EU Enlargement: Aspects of (International) Procedural Law

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I. Introduction

Unified rules on international jurisdiction and on the recognition and enforcement of foreign judgments are an important tool for the integration of various national markets.[1] This kind of integrative rule is required in many areas: within the scope of application of the EC and EEA Treaties, where free movement of goods, persons, services, and capital is guaranteed, this need is obvious. The need, however, also exists on a global level. The ever-increasing number of international economic relations is accompanied by an ever-stronger desire for legal certainty in transborder legal traffic.

A strong contribution to the ever-increasing transborder legal traffic is made by the opportunities that became available after the fall of the Iron Curtain. The collapse of the socialist systems has enormously intensified the transborder traffic of persons and international economic activities[2] between the EU Member States and the former socialist countries. New needs but also new chances for integration have been created and various steps towards integration have been taken. The Central and Eastern European Countries (CEECs) are quite active in ratifying the

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1 As to this aspect *see Hess*, Die Integrationsfunktion des europäischen Zivilverfahrensrechts, in this volume.

2 As to international trade law in the former socialist countries *see Martiny*, 'Die Bedeutung des Internationalen Privatrechts und der Rechtsharmonisierung für den grenzüberschreitenden Handel im Ostseeraum', in: Heiss (ed.), *Brückenschlag zwischen den Rechtskulturen des Ostseeraumes*, Tübingen 2001, pp. 249. The role of arbitration for transborder trade with former socialist countries is stressed by Müller, 'Facilitating Transborder Trade in the Baltic Sea Area: The Role of Arbitration', in: Heiss (ed.), *Brückenschlag zwischen den Rechtskulturen des Ostseeraumes*, Tübingen 2001, pp. 277 et seq.

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Hague[3] and UNCITRAL Conventions.[4] They all joined the Council of Europe[5] and ratified several of its international conventions.[6] Most importantly, ten of the former socialist countries are accession candidates to the EU. These prospective Member States are currently engaged in the preparations for their accession, which includes the adoption of a multitude of rules of European procedural law.

The purpose of this paper is to highlight some aspects of the integration process. It will focus principally on the situation in Poland. Three questions are at the centre of the analysis:

1) To what extent are the CEECs integrated by means of international procedural law?[7]
2) To what extent could the Lugano-Convention offer an intermediate status of procedural integration to associated CEECs during the pre-accession phase?[8]
3) What are the consequences of EU accession of the CEECs with a view to European civil procedural law?[9]

II. Integration of CEECs by Accession to Treaties on International Procedural Law in General

There are definite integrative effects to be achieved by accession of CEECs to international treaties on procedural law. However, this is a rather unsystematic approach to integration, since the procedural rules contained in international treaties do not form a systematic and structured body of procedural law.[10] Nevertheless, CEECs strongly articulate their need and desire for integration by joining such international treaties. Poland is a striking example: It has expressed its desire for integration by ratifying a large number of international conventions. Among others, Poland has acceded to the following treaties:

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[3] An overview of the current state of ratification of Hague Conventions is given at <http://www.hcch.net/e/conventions/index.html>.

[4] An overview of the current state of ratification of UNCITRAL Conventions is given at <http://www.uncitral.org/english/status/status-e.htm>.

[5] Hungary (6 November 1990), Poland (29 November 1991), Bulgaria (7 May 1992), Estonia (14 May 1993), Lithuania (14 May 1993), Slovenia (14 May 1993), Czech Republic (30 June 1993), Slovakia (30 June 1993), Romania (7 October 1993), Latvia (10 February 1995), see The Council of Europe-Homepage <http://www.coe.int> – as of 27 June 2001.

[6] An overview of the current state of ratification of Conventions drafted by the Council of Europe is given at <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm>.

[7] *See infra* section II.

[8] *See infra* section III.

[9] *See infra* section IV.

[10] This is a characteristic feature of unified (harmonized) law in general; see *Zweigert/Kötz*, *Einführung in die Rechtsvergleichung*, 3rd ed., Tübingen 1996, at p. 27.

- 1954 Convention Relating to Civil Procedure
- 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters
- 1967 European Convention on the Adoption of Children
- 1968 European Convention on Information on Foreign Law, with the Additional Protocol of 1978
- 1970 Convention on the Taking of Evidence Abroad in Civil and Commercial Matters
- 1970 Convention on the Recognition of Divorces and Legal Separations
- 1973 Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations
- 1977 European Agreement on the Transmission of Applications for Legal Aid
- 1993 Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption

While these numerous ratifications demonstrate a strong desire for integration, a closer look also shows some contradictory behaviour on the part of the Polish government. While the conventions listed above were ratified swiftly and became binding under public international law in Poland's relations with other signatories, Poland did not publish all of these conventions in its national official journal.[11] This very publication, however, is a precondition for domestic application of a convention in Poland. It has been rightly criticized that such behaviour is not in line with Poland's constitutional commitment to the rule of law.[12] The legislature has reacted by adoption of a special statute[13] that particularly emphasizes the duty of publishing international treaties signed by Poland.[14] Indeed, the political criticism and the new statute are beginning to show positive effects.[15]

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[11] *See Semprich*, 'Adopcje, alimenty, doręczenia' (Adoption, maintenance, service of documents) in: '*Rzeczpospolita*', of 2 April 1999, no. 78 <http://www.rp.pl/gazeta/wydarie_990402/prawo/prawo_a_1.html#1>; among other aspects, *Semprich* mentions that the Polish Ministry of Justice provided courts with an unofficial text of the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, suggesting its application.

