure based on Article 95 of the Community Treaty was disputed. Then, on the 1st of May 1999 the Treaty of Amsterdam entered into force and thereby judicial cooperation in civil matters received an effective legal basis in the new Article 65 of the Community Treaty. Judicial cooperation was no longer a third-pillar matter of intergovernmental cooperation, but became a Community matter with important tasks for the Commission and the right of codecision for the European Parliament. The prospects for attaining harmonisation in issues of civil procedure like a harmonised debt-collecting procedure based on Article 65 EC Treaty have therefore also increased.

Independent of the institutional developments in matters of European legislation concerning civil law including civil procedure, an academic project was started in 1990. The report of this project was called after its chairman the Storme Report, and emphasised the need for European harmonisation and mapped the most important subjects. Although during the first years of its existence this Report received relatively little attention, it seems not to be superfluous. Especially since the Amsterdam Treaty, it is regularly referred to.<sup>13</sup>

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<sup>10</sup> Treaty of 7 February 1992, which entered into force 1 November 1993. Judicial cooperation took place in the third pillar based on Art. K 1 paras. 6 and 7 of the Treaty establishing the European Union. See also: Freudenthal and Van der Velden, *op. cit.* note 5, p. 85.

<sup>11</sup> Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters of 26 May 1997 and the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 29 November 1996. The Brussels Convention on jurisdiction and the enforcement of judgments in matrimonial matters of 28 May 1998 was, however, ratified.

<sup>12</sup> Directive 2000/35/EC, OJ L168 of 3 June 1998, p. 13. The Directive is based on Art. 95 of the Treaty establishing the European Community.

<sup>13</sup> M. Storme (ed.), *Approximation of Judiciary Law in the European Union*, Dordrecht: Nijhoff 1994.

### 3. The Treaty of Amsterdam<sup>14</sup>

#### 3.1 Introduction

According to the Amsterdam Treaty, the implementation of a European Judicial Area is an independent aim of the Community.<sup>15</sup> The legal basis to achieve that aim is Article 65. This Article indicates the legal measures that may be used in the area of cooperation in civil and commercial matters with cross-border effects, including civil procedure, as far as is required for the well-functioning of the internal market. These measures include the improvement and simplification of the cross-border service of documents, cooperation in the collection of means of evidence and the recognition and enforcement of judicial decisions in civil and commercial matters. Article 65 also includes a general provision of civil procedure, which provides a legal basis for taking measures to eliminate obstacles to the well-functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Especially Article 65 of the Amsterdam Treaty, which declares the harmonisation of civil procedure to be an explicit task of the Union, is new. Some insight into the meaning of this Article is provided by the Vienna Action Plan, which was accepted by the Council and the Commission in January 1999.<sup>16</sup> Amongst the general measures to be taken are legal certainty and equal access to the courts, both to be guaranteed by certainty over the competent court and over the applicable law, and by speedy and honest proceedings followed by an effective enforcement of the decision.<sup>17</sup> To achieve these aims, the Community may take legal measures which are consistent with the principles of subsidiarity and proportionality.<sup>18</sup> This means that the measures may not stretch beyond what is necessary.

Subsequently, in its Conclusion of Tampere the European Council gave a more explicit interpretation of these general legal measures and thus it started the actual developments involved in harmonising the legislation of European civil procedure.<sup>19</sup> The Tampere Conclusions indicate some specific items of civil procedure, to be based on Article 65, which have to be realised in an expeditious, some even in a speedy way. Among these are simplified and accelerated procedures for small and uncontested claims, the simplified enforcement of court decisions through the abolition of the *exequatur* and the introduction of a European enforcement order. In addition, an easily accessible system of legal information should be installed through a network of competent national authorities.

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<sup>14</sup> OJ 1997 C 340. Entered into force 1 May 1999.

<sup>15</sup> Arts. 61 and 69 of the EC Treaty. See B. Hess, *The Integrating Effect of European Civil Procedural Law*, *EJLR*, 2002, pp. 3-17.

<sup>16</sup> Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice; text adopted by the Justice and Home Affairs Council of 3 December 1998 (known as the Vienna Action Plan); OJ C 19/01 of 23 January 1999.

