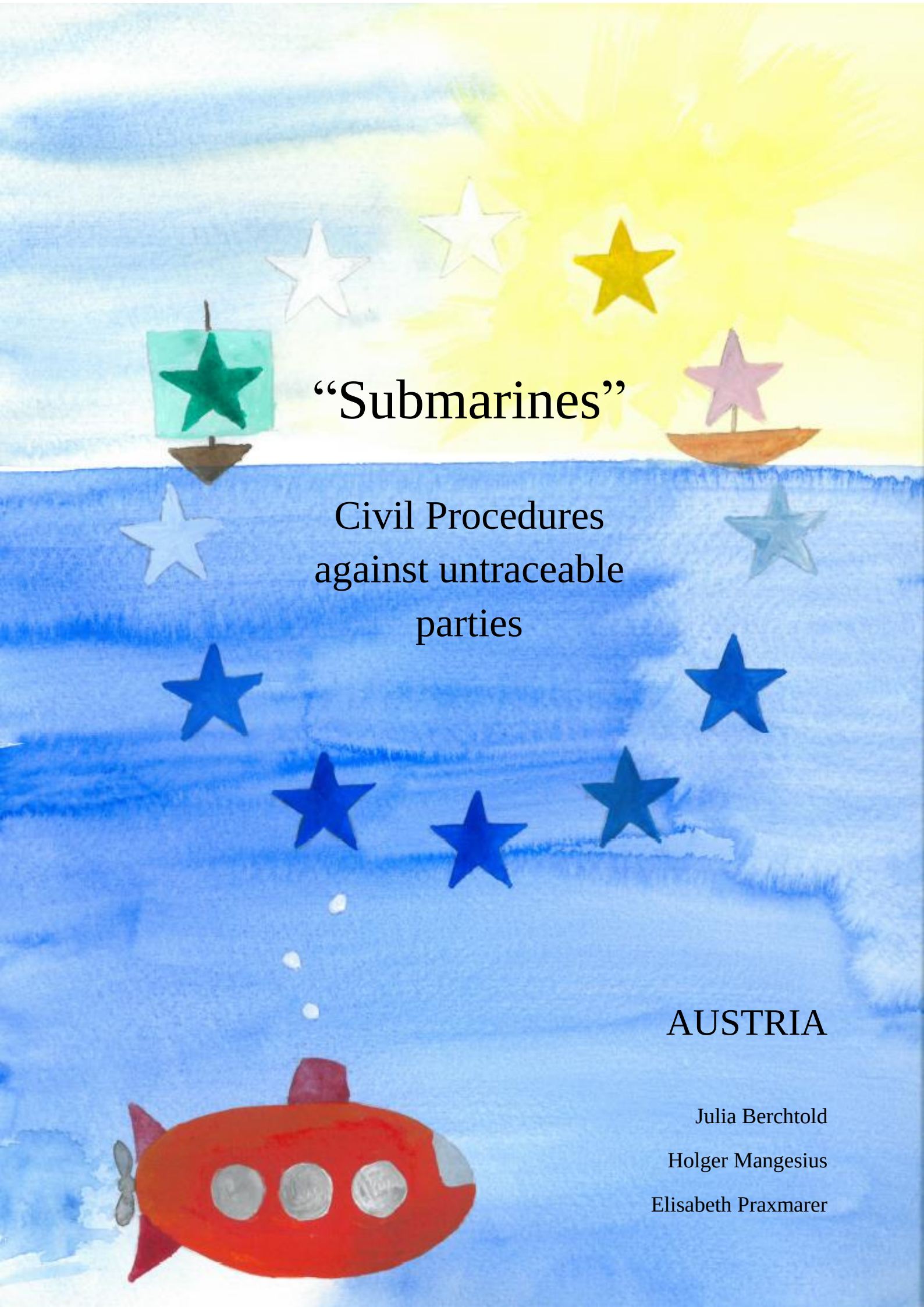

“Submarines”

Civil Procedures against untraceable parties

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1. Introduction

Nowadays we live in a Europe that is more and more economically connected. It is common to conclude contracts with business partners and consumers from other Member States. The four freedoms of the European Union, namely the free movement of goods, the free movement of capital, the free movement of services and the free movement of persons (including the free movement of workers as well as the free movement for the non-economically active), also contribute to the fact that the courts of the Member States of the European Union have to decide more and more cross-border cases. Many cases involve people with different nationalities and domiciles in different Member States.