[12] *Gralla*, 'Polnische Regierung verzögert die Bekanntgabe ratifizierter völkerrechtlicher Abkommen', WiRO 1999, at p. 309.

[13] Law of 20 July 2000 on the publication of statutes and other legal acts (Dz.U. 2000, No. 62, Pos. 718).

[14] *See* von Redecker, 'Chronik der Rechtsentwicklung in Osteuropa, Polen', WiRO 2000, at p. 387.

[15] *See* <http://bap.lex.pl/cgi-bin/demo.cgi?comm=zeszyty&wyd=9&rok=100> and <http://bap.lex.pl/cgi-bin/demo.cgi?comm=zeszyty&wyd=9&rok=101>.

III. The Lugano-Convention – An Instrument for a Pre-Accession Integration of Candidate Countries?

1. The Inaccessibility of EU Civil Procedural Law in the Pre-accession Phase

All candidate countries currently pass through a pre-accession phase. During this phase, EU procedural law is not available as an instrument of integration. The Brussels Convention[16] is open for accession only to EU Member States.[17] Procedural rules contained in secondary EC law, regulations[18] as well as directives[19], by their very nature apply only to the Member States.[20] Therefore, these sources of European procedural law will only become relevant to CEECs after their accession to the EU.

2. The Current Relationship between the CEECs and the EU under the Association Agreements

The CEECs that have applied for full membership in the EU all have concluded association agreements with the EU and its Member States[21] under Article 310 ECT – the 'Europe Agreements'. Those agreements provide for a certain – rather small –

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[16] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968, OJ 1972 L 299/32.

[17] On the other hand, membership in the EU will not be granted without accesion to the Brussels Convention; *see* Article 63 of the Brussels Convention.

[18] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1; Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ 2000 L 160/19; 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, OJ 2000 L 160/37; Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, OJ 2000 L 160/1; Council 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, OJ 2001 L 174/1.

[19] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ 1998 L 166/51; Article 7(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29; Article 11(2) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19; Article 6 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 1997 L 18/1.

[20] Of course, nothing stops a third country from adopting legislation along the lines of an EU directive, based on the simple belief that it is sensible legislation; as to the requirement to take over the *acquis communautaire* for accession to the EU, *see infra* section IV.3.

[21] *See, e.g.*, the Europe Agreement with Poland, OJ 1993 L 348/2.

part of the economic freedoms contained in the EC Treaty already now.[22] Thereby the accession candidates reach a status that is to some extent similar to the one of the EFTA countries.

3. Irrelevance of the Association Status for Access to the Lugano Convention

Conclusion of the association agreements raises the question of whether the status of an associated country also requires, or at least allows, accession to the Lugano Convention. However, a closer look at the Lugano Convention reveals that candidates for EU membership certainly do not have automatic access to this Convention, even if such access is not impossible. While EU Member States and EFTA member States have a right to join the Lugano Convention pursuant to its Article 60 a) and b), candidates for EU membership remain third countries for the purposes of the Lugano Convention in spite of their association[23] with the EU and, therefore, need a special invitation pursuant to Article 62(1) b) before they are able to join the Lugano Convention. This shows that the Lugano Convention, as a parallel convention to the Brussels Convention, is intended for the geographic extension of the principles of EU international procedural law. However, the geographic extension is envisaged primarily for the EFTA countries. Towards third countries, the Lugano Convention is hesitant and cautious. In spite of the fact that the Lugano Convention was drafted at a time when the opening of Central and Eastern Europe was already on the horizon, it has never been meant as an instrument of pre-accession integration for CEECs.

4. The Procedure for Accession of CEECs to the Lugano Convention

The hesitation of the Lugano Convention towards expansion is explicitly stated in the report provided by *Jenard* and *Möller*.[24] In its preamble, this report states that the EC and the EFTA form a group of European countries which share very similar basic ideas about constitutional (separation of powers between legislature, executive and judiciary), legal (primacy of law, individual rights), and economic (market economy) principles.[25]

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[22] As to the Europe Agreements *see Inglis*, 'The Europe Agreements Compared in the Light of their Pre-Accession Reorientation', CMLRev 2000, Vol. 37, pp. 1173 et seq.; *Evans/Falk* (eds.), *Transformation and Integration – The New Association Agreements*, Umeå 1992; *Ramsey*, 'The Implications of the Europe Agreements for an Expanded European Union', ICLQ 1995, Vol. 44, pp. 161 et seq.; *Müller-Graff*, 'East Central Europe and the European Union: From Europe Agreements to a Member Status – General Report', in: Müller-Graff (ed.), *East Central Europe and the European Union: From Europe Agreements to a Member Status*, Baden-Baden 1997, at p. 14.

[23] *See* Article 60 of the Lugano Convention.

[24] OJ 1990 C 189/57; *see also Trunk*, 'EuGVÜ und Osteuropa', IPRax 1991, pp. 278 et seq., at p. 279.

[25] *Jenard/Möller*, OJ 1990 C 189/57, at p. 61.