<sup>17</sup> Action Plan (see note 16, paras. 15 and 16).

<sup>18</sup> Article 5 of the Treaty establishing the European Community.

<sup>19</sup> Tampere Council, 15/16 October 1999, *EU Bull.* 10-1999, pp. 7-15.

Today, one may conclude that a number of the items mentioned have been realised or are subject to legislative activity. In addition, other items, not mentioned in the Tampere Conclusions, have been taken up, like cross-border legal aid and the simplification of cross-border attachments.<sup>20</sup>

The drive with which the Commission initiated and elaborated the various subjects deserves respect and engenders satisfaction, although scepticism is sometimes justified as to the quality of the legislative work and concerning the desirability of some activities - like that of the European Enforcement Order.

A clear disadvantage of the harmonisation on the basis of Article 65 is the fact that Denmark, by a general reservation to the Amsterdam Treaty, does not cooperate in the legal harmonisation based on Article 65. The United Kingdom and Ireland are free to choose whether or not to participate in this legislative work; up to now, their decision has been positive. The participation of the UK and Ireland is important not only from a political standpoint, but also from a legal one, since these two Member States belong to the common law system, which often differs from the civil law systems of the European continent. By their participation in the realisation of European legal instruments, they contribute in a very special way to the success of European civil legislation.

### 3.2 Legal instruments realised

As stated above, only one of the three conventions was realised under the Treaty of Maastricht. The two others, the Convention on the service of documents and the Convention on Jurisdiction and the enforcement of judgements in family matters - the Brussels II regulation - did not enter into force. The same holds true for the European Convention on Insolvency, which was never formally accepted.<sup>21</sup> After the entry into force of the Treaty of Amsterdam, the Commission decided to reframe these three existing intergovernmental conventions in three Community instruments, and within a short period of time the first three regulations on civil law were born. Compared to the difficulties which surround the realisation and entry into force of international conventions, as well as the often restricted accession by negotiating and other States, legal instruments of the European Union appear to require less time-consuming negotiations, enter into force speedily and become applicable in all EU Member States at the same time.<sup>22</sup>

During the Treaty of Maastricht period, negotiations took place on the revision of the Brussels I Convention 1968 on Jurisdiction and the Enforcement of judgments in civil and commercial matters. After the Treaty of Amsterdam, the Commission transposed the results of these deliberations into a proposal for a Brussels I Regulation, which was soon accepted and entered into force in March 2002.<sup>23</sup> Council Regulation (EC) no. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, which entered into force on 31 May 2001, is the beginning of European

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<sup>20</sup> This realisation is entirely in keeping with the decisions which were adopted in the Vienna Action Plan; see note 16.

<sup>21</sup> See note 9.

<sup>22</sup> R. Barents, *Het Verdrag van Amsterdam in werking*, Kluwer, 1999, p. 130.

<sup>23</sup> OJ L 12/1, 16 January 2001, Regulation no. 44/2001 of 22 December 2000.

procedural legislation which has entered or will enter into force during the Treaty of Amsterdam.<sup>24</sup>

Number five on the list of civil regulations is European Regulation (EC) no. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence, in civil or commercial matters.<sup>25</sup>

Next to the five regulations based on Article 65, there are two directives on civil procedure. These are the Directive combating late payments in commercial transactions<sup>26</sup> and the Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.<sup>27</sup>

To reduce practical problems in cross-border litigation, the Council decided to establish a European Judicial Network, to provide useful information on the national legal systems.<sup>28</sup> Today, Commission proposals for a revision of the Brussels II Regulation and for a Regulation on a European Execution Order are being studied.<sup>29</sup>

Two important instruments concerning issues of European civil procedure are now being prepared, viz. an instrument containing a debt collection procedure and an instrument for uncontested and small claims.<sup>30</sup> The former is being studied in a Green Paper, inviting all interested parties to communicate their views on the subject. Another Green Paper is actually being studied; it will deal with provisional enforcement, garnishment and the transparency of assets.<sup>31</sup> To demonstrate the fact that the need to harmonise procedure is at least liable to discussion, one might point to the reactions of the Member States to the Green Paper on the order for payment. Thus, the United Kingdom Parliament explained that the Government would look positively at proposals for measures which are capable of delivering real benefits to ordinary people by reducing the costs, complexity and inefficiency often associated with pursuing claims across borders, provided that it is satisfied that such measures are genuinely necessary for the proper functioning of the internal market.<sup>32</sup>

