The Contribution of the European Court of Justice to the area of civil justice cooperation

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3 Introduction
Uniform Interpretation

- Courts interpret the law
- Supreme Courts offer uniform interpretation

Uniform interpretation of EU law is
- The most important contribution of the ECJ
- Uncontroversial
Uniform Interpretation

- Many judgments of the ECJ are uncontroversial

- They offer interpretations of EU law
  - Dictated by the language of the EU provisions
  - neither conservative, nor liberal
Opportunities to Foster Integration

- Not in cases where EU law allocates power between Member states
  - Jurisdiction of courts of MS is neutral

- Rather in cases where EU law aims at decreasing the significance of borders:
  - unilateral actions in other MS
  - recognition of foreign acts
Promoting European Integration

A) By surfing on the EU freedoms of movement

B) Through progressive interpretations of PIL Regulations
A) Surfing on the four freedoms

- The four freedoms are at the core of European integration
- Some PIL rules were interpreted in the light of the four freedoms
- ECJ promoted European integration
  - But the driving force was external

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A) Surfing on the four freedoms

- Freedom of movement of people
  - Recognition of names given abroad

- Freedom of establishment of companies
  - Recognition of companies incorporated abroad
B) Progressive interpretations

- Some PIL regulations achieve a certain level of integration of Member States

- The ECJ adopted liberal interpretations which furthered integration
  - A driving force of European integration
  - Went beyond literal interpretation
Evidence Regulation (1206/2001)

- Regulation provides for 2 methods for taking evidence
  - Direct Transmission of Request between Courts
    - Cooperation between Requesting and Requested Courts
  - Direct taking of evidence by the requesting court
    - Authorization must be sought from Requested state
    - Requested State may assign its own court to take part in the performance of the taking of evidence

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Issue for the ECJ: can other methods be used?

- May a Belgian court simply appoint an expert?
  - Who would carry out investigations abroad
  - Without asking first the other Member State

- ECJ: Yes, Evidence Regulation need no be applied
  - Member states are not restricted by the Evidence Regulation
  - They may take evidence in other states through other instruments
“Regulation No 1206/2001 does not govern exhaustively the taking of cross-border evidence, but simply aims to facilitate it, allowing use of other instruments having the same aim”
Service Regulation (1348/2000)

- Applies to « judicial or extra judicial documents »
- Addressee may refuse service for lack of translation
- Should all documents be translated?
  - *Literal interpretation*: Yes
Case 14/07, Weiss, 2008

Issue for the ECJ: a different regime for annexes?

- Obligation applies to the act instituting proceedings
  - Different regime for the annexed evidence?
  - In this case: 150 pages of annexes

- ECJ: obligation only applies to main document
  - Not to documents with a purely evidential function

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“Every effort must therefore be made to reconcile the objectives of effectiveness and speed in the transmission of procedural documents, which are necessary for the sound administration of justice, with that of the protection of the rights of the defence (...)

“(…) Documents which have a purely evidential function and are not necessary for the purpose of understanding the subject-matter of the claim and the cause of action do not form an integral part of the document instituting the proceedings within the meaning of [the] Regulation.”
Protecting Fundamental Rights
An important contribution of the ECJ

- The ECJ often grounds its decisions in the protection of fundamental rights

- PIL Regulations are interpreted in the light of fundamental rights

- Is it, then, the essential contribution of the ECJ?
  - Judge Koen Lenaerts, ICLQ 2010
An important contribution of the ECJ

A few examples

- Case 7/98, Krombach, 2000
  - Fundamental rights define public policy

- Case 14/07, Weiss, 2008
  - Fundamental rights contribute to definition of documents under the Service Regulation
Fundamental Rights v. Integration

- What if fundamental rights do not foster but rather are an obstacle to European integration?

- Would the Court prefer fundamental rights?

- A case study: abolition of exequatur
  - Partially achieved by a number of Regulations
  - Eventually rejected in the Brussels I Recast
Matrimonial Regulation (Brussels IIbis)

- Return of child judgment recognised/enforceable
  - without the need for a declaration of enforceability
  - without any possibility of opposing its recognition

- No public policy exception

- Court of origin must verify
  - child was given an opportunity to be heard
  - Parties were given an opportunity to be heard
Case 491/10, Pelz, 2010

Issue for ECJ: what if court of origin did not?

- A Spanish – German couple separates
- German mother takes the child to Germany
- Spanish judgment orders return of the child

- Should the Spanish Judgment be enforced if it infringed fundamental rights?
  - Absence of hearing of the child
  - As required by Article 24 EU Charter
Case 491/10, Pelz, 2010

- **Ruling:** foreign judgment must be enforced

- Otherwise, the effectiveness of EU law would be undermined

- The fundamental right does not create an absolute obligation to hear the child

- In any case, it is exclusively for the court of origin to decide, and it must be trusted
Fundamental rights v. Integration

- For the ECJ, European integration prevails

- In 2010, abolition of exequatur was a clear objective of the European lawmaker
  - European Summit, Tampere 1999

- The European lawmaker has since then changed its mind
  - Brussels I Recast, 2012
A View from London
Three Controversial Decisions

- English lawyers have been very critical of

  - Case 116/02, Gasser, 2003
    - Lis pendens applies to choice of court agreements
  
  - Case 159/02, Turner, 2004
    - Anti-suit injunctions violate mutual trust
  
  - Case 281/02, Owusu, 2005
    - *Forum non conveniens* does not apply with third states
Three Controversial Decisions

- Reveal a lack of understanding of the practice of commercial litigation?
  - Case 116/02, Gasser, 2003
    - choice of court agreements can be ignored
  - Case 159/02, Turner, 2004
    - Abuse of process is left unpunished
  - And not alternative remedy is offered.

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Is more commercial experience needed?

Judges on the ECJ

« have almost all been involved in public law, public administration, diplomacy and politics. Only a few have had any apparent experience in private-law litigation, or indeed commercial-law activities of any kind. This might explain why they gave the judgments they did. »

Prof. Trevor Hartley, Hague Lecture, 2006
Three Controversial Decisions

- Biased against common law remedies?
  - Common law practices are always rejected
    - Case 281/02, Owusu, 2005
      - Forum non conveniens
    - Case 159/02, Turner, 2004
      - Antisuit injunction unpunished

- Is the minority always wrong in the EU?
  - Is it the result of the comparative method?
  - Should not the merits of the doctrines come first?
In Defense of the ECJ

- The EU legislator chose the civil law approach
- The ECJ is deferential to the Union legislator
  - Judge Koen Lenaerts, ICLQ 2010

- Is this convincing?
  - The Brussels I Regulation is silent on these issues
  - The ECJ has often gone beyond literal interpretation to further European integration
The Brussels I Regulation Recast

- In 2012, the Regulation was amended
  - Will apply in January 2015

- Gasser is simply overruled

- A new provision on *lis pendens* with third states
  - *Lis pendens* will only be discretionary
  - In effect, reintroduces a form of *forum non conveniens* and abolishes *Owusu*
Is the EU « United in Diversity »?

- The ECJ has been unable to build on cultural diversity
- It did not borrow the best of each tradition
- It did not attempt to achieve a synthesis
- It relied on the tyranny of the majority