Quite obviously, a certain degree of similarity of legal culture is a pre-requisite for a close legal relationship as the one created by the Lugano Convention. In another place, the report explicitly mentions that the Lugano Convention is cautious towards third countries[26] and that this **cautiousness** is reflected in the specific conditions provided for accession of third countries to the Lugano Convention.[27]

Indeed, the conditions for accession and the required procedure[28] show clearly that the Lugano Convention has hardly more missionary intentions than the Brussels Convention. There is no procedure for application by an interested country. Quite the contrary, an invitation by the club of Lugano members is required. And such an invitation can only be extended to a third country after a complicated internal procedure. A country willing to join the Convention needs to find a member State willing to act as its patron.[29] This patron has to ask the depository country – Switzerland – to invite the third country for accession. The invitation requires the prior consent of all EU and EFTA States that are members of the Lugano Convention.[30] If only one member State has doubts about the effectiveness of the rule of law and the functioning of the judicial bodies in the candidate country, that member may simply withhold its consent and prevent any invitation from being extended. There is no need even to explain such a move. There will simply be no invitation and the candidate may never know why.

5. *The Example of the Accession Efforts of Poland, Hungary, the Czech Republic and Estonia*

The state of the accession efforts of Poland, Hungary, the Czech Republic and Estonia confirms these observations. In any case, accession negotiations have been initiated with only very few of the CEECs. And only those with Poland have been concluded successfully, allowing the Lugano Convention to enter into force in Poland on 1 February 2000.[31] In the case of Hungary, the Czech

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[26] *Jenard/Möller*, OJ 1990 C 189/57, at p. 84.

[27] *Jenard/Möller*, OJ 1990 C 189/57, at p. 84.

[28] As regards the accession procedure *see Jametti Greiner*, 'Zur Erweiterung des Geltungsbereichs des Lugano-Übereinkommens in den mittel- und osteuropäischen Raum, insbesondere zur Situation Polens', AJP/PJA 1998, pp.707 et seq.; *Czernich/Tiefenthaler*, Die Übereinkommen von Lugano und Brüssel, Wien 1997, Article 63.

[29] As to the role of the patron *see Jenard/Möller*, OJ 1990 C 189/57, at p. 84.

[30] Article 62(1)(b) of the Lugano Convention; *see Jametti Greiner*, *supra* note 27, at p. 707.

[31] The treaty is published in Dz.U. 2000, No. 10. Pos. 132; *see also* the notification of the government of 31 December 1999 (Dz.U. 2000, No. 10, Pos. 133); *see Wagner*, 'Zum Inkrafttreten des Lugano-Übereinkommens für die Republik Polen', WiRO 2000, 47 et seq.; *Trzeciakowska*, 'Das Lugano-Übereinkommen – Anerkennung und Vollstreckbarerklärung ausländischer Urteile in Polen', WiRO 2000, 404 et seq.; *Martiny/Ernst*, 'Der Beitritt Polens zum Luganer Übereinkommen', IPRax 2001, 29 et seq.; *Ciszewski*, 'Przystąpienie Polski do konwencji lugańskiej i do europejskiej konwencji o doręczaniu pism sądowych i pozasądowych' (Poland's accession to the Lugano Convention and the

Republic and Estonia, the consent of several of the original member States is still missing.[32]

Since a formal application for accession is not foreseen under the Lugano Convention, Poland had informally approached the member States. Some of those countries were 'surprised'[33], although generally 'open'[34] to Poland's desire to become a member of the Lugano Convention.[35] Switzerland then handed all required documents to the member States and gave them three months to express their consent. However, this deadline had to be prolonged. Several member States insisted that the free circulation of court decisions and public documents could only be established in their relations with Poland once a high degree of mutual trust in the functioning of the judicial system had been achieved. Consequently, the old member States asked for more specific information on the actual status of judicial reform in Poland.[36] Eventually, Poland was invited for accession in February 1998.[37]

6. Some General Conclusions

The Lugano Convention was drafted in order to extend principles of EU procedural law to EFTA countries. However, it was never intended to give transition countries in Central and Eastern Europe access to the European principle of free circulation of

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European Convention on the service of judicial and extrajudicial documents), KPP 1999, No. 4, pp. 815 et seq.; *Flaga-Gieruszyńska*, 'Konwencja o jurysdykcji krajowej i wykonalności orzeczeń w sprawach cywilnych i handlowych – wybrane zagadnienia' (Selected aspects of the Convention on jurisdiction and enforcement of foreign judgments) Rejent 2000, No. 1, pp. 68 et seq.; *Weitz*, 'Przedmiotowy zakres zastosowania Konwencji Lugańskiej' (The scope of application of the Lugano Convention), KPP 2000, No. 2, pp. 427 et seq.; *Frey*, 'Zasady ustalania jurysdykcji krajowej w sprawach pracowniczych w Konwencji z Lugano' (Basic aspects of jurisdiction in employment cases under the Lugano Convention), Radca Prawny 2000, No. 3, pp. 41 et seq.; *Fuchs*, 'Znaczenie ratyfikacji przez RP Konwencji z Lugano dla właściwości sądu w zakresie ubezpieczeń gospodarczych' (The relevance of the ratification of the Lugano Convention by Poland for jurisdiction in insurance matters), in: *Wymiar sprawiedliwości w Unii Europejskiej* (Case law of the EU), Mika (ed.), Toruń 2001, pp. 401 et seq.

[32] We would like to thank Dr. jur. Jametti Greiner, Vice director at the Federal Ministry of Justice in Berne, Switzerland, for this information.

[33] *See Ciszewski*, *supra* note 31, pp. 815 et seq.; at p. 816.

[34] *See Jametti Greiner*, *supra* note 28, pp. 707, 708: '... einzelne Vertragsstaaten der Öffnung des Lugano-Übereinkommens gegenüber mittel- und osteuropäischen Staaten sehr positiv gegenüberstanden. Andere gaben sich demgegenüber etwas vorsichtiger ...'.