Related to European civil procedure are the proposals for alternative dispute

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<sup>24</sup> OJ L 160/37, 30 June 2000, Regulation no. 1348/2000 of 29 May 2000. The Insolvency Regulation (no. 1346/2000 of 29 May 2000) which is less relevant for procedural law will not be considered here, nor will the Brussels II Regulation concerning family law (no. 1347/2000 of 29 May 2000).

<sup>25</sup> OJ L 174/1, 27 June 2001, Regulation no. 1206/2001 of 28 May 2001, will enter into force on 1 July 2004 and will be applied from 1 January 2004.

<sup>26</sup> OJ L 200/35, 8 August 2000, Directive no. 2000/35 of 29 June 2000.

<sup>27</sup> OJ L 26/41, 31 January 2003, Directive no. 2002/8/EC of 27 January 2003.

<sup>28</sup> OJ L 174/25, 28 May 2001, Council Decision no. 2001/470/EC establishing a European Judicial Network in civil and commercial matters.

<sup>29</sup> OJ C 203 E/86 of 27 August 2002, COM(2002) 159 def.

<sup>30</sup> COM(2002) 746 final, of 20 December 2002.

<sup>31</sup> JAI/A3/2002/02.

<sup>32</sup> The United Kingdom Parliament, deposited in Parliament 16 January 2003, <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xiii/6308.htm>.

resolution,<sup>33</sup> in the preparation of which a Green Paper has been published, and for a European Extra-judicial Network, supporting the well-functioning of extra-judicial conflict resolution.<sup>34</sup>

### 3.3 Harmonisation of European civil procedure<sup>35</sup>

Almost a century after the first of the Hague Conventions on Civil Procedure, Conventions that were aimed at regulating legal service between contracting states, the European Union has incorporated most of these subjects in specific legal instruments.<sup>36</sup> The EU decision not to accede to the Hague Conventions but to legislate these subjects independently originated from the desire for more effectiveness and more efficiency in order to achieve flexible judicial cooperation and open access to the courts so that commerce within the internal market is improved. These aims are, according to the Community, easier to realise between a restricted number of states within a restricted territory than in a worldwide setting between many states which are primarily concerned with their sovereign power. The desired simplification and acceleration of procedure had not been realised in the Hague Service Convention of 1965, not even within Europe. For that reason, in 1993 the Netherlands initiated deliberations in the European Union on a convention which would provide, between the Member States, a simple and speedy system of service of documents in civil and commercial matters. The European Convention on the service of documents was concluded in 1997 but never entered into force.

The European Convention on the service of documents of 1997 was, as far as its substance is concerned, based on the Hague Service Convention. Its starting point was a clear and reciprocal trust in each other's system of the attribution of justice. Simplicity and speed were to be realised by replacing the Hague Convention system of service through central authorities by a system of direct service via decentralised bodies comparable to the domestic system of serving. A novelty is the way in which the date of service is determined. The fundamental differences in the systems of service of documents within the Union required a uniform system.<sup>37</sup> Some states' national laws of civil procedure fix the date of service in international cases at the date of real service, while the laws of other states fix it at the date of the delivery of the document to the public prosecutor. In the European Service Regulation,

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<sup>33</sup> Green Paper COM(2002) 196 def., 19 April 2002.

<sup>34</sup> Working Paper of the Commission on the establishment of a European Extrajudicial Network, <http://europa.eu.int/scadplus/leg/>.

<sup>35</sup> This section will examine only the European Regulations. Only regulations have direct effect and may therefore result in harmonisation. Directives, however, need to be implemented, leaving a certain margin of discretion to the national legislatures, which is why their harmonising effect may be minimal.

<sup>36</sup> The Hague Convention relating to Civil Procedure of 1954 includes the subjects (I) service of writs and extrajudicial documents, (II) letters rogatory, (III) security for costs and penalties by foreign plaintiffs (*cautio judicatum solvi*), (IV) free legal aid, (V) free issue of extracts from registers of births, marriages and deaths and (VI) imprisonment for debt (currently regulated in the Service of Documents Regulation and the Taking of Evidence Regulation).