When a party files a civil suit a situation may occur in which the defendant is untraceable because his domicile is unknown. In order to illustrate the problems occurring with the disappearance of parties to a lawsuit we would like to compare them with a submarine operating under water and therefore being undetectable.

In these cases it is impossible to deliver the document which initiates the proceedings to the defendant.

The question arises how to handle these cases without infringing either the plaintiff's fundamental right to access to justice or the defendant's fundamental right to a fair trial. If a court delivers a judgement against a defendant who was never aware of the ongoing proceedings against him and never had the chance to defend himself this would harm the defendant’s right to a fair trial. On the other hand a denial of proceedings in such cases would lead to a restriction of the plaintiff’s right to an effective remedy and the right of access to a tribunal. Therefore the challenge is finding a fair balance between these two opposing positions.

The right to an effective remedy and the right to a fair trial are not only general principles[1] of EU Law but also guaranteed by Article 47 Charter of Fundamental Rights of the European Union (Charter), as well as Article 6 European Convention on Human Rights (ECHR).

Article 47 Charter and its heading read as follows:

[1] E.g. ECJ 15.05.1986, C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary;* 15.10.1987, C-222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others;* 03.12.1992, C-97/91, *Oleificio Borelli SpA v Commission of the European Communities.*

"Right to an effective remedy and a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Everybody shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."

The first paragraph is based on Article 13 ECHR:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The second paragraph corresponds to Article 6 (1) ECHR which reads as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

The guarantee of access to justice requires that the law provides a court which has jurisdiction. Additionally the court has to be actually accessible, meaning, in particular, that the conduction of the proceedings must not be disproportionally hampered by procedural impediments which are hard to overcome[2]. The right to a fair trial also includes the right to be heard when proceedings are under way[3].

The right to a fair trial would be infringed if a judgment were rendered even though the defendant did not receive the document initiating the lawsuit and was therefore not aware of it. However, it would impair the right to an effective remedy if a plaintiff would be unable to obtain a judgment whenever the service of the initial document to the defendant could not be achieved. This shows quite plainly that the right to be heard and the right to access to justice

[2] *Eser* in *Meyer* (Hrsg), Charta der Grundrechte der Europäischen Union[4] (2014) Art 47 Rz 28).

[3] *Eser* in *Meyer* (Hrsg), Charta der Grundrechte der Europäischen Union[4] (2014) Art 47 Rz 34).

are closely linked; both of them aspire to enable the parties to assert their respective concerns in court.

Service of documents is an important part of every judicial process. It is essential for the protection of the rights of the parties to a lawsuit. It also ensures the defendant's right to be heard. At the same time it is necessary to grant the plaintiff access to justice.

The Regulation No. 1393/2007[4] seeks to simplify the cooperation between the judicial authorities of the Member States of the EU. It would be natural if this regulation included provisions dealing with the cases described earlier. Therefore, it is surprising that the regulation does actually not apply to cases where the address of the person to be served with the document is not known (Article 1 (2) Regulation No. 1393/2007). This problem is only marginally touched in so far as the regulation provides that in cases where the request for service cannot be fulfilled on the basis of the information or documents transmitted, the receiving agency has to contact the transmitting agency in order to secure the missing information or documents (Article 6 (2) Regulation No. 1393/2007). Thus, it is obvious that the regulation does not oblige the receiving agency to assist in locating the addressee[5].

The question is whether other regulations, in particular Regulation No. 44/2001[6], Regulation No. 1215/2012[7], Regulation No. 4/2009[8], Regulation No. 2201/2003[9], can be applied despite the fact that the defendant can't be served because his domicile is unknown. The goal has to be to avoid situations of denial of justice, which the plaintiff would face if failure of service would always prevent conducting legal proceedings.