[35] The patron, the Netherlands, asked for an invitation of Poland – *see Jametti Greiner*, *supra* note 27, pp. 707, 708.

[36] As early as 1992, shortly after the Lugano Convention came into force, Poland handed over a comprehensive report on its law of civil procedure as well as the amendments envisaged by the new draft code on civil procedure; *see Ciszewski*, *supra* note 30, at pp. 815, 816.

[37] For further information *see Jametti Greiner*, *supra* note 27, at pp. 707, 708.

court decisions and public documents. While such a function is not totally excluded under the provisions of the Convention, the procedures and negotiations for accession by CEECs so far confirm that the Lugano Convention has little desire for expansion. As a consequence, legal certainty required in international trade between the EU and EFTA countries on the one hand and the CEECs on the other is provided today and in the foreseeable future by recourse to international arbitration. The CEECs have gained access to the New York Convention on the Recognition and Enforcement of Arbitral Awards,[38] since in the area of arbitration, the Western partners have not seen a similar need for cautiousness as described above for the areas covered by the Lugano Convention.

As a consequence, one may very well doubt whether the ongoing accession procedures of some CEECs to the Lugano Convention make any sense at all. The countries currently negotiating for membership in the Lugano Convention have very good chances of joining the EU as full members in the near future. Therefore, it can be expected that EU procedural law will become applicable in these countries more or less at the same time or even before they are able to join the Lugano Convention. It can be argued that there is nevertheless good reason for holding parallel negotiations for membership in the EU and in the Lugano Convention. While reform of the judicial system is only one of several criteria required by the EU, the negotiations for membership in the Lugano Convention focus on this aspect. Therefore, the functioning of the judicial system may ultimately play a minor role in the final decision for EU accession, while parallel negotiations with the Lugano partners can reinforce this point.

7. *Some Observations on the Entry into Force of the Lugano Convention in Poland*

The Lugano Convention has been ratified by Poland and was published in its official journal in line with the Polish constitution.[39] As a consequence, the Lugano Convention is directly applicable in Polish courts and superior to autonomous statutory provisions.[40]

There are a number of immediate consequences for Polish statutory law. On the one hand, the Polish law on the use of the Polish language, requiring private contracts to be drafted in Polish to be enforceable, cannot be applied to jurisdiction clauses governed by Article 17 of the Lugano Convention. With regard to the parallel provision of Article 17 of the Brussels Convention, the European Court of

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[38] An overview of the state of ratification is provided at <http://www.uncitral.org/english/status/status-e.htm>.

[39] As to the ratification of international teaties in general *see* Articles 88(3) to 91 of the Polish constitution; a translation into German is presented by *Diemer-Benedict*, 'Die neue Verfassung der Republik Polen', Osteuropa-Recht 1997, pp. 223 et seq., at p. 238.

[40] See Article 91(2) of the Polish constitution. This article applies because the Lugano Convention was ratified following a law permitting ratification.

Justice has clearly ruled that formal requirements for jurisdiction clauses are regulated by the Convention.[41] Additional formal requirements, for example regarding the language to be used, are inadmissible.

On the other hand, Poland enacted a law on the protection of consumer rights and the liability for damages caused by hazardous products[42] on 2 March 2000.[43] Pursuant to this law, more precisely its Article 18, the provisions of the so-called 'Unfair Contract Terms Directive' have been transposed into Polish law. Article 18 of the law changes several provisions of the Polish civil code (Articles 384, 385, 385^1, and 385^2) and adds the new Articles 384^1, 385^3, and 385^4. Article 385^3 of the civil code contains a list of abusive clauses. This list includes a prohibition of clauses derogating from Polish jurisdiction in consumer matters (Article 385^3 (No. 23) of the civil code). However, consumer protection in this respect is regulated by the Lugano Convention (Articles 13 et seq.). Therefore, Article 385^3 (No. 23) of the civil code cannot be applied in cases governed by the Convention.

8. *The Actual Impact of the Lugano Convention: 'Persuasive Authority'*

a) *Persuasive Authority for Autonomous International Procedural Law*

In spite of the very hesitant admission of CEECs to the Lugano Convention, intensifying international trade *de facto* increases the importance of (autonomous) international procedural law in the accession countries. Its statutory form as well as its application by the courts has been heavily influenced by the successful models[44] of the Brussels and Lugano Conventions. As far as the Polish judiciary is concerned, the Lugano Convention has been a persuasive authority long before Polish negotiations for accession to this Convention: As early as 1993, the Supreme Court has based a decision on a question of jurisdiction for the granting of injunctions on Article 24 of the Lugano Convention by way of comparative legal method.[45] What needs to be mentioned in this context is the fact that the reference to Article 24 in

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[41] *See* the judgment by the European Court of Justice of 24 June 1981 in Case 150/80, *Elefanten Schuh v Pierre Jacqmain*, 1981 ECR 1671; and *see Downes/Heiss*, 'Sprachregulierungen im Vertragsrecht', ZVglRWiss 1999, pp. 28 et seq., at p. 34, with note 40.

[42] As to this law *see*, for example, *Suproń-Heidel*, 'Prinzipien des polnischen Zivilrechts und europäische Angleichung', JJZ 2000, pp. 43 et seq., at p. 53.

[43] A German translation of the law is presented by *Trzeciakowska*, 'Polen: Verbraucherschutz- und Produkthaftungsgesetz', WiRO 2000, pp. 43 et seq., at p. 53.

[44] As to this aspect of the Lugano Convention in general *Geimer*, Das Brüsseler Übereinkommen – Erfolgsmodell und Oldtimer zugleich, in this volume.