<sup>37</sup> M. Freudenthal, Europese verordening inzake de betekening en kennisgeving van stukken, *NIPR* 2001, pp. 3-14.

which is identical to the European Convention on the service of documents of 1997, service only has taken place if the document has reached the addressee. Thereby the fictitious service, like the service to the public prosecutor, the *remise au parquet* recognised in the French, Belgian, Luxembourg and Dutch civil procedures, is no longer valid in European cases of delivery.<sup>38</sup>

The Service Regulation offers more opportunities for harmonisation which are not yet fully in use. Next to the more formal way of delivery via decentralised bodies, the Regulation includes two less formal ways of delivery. One is delivery by mail, provided in Article 14 of the Regulation; the other is delivery of documents sent by the acting party directly to the authority which is competent for serving at the place of residence of the addressee, as is determined in Article 15 of the Service Regulation. From the beginning, the European Commission has underlined the importance of European service by post as a means of simplifying and accelerating service within the Union. The Regulation obliges Member States to accept this way of serving judicial and extra-judicial documents; they are not allowed to exclude it. However, in order to protect the defendant, Member States may prescribe on what conditions such postal delivery has to be performed on their territories. These conditions considerably differ from State to State and thereby hamper harmonisation for the time being. In some States, like the Netherlands, delivery by post is not recognised; in such States, Article 14 does not play a role. However, to realise a genuine European legal area delivery by post should gain a more prominent position. Therefore, in the Netherlands it is proposed to introduce international postal delivery at least in special cases.<sup>39</sup>

The Regulation on Evidence replaced the Hague Evidence Convention 1970 within Europe. The Regulation uses as its point of departure the system of the Evidence Convention, which was already able to bridge the differences in the collection of evidence between the common law systems and the civil law systems. The Evidence Convention accepted the Anglo-American way of collecting evidence abroad, which is that collection may be performed by an expert or commissioner nominated to that effect by the initial court. Contracting States were entitled to exclude this way of direct collection of evidence, as they often did, since the collection of evidence by an expert nominated by a foreign court was considered to be a violation of state sovereignty. The civil law of evidence is still characterised by the interrogation of witnesses by a court. The Evidence Regulation overrode this principle and it allows the collection of evidence by court officials, commissioners or other persons. In this way, the Regulation clearly interferes with Member States' national rules of civil procedure. Cooperation between Member States was considered to be more important than the retention of the principle of sovereignty within the Member States. Legal practice may welcome this additional way of cross-border interrogation of witnesses.<sup>40</sup> Within the European Judicial Area, a new cooperative model emerges, permitting cross-border procedural acts without judicial assistance. Considering the actual situation, such a model for the interrogation of witnesses will be a genuine improvement in the integration process.

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<sup>38</sup> M. Freudenthal, Internationale bewijsverkrijging. Van Haagse en Europese samenwerking, *NIPR* 2002, pp. 109-122.

<sup>39</sup> M. Freudenthal, Waarom niet betekenen per post?, *Advocatenblad* 2003, pp. 472-477. The legislation would have to be amended to make it possible to send documents by post.

<sup>40</sup> B. Hess, Aktuelle Perspektiven der europäischen Prozessrechtsangleichung, *JZ* 2001, pp. 573-583.

The differences in legal culture in the law of civil procedure in the civil law and the common law countries not only finds expression in the different ways of collecting evidence, but also in the frequency of its use. An important characteristic of the common law procedure is the strict separation of the pre-trial phase and the trial itself, the day in court. The common law tradition requires the parties to collect evidence in the pre-trial period, which used to be called the discovery or pre-trial discovery and is now called disclosure. The far-reaching powers of American attorneys to search for evidence in the pre-trial period was the reason for introducing into the Hague Evidence Convention - at the proposal of the British government - the right to make a reservation concerning pre-trial discovery of documents.

The European Evidence Regulation followed this example and introduced a restriction to the discovery rule: it excluded fishing expeditions. The request for a right to collect evidence may not be granted if it is aimed at the collection of information other than that which is needed in the proceedings.<sup>41</sup> Within the European Union the possibility of a fishing expedition in a proceeding is hereby reduced. The new Civil Procedure Rules in English law have reduced the different options of disclosure by charging the court instead of the parties with the management of the collection of evidence. On the other hand, in the Netherlands the new rules of civil procedure, introduced in January 2002, have put more emphasis on the presentation of documents which might be of importance in a proceeding. Thus, the Dutch legislature was influenced by the English system of disclosure. The Storme Report, too, presented a similar rule.<sup>42</sup>

As already indicated, the Brussels I Convention of 1968 started the partial harmonisation of European civil procedure. This partial harmonisation primarily took place through the concept of mutual recognition. The Conclusion of the Tampere Euro Summit emphasised the further elaboration of this concept of mutual recognition. The Brussels I Regulation elaborates the importance of mutual recognition by the simplification of the procedure of *exequatur*. Pursuant to the Regulation, a court decision which is enforceable in the State of origin is, upon the request of the claimant, to be declared enforceable in another Member State if it complies with certain formalities. Only after the decision of *exequatur* may the other party object to its delivery, raising grounds for its refusal. The draft Regulation on the European Enforcement Order proposes to go a step further. The draft intends to abolish the enforcement procedure in its entirety. The title then obtained in the proceedings on the merits can then be enforced in every Member State, without any intermediate measures.<sup>43</sup>

Next to harmonisation through mutual recognition, harmonisation may take place independently. This can be shown by the rules on *lis pendens* and the dependence of cases. In the Brussels I Convention of 1968, the question whether a case was pending or not had to be decided according to the law of each of the courts concerned. The Brussels I Regulation ends this system and has a uniform, autonomous solution.<sup>44</sup> The main problem is that Europe has two different systems at the moment when court pendency starts. One is the system used

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<sup>41</sup> The Regulation does not include any provisions which expressly rule out pre-trial discovery and fishing expeditions. Instead, the Council declared in Annex II, JUSTCIV 64, Brussels, 15 May 2001, that the Regulation does not apply to pre-trial discovery and fishing expeditions.

<sup>42</sup> See note 13, and further Freudenthal, op. cit. note 38; see footnote 45 there.

<sup>43</sup> COM(2002) 159 def., OJ C 203 E/86 of 27 August 2002.

<sup>44</sup> An identical provision is included in Art. 11 of the Brussels II Regulation.

in, among others, Germany and the UK, where pendency starts as soon as the case is registered in court, the other system is used in, among other countries, the Netherlands and France, where a case is pending as soon as the defendant is served with a summons to appear. Article 30 of the Brussels I Regulation provides for a compromise between the two systems of pendency. In the former system, a case is pending at the time when the document instigating the case is received by the court registry. In the latter, the time of pendency starts at the moment the authority responsible for the service of documents in the defendant's State receives the instigating document.<sup>45</sup>

#### **4. The European Convention**

The harmonisation of European civil procedure now determined in Article 65 of the Community Treaty will continue at almost the same level once the European Convention has entered into force. The relevant Article of the Convention (Article III-165) incorporates the conclusions of Tampere and offers an extra dimension by introducing the possibility of taking measures which are aimed at guaranteeing wider access to the courts.<sup>46</sup> According to the projected Article, legal cooperation even includes the mutual adaptation of national legislation for cross-border cases. To achieve that goal, European laws and basic laws, the new terminology for regulations and directives, may be accepted which guarantee a high level of access to justice as well as the fair operation of civil procedures, if needed by promoting the compatibility of the rules of civil procedure in force in the Member States.

The draft European Convention Article on civil cooperation explicitly mentions the mutual adaptation of provisions of civil procedure. Thus, the Convention offers a basis for the further harmonisation of the law of European civil procedure, a development which might at the very least be called gratifying.

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<sup>45</sup> In both situations, the claimant should subsequently do everything that is necessary with a view to the service on or notification to the defendant of the document or its submission to the court.

<sup>46</sup> La Convention Européenne, Brussels, 1 April 2003, Conv. 644/03 and Conv. 614/03 Annex; Art. III-165, Art. III-153(4) and Art. I-141.