[45] *See Ciszewski, supra* note 31, at p. 820, referring to the decision of the Supreme Court of 18 February 1993, I CRN 6/93, OSN CA 1993, No. 11, Pos. 204, 120; *see also* the decision of the Supreme Court of 14 July 1998, III CKN 548/98, OSN C 1999, No. 3, Pos. 48, 13 (16).

that case did not serve the purpose of favouring Polish nationals involved in the dispute. Quite to the contrary, it opened the way for the foreign plaintiffs to obtain a preliminary injunction against a Polish defendant from Polish courts in spite of the general jurisdiction being vested in foreign courts.[46]

b) Persuasive Authority of the Lugano Convention for International Procedural Law Applied in the Relationship between CEECs

The reforms in the CEECs have also created a need for recognition and enforcement of judgments in civil and commercial matters in relations between the countries in transition themselves. Poland and Romania have concluded a convention on enforcement.[47] Hardly surprising, the content of this convention is similar to that of the Lugano Convention.[48]

IV. Accession to the European Union and European Procedural Law

1. The Accession Criteria and their Relevance for Procedural Law

At the 1993 Copenhagen Summit, the European Council formulated criteria which have become preconditions for accession of the CEECs to the EU. There are three criteria:

1. Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
2. The existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; and
3. The ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

Of these criteria, the first and third are of immediate relevance to procedural law. The first ('political') criterion is already set out in Article 49 TEU. Only European countries that follow the principles of Article 6(1) TEU may join the European Union. Article 6(1) TEU emphasises the principle of rule of law and the recognition of human rights and fundamental freedoms as fundamental principles shared by all Member States. As can be seen from Article 6(2) TEU, human rights and

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[46] In the particular case, an arbitration panel in Zurich (Switzerland) had jurisdiction.

[47] The treaty was signed on 15 May 1999; *see Ciszewski, supra* note 31, at p. 820. We owe thanks to the Polish Institute of International Affairs for the information given on 13 July 2001, according to which the treaty is not yet in force. A draft ratification law has been sent to the parliament ('Sejm') by the government on 12 June 2001.

[48] *Ciszewski, supra* note 31, at p. 820.

fundamental freedoms embrace the guarantees contained in the European Convention on Human Rights, as well as the general constitutional traditions of the Member States. The latter can now be specified by reference to the Charter of Fundamental Rights of the European Union.[49] In the present context, Article 6(1) ECHR is of particular importance. The guarantee of a fair trial is an absolute prerequisite for accession to the EU by way of Article 49 in connection with Article 6(1) TEU. The same is true for accession to instruments of European procedural law. A supranational system for international jurisdictions, the abolition of exorbitant jurisdictions, as well as the more or less unconditional recognition and enforcement of judgments from other EU Member States require the guarantee of all rights granted by Article 6 ECHR. Only then mutual trust as mentioned in the report by Jenard and Möller will be justified.[50] Therefore, it can be said that the elements of the first accession criterion resemble the basic constitutional concepts that Jenard and Möller mention as being fundamental to establishing the required mutual trust.

Concerning the third accession criterion, the EU has often emphasized that the complete adoption of the *acquis communautaire* is a prerequisite for membership from which no exceptions will be granted. The mere adoption of legislative acts, however, is not enough. The candidate countries must guarantee the effective application and enforcement of the *acquis communautaire*.

Several conclusions can be drawn from this. First, candidate countries that do not guarantee the rule of law and fundamental (procedural) rights, will not be invited to join the EU. Furthermore, accession to the EU depends on the adoption of the entire *acquis communautaire*, including all the EU international procedural law. And the adoption of this procedural law will only be considered complete when it is effectively enforced in the candidate countries. For all those reasons, judicial reform is a key element in the preparations of the candidate countries for accession.

2. *The First Accession Criterion: Rule of Law and Fundamental Rights under Article 6(1) ECHR in Poland*

a) Polish Constitutional Law

As with all other accession candidates, Poland is a member of the Council of Europe[51] and hence of the European Convention of Human Rights.[52] Therefore, the guarantee of a 'fair trial' contained in Article 6(1) ECHR applies in Poland. According to its constitution, Poland is a democratic country governed by the rule of law (Article 2). The exercise of public power is bound to the law (Article 7), the state power is divided (Article 10(1)). Furthermore, the constitution guarantees access to justice (Article 45), and grants certain means of legal protection (Articles 77-81). In

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[49] Charter of Fundamental Rights of the European Union, OJ 2000 C 364/1.
[50] As to the report see note 24.
[51] *See supra* note 5.
[52] Ratified on 19 January 1993 (Dz.U. 1993, No. 61, Pos. 284–286).

this respect, the individual constitutional complaint under Article 79, introduced by the new Polish Constitution of 1997 has to be mentioned. Specifically from an institutional point of view, the provisions on the independence of judges deserve some attention. Judges are independent and bound only by the Constitution and by statutory law (Article 178(1)); judges are appointed for an unlimited time (Article 179), and cannot be removed from office (Article 10(1)); impeachment and criminal prosecution are possible only in accordance with special constitutional provisions (Articles 180(2) to (5) and 181). Particularly striking is the special guarantee provided for in Article 178(2) of the Polish Constitution. According to this provision, judges are guaranteed working conditions, as well as salaries, that comply with the dignity of their office, as well as the amount of duties involved.[53]

b) Polish Constitutional Reality

A look at the Polish constitutional provisions raises questions regarding the constitutional reality, since there may well be differences between the constitution as such and its application in practice. One indicator for such differences could be the number of cases dealing with questions of access to justice and effective legal protection of individuals.[54] In fact, there are already several judgments by the Constitutional Court regarding questions of access to justice and effective legal protection. In particular, there are some interesting recent decisions on the guarantee of access to justice under Article 45 of the Polish Constitution. This provision has been used to support an extensive interpretation of Article 1 of the civil procedure code. According to this interpretation, any case for which no other procedure is open for the citizens[55] under Polish law must be considered a civil matter for which jurisdiction of the civil courts is provided. The resulting legal situation is similar to the one in Germany under Article 19(4)(2) of the German Basic Law. The European Court of Human Rights has also had opportunities to deal with cases from Poland. It already ranks third with regard to the number of procedures brought to the attention of the ECHR institutions. It is only from Turkey and Italy that there have been more procedures.[56] Many of the cases from Poland concern civil procedures

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[53] For more detailed analysis *see Zoll/Paintner*, 'Die Stellung des Richters in Polen' in *Richterbild und Rechtsreform in Mitteleuropa*, Oberhammer (ed.), Vienna 2001, at pp. 67 et seq., at pp. 82 et seq.

[54] *See*, for example, the decisions of the Constitutional Court of 7 January 1992, K 8/91 (OTK 1992 I, Pos. 5, 76); of 19 June 1992, U 6/92 (OTK 1992 I, Pos. 13, 196); and *see Brunner/Garlicki, Verfassungsgerichtsbarkeit in Polen, Analysen und Entscheidungssammlungen 1986–1997*, Baden-Baden 1999.

[55] Decision of the Constitutional Court of 10 July 2000, SK 12/99 (OTK ZU No. 5 (35)/2000, Pos. 143, 804); and *see Fijałkowski*, Kodeks postępowania cywilnego: Orzecznictwo sądowe, komentarz (Code of civil procedure: decisions, commentaries), 3rd ed., Wyd. Artman, Warszawa 2001, Article 1, note 16, at p. 14.

[56] This is reported by *von Redecker*, 'Chronik der Rechtsentwicklung in Osteuropa, Polen', WiRO 2001, at p. 25.

that have been unduly delayed. In several of these cases, the European Court of Human Rights has found a violation of the ECHR.[57] On the one hand, these cases may indicate that the constitutional reality in Poland may not yet be in line with the constitutional requirements. On the other hand, the number and type of cases decided by the Constitutional Court and by the European Court are not necessarily to be seen in a negative light. Instead, the relatively high number of cases brought to the Constitutional Court and to the European Court show two things – as is often the case in the process of transformation in the transition countries of Central and Eastern Europe: At first sight, the proceedings show deficits in the legal protection available for individuals. When undertaking a more profound and dynamic analysis, however, they also indicate that the constitutional and international rights are effectively ascertained by the citizens[58] and ultimately enforced by the courts. Looking at the issues from this point of view demonstrates, therefore, that problems certainly do exist but that they are being addressed at the same time. The future will show whether Poland will be able to reform its judiciary to ensure that its citizens have fewer reasons to file complaints. As yet, there is no sign of a decrease in the number of complaints.

A rather obvious gap between the constitutional text and the constitutional reality can be identified when looking at the working conditions of the judges as provided by Article 178(2) of the Polish Constitution. According to various sources, the number of judges is insufficient, their salary is inadequate, and the equipment at the courts is inappropriate.[59] As far as criminal procedures are concerned, some reports even indicate a concern that the entire judicial system might collapse.[60] In addition, numerous judgments are not being enforced in good time and may no longer be enforceable by virtue of the statute of limitations.[61] Similar problems of enforcement have also been found in civil procedures. Recently, the European Court of Human

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[57] For more detailed analysis see *Nowicki*, 'Wokół Konwencji Europejskiej. Krótki komentarz do Europejskiej Konwencji Praw Człowieka' (The European Convention. A short commentary on the ECHR), Zakamycze 2000, pp. 80–83.

[58] *See Leonhardt*, 'Chronik der Rechtsentwicklung in Osteuropa, Verfassungs- und Verwaltungsrecht-Polen', WiRO 2000, at p. 109; *see also* the report on an increasing turn of citizens to the national ombudsman, Polen ist kein Rechtsstaat, Süddeutsche Zeitung of 16 May 2000, No. 112 at p. 10.

[59] *See Czeszejko-Sochacki*, 'O wymiarze sprawiedliwości w świetle Konstytucji, międzynarodowych standardów i praktyki' (The judiciary in the light of the constitution, international standards and practice), PiP 1999, No. 9, at pp. 3 et seq., at pp. 8 et seq.; *Garsztecki*, 'Polnisches Rechtsbewußtsein und polnischer Rechtsdiskurs in Zeiten des Wandels', in: Eichwede (ed.), Analysen zur Kultur und Gesellschaft im östlichen Europa, Bd. 8: *Recht und Kultur in Ostmitteleuropa*, Bremen 1999, at pp. 221 et seq., at pp. 268 et seq.

[60] *von Redecker*, 'Chronik der Rechtsentwicklung in Osteuropa', Polen, WiRO 2000, p. 257; *see also Heß*, 'Vergleichende Bemerkungen zur Rechtsstellung des Richters', in: *Richterbild und Rechtsreform in Mitteleuropa*, Oberhammer (ed.), Vienna 2001, at pp. 1 et seq., at p. 20.

[61] *Leonhardt*, 'Chronik der Rechtsentwicklung in Osteuropa, Rechtspflege-Polen', WiRO 2000, p. 194.

Rights was dealing with a case of ineffective enforcement of a civil judgment and found a violation of Article 6(1) ECHR by Poland.[62]

3. *The Third Accession Criterion: Transformation and Effective Enforcement of the (Procedural) Acquis Communautaire*

a) The EU Strategy for the Preparation of the Associated Countries for Accession

On 3 May 1995, the EU Commission published a White Paper on the preparation of the associated countries in Central and Eastern Europe for integration into the Common Market of the EU. This paper outlines the basic elements of the EU's pre-accession strategy.[63] The White Paper's annex contains a list of the various elements of the *acquis communautaire* in a systematic order and gives advice to the accession candidates as to the priorities in the implementation of the acquis. Although the timing and method of transformation is left to the discretion of the candidates, the Commission provides advice on the implementation of the acquis step by step.[64] International procedural law is dealt with in the context of point 17 of the annex in the context of private law.[65] These sections of the annex are stressing the importance of the Brussels and Lugano Conventions. It connects accession to the EU to accession to the Brussels Convention, since this Convention is considered an essential element of the Common Market.[66] After seven years, the list of European sources of international procedural law must naturally be updated. Since the introduction of the new Article 65 ECT by way of the Treaty of

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[62] *See* the judgment of the European Court of Human Rights of 4 April 2000 in Case 'Dewicka' (No. 38670/97), reported by *von Redecker*, 'Chronik der Rechtsentwicklung in Osteuropa, Polen', WiRO 2000, p. 291. *See also* the judgment of the European Court of Human Rights of 23 October 2000 in Case 'Kudła' (No. 30210/06),, NJW 2001, pp. 2694 et seq.; as to this case *Meyer-Ladewig*, 'Rechtsbehelfe gegen Verzögerungen im gerichtlichen Verfahren – zum Urteil des EGMR Kudła/Polen', NJW 2001, p. 2679; for further cases *see* < http://www.hri.ca/fortherecord2000/euro2000/vol2/polandechr.htm > .

[63] COM(95) 163 final (with Annex).

[64] As to the competition between the accession candidates *see Bungs*, The Baltic States: Problems and Prospects of Membership in the European Union, Baden-Baden 1998, at p. 89; *Šumilo*, 'EU Expansion: Political and Economic Interests of Applicant States', in: *Heiss* (ed.), *Brückenschlag zwischen den Rechtskulturen des Ostseeraumes*, Tübingen 2001, pp. 97 et seq. *See also* the report on the efforts of Poland for the adoption of the *acquis communautaire* as described by *Leonhardt*, 'Rechtsentwicklung in Osteuropa, internationale Rechtsbeziehungen-Polen', WiRO 2000, at p. 193; *Leonhardt* points out that Poland has been warned by EU-delegates that the Czech Republic and Hungary had 'bypassed' Poland in adapting to EU-law.

[65] In particular within Chapter III – mutual recognition of judgments in civil and commercial matters; *see* the Annex to the White Paper, COM(95) 163/2 final pp. 331 et seq.

[66] *See* the Annex to the White Paper, COM (95) 163/2 final, at p. 332.

Amsterdam, several regulations concerning international procedural law have been enacted.[67]

Without a doubt, the transformation of the *acquis communautaire*, combined with the institutional reforms required for the effective enforcement of the law, places a heavy burden on the candidate countries. For this reason, the White Paper also provides for a variety of supporting measures to be provided by the EU.[68] These supporting measures focus more and more on the reconstruction of the legal institutions, including the judiciary.[69]

b) Evaluating the Progress Made by the Candidate Countries: The Method and Its Consequences

The European Commission systematically evaluates accession countries regarding their progress on the way to fulfilling the criteria for membership. This evaluation is done annually and deals with the implementation of the *acquis* into national law, as well as with institutional reforms. Since the latter will ultimately be of predominant importance, one might expect a particularly intensive evaluation of the progress made concerning reform of the judiciary. However, the progress report from the Commission, published for Poland on 8 November 2000, shows a contrary trend. The EU evaluation certainly does not provide a clear picture of the achievements and the remaining challenges on the path to effective judicial reform.

The vagueness of the assessment is firstly found in the general and broad language used by the Commission. The report announces a need for compliance with the prerequisites of a step-by-step and harmonic integration of the accession countries, concretely in the adjustment of their administrative structures.[70] It further requires continuing and intensified efforts in order to ensure that all necessary measures are completed before accession to the EU. This is particularly stressed for judicial reform.[71] Some quantitative analysis is also provided, namely the report refers to the creation of some 200 new court chambers in civil and penal matters.[72] Furthermore, the report criticizes the fact that criminal procedures, which last an average of 6 months in Poland, take about 40 months in Warsaw. Similar data are given for

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[67] *See supra* note 18.

[68] *See Heiss*, 'Vom EU- zum gesamteuropäischen Privatrecht? – Privatrechtsharmonisierung in der sich erweiternden Union' in: *Europäisches, ausländisches, internationales Privatrecht – Festschrift zum 75-jährigen Bestehen des Hamburger Max-Planck-Instituts*, Tübingen 2001, pp. 123 et seq., at p. 128.

[69] *Schübel*, 'EU-Erweiterung: Auf- und Ausbau der Verwaltungsstrukturen der Beitrittskandidaten im Bereich Justiz und Inneres', EuZW 2000, p. 418.

[70] Regular report 2000 from the commission on Poland's progress towards accession < http://europa.eu.int/comm/enlargement/report_11_00/pdf/en/pl_en.pdf > , at p. 32.

[71] Report 2000, at p. 21.

[72] Report 2000, at p. 17.

commercial cases, as well as land ownership registrations.[73] The report shows a slight increase in the number of judges to 8194.[74] Other qualitative evaluations remain vague. It is said that the Polish Securities Commission acts very professionally and efficiently, while the Insurance Supervisory Board is being blamed for slow reaction time and inefficient work.[75] In addition, there are some more general remarks regarding the duration of proceedings, the relatively high cost of law enforcement, and the generally negative public opinion of the judicial system. Finally, the report criticizes the fact that EU law is not a mandatory subject in legal education and that it is rarely offered as a specialized course in law schools.[76]

As these examples clearly show, there is no scientific basis or well-reasoned evaluation. One negative consequence of this approach could be that the question of successful institutional and judicial reform in the accession candidates will ultimately be decided by diplomats, rather than experts. This could result in inadequately early or in inadequately late accessions. It might, furthermore, create mistrust and even fear in the population of both Member States and CEECs, because the lack of objectively evaluated and proven data can obviously lead to erroneous decisions in one way or another. These negative consequences could be avoided if the EU and the accession candidates submitted the fulfilment of the criteria to an evaluation by independent international experts.

c) *Reform of the Judiciary is Not Enough: A Brief Look at Other Institutions*

The transformation and effective enforcement of the *acquis communautaire* will require more than a mere reform of the judiciary. Attorneys, public notaries, public accountants, private organizations (such as consumer organizations), and so on, also play an important role.[77] With a view to the procedural *acquis communautaire*, two observations shall be made, one relating to public notaries, the other to consumer organizations.

It was argued above that the integration of a country into the EU regulations on jurisdiction and enforcement requires confidence in its judicial system. Such confidence, however, cannot be limited to the courts of the foreign legal system. It must extend to the public notaries in the accession countries. This follows from Article 50 of the Brussels and Lugano Conventions and from Article 57 of the new Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[78] which provide for the free circulation of enforceable

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[73] Report 2000, at p. 17.
[74] Report 2000, at p. 18.
[75] Report 2000, at p. 38.
[76] Report 2000, at p. 18; a different view on this point is presented by *Suproń-Heidel*, *supra* note 42, at pp. 56 et seq.
[77] *See Heiss*, *supra* note 68, at p. 136.
[78] OJ 2001 No. L 12/1.

notarial acts within the territorial scope of application of the respective instruments. Polish law provides for enforceable notarial acts in Article 177(1)(4) of the code of civil procedure. These are now to be recognized and enforced everywhere in all member states of the Lugano Convention. This is possible only if there is a fundamental trust in the integrity and efficiency of Polish public notaries.

Another example is the need to have functioning consumer organizations following from procedural law as part of the *acquis communautaire*. Several directives grant a right to bring an action for an injunction to so-called 'qualified entities' (i.e. consumer organizations) for the protection of collective interests of consumers. The most striking example can be found in Article 7(2) of the Directive on unfair contract terms in consumer contracts. The right to bring an action for an injunction has been extended to transborder cases by the recently adopted Directive 98/27 of 19 May 1998 on injunctions for the protection of consumer interests.[79] This is an effective means of consumer protection, provided that there are well equipped and functioning consumer organizations in place. A view to the situation in Poland reveals that these types of 'class actions' did not exist until very recently. The instrument was introduced into Polish civil procedure law in 2000 by a statute granting various rights to consumers.[80] According to this statute, actions of consumer organizations are limited to the prevention of abusive clauses in general contract terms. Contrary to several other EU directives[81], similar class actions are not yet granted for other purposes, for example, in the field of distance selling. Moreover, it must be questioned whether the new instrument[82] will prove an effective means of consumer protection. Generally, the transition countries do not have much experience with these kind of instruments and reports also show that the existing consumer organizations lack sufficient resources.

V. Summary

There is a strong desire on the part of the former socialist countries to integrate into international instruments for the determination of international jurisdiction and for the enforcement of foreign judgments. However, the Lugano Convention will most

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[79] OJ 1998 L 166/51, as amended by OJ 1999 L 171/12 and OJ 2000 L 178/1.

[80] *Trzeciakowska, supra* note 43, at p. 43.

[81] *See supra* note 19.

[82] Roethe, 'Zum Konsumentenschutz in den MOE-Staaten – Transition und Rechtsvielfalt', in: Micklitz (ed.), Rechtseinheit oder Rechtsvielfalt in Europa?: Rolle und Funktion des Verbraucherrechts in der EG und den MOE-Staaten, Baden-Baden 1996, at pp. 205 et seq., at pp. 211 et seq.; *Brockhoff*, 'Maßnahmen der AgV zur Unterstützung von Verbraucherorganisationen in den Ländern Mittel- und Osteuropas', in: Micklitz (ed.), Rechtseinheit oder Rechtsvielfalt in Europa?: Rolle und Funktion des Verbraucherrechts in der EG und den MOE-Staaten, Baden-Baden 1996, pp. 241 et seq.

likely fail to provide a basis for such an integration in the phase prior to the accession of the corresponding countries to the EU.

Full EU membership requires that the accession candidates bring their procedural law fully in line with the *acquis communautaire*. They must also reform their institutions (the courts, as well as various other institutions) in a way that makes them compatible with EU standards of fundamental (procedural) rights as mentioned in Articles 49 and 6 TEU. Finally, the relevant institutions must become strong enough in order to be able to safeguard the effective application of the *acquis communautaire*.