The European Court of Justice has already been called to decide in different cases, in which a (valid) address of the defendant was unknown.

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[4] Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No. 1348/2000.

[5] Report from the Commission COM (2013) 858 p. 7.

[6] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[7] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[8] Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

[9] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000.

2. Case study

2.1. ECJ 15.03.2012, C-292/10, *G v Cornelius de Visser*

In the case of *G v Cornelius de Visser* the address of the defendant was unknown. The proceedings concerned an action for liability arising from the uploading onto an internet site of photographs in which the plaintiff appeared partly naked. The administrator's address given in the legal information of the internet site in question and in the domain registry database seemed to be invalid. Mr de Visser was registered as owner of the domain with addresses in the Netherlands. However service at these addresses failed. Furthermore his residence wasn't officially registered. Therefore the national court (Landgericht Regensburg) ordered service by public notice of the initiating application and the preliminary written procedure. The national court itself was convinced that the defendant had not taken notice of this public notice and was unaware of the proceedings against him. Having doubts about the applicability of the Regulation No. 44/2001 it referred the case to the European Court of Justice.

The ECJ came to the conclusion that the regulation is applicable if the defendant is probably a European Union citizen whose whereabouts are unknown and there is no firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union. The court argued that on the one hand this would enable the applicant to identify easily the court in which he may sue and on the other hand it would enable the defendant reasonably to foresee before which court he may be sued. Therefore the applicability of the uniform rules of this regulation would be in the interest of both. As a consequence those rules of jurisdiction which are not building on the defendant's domicile, e. g. Article 5 (3) Regulation No. 44/2001, are applicable.

Concerning the service by public notice the ECJ stated that this does not preclude the issue of a judgment by default against a defendant who cannot be located if the national court has satisfied itself that all investigations required by the principles of diligence and good faith have been undertaken to trace him/her.

In absence of (an applicable) regulation of national procedures by European Union law, it is therefore up to the Member States to lay down the procedural rules applicable to actions brought before their courts as long as those rules do not infringe European Union law, including the provisions of Regulation No. 44/2001. The ECJ pointed out that the provisions in this regulation intend to ensure, that the proceedings observe the rights of defendants. The defendant's rights have to be weighted up against the plaintiff's right to bring an action before

a court to rule on the merits of his claim. In the case that the defendant does not enter an appearance and his address is unknown Article 26 (2) Regulation No. 44/2001 is applicable. Thus the court has to stay the proceedings so long as it has not been established that the defendant has been able to receive the document informing him of the proceedings and to enable him to prepare his defence or that all necessary steps have been taken to this end. Nevertheless it may continue proceedings after all necessary steps have been taken to enable the defendant to pursue his rights even if it could not establish that the defendant has been served. This restriction of the defendant's rights is justified in the light of the applicant's right to effective protection. While the applicant runs the risk of being deprived of all possibility of recourse, the defendant still has the opportunity to oppose the recognition of the judgment issued against him (Article 34 (2) Regulation No. 44/2001).

In this judgment the ECJ also reached the conclusion that a certification as a European Enforcement Order within the meaning of Regulation No. 805/2004 of a judgment by default issued against a defendant whose address is unknown is precluded. It argued that Article 14 (2) Regulation No. 805/2004 states that "for the purposes of this regulation, service under paragraph 1 [which determines various ways of service without proof of receipt by the debtor] is not admissible if the debtor's address is not known with certainty". As the regulation derogates from the common system of recognition of judgments, the conditions for its application have to be interpreted strictly. Furthermore the abolition of any checks in the state of Enforcement is inextricably linked to and dependent upon the existence of a sufficient guarantee of observance of the rights of the defence (recital 10 in the preamble to Regulation No. 805/2004). While under the Regulation No. 44/2001 the defendant has the opportunity to ensure respect for his rights of defence by applying for refusal of enforcement (Article 34 (2) Regulation No. 44/2001), there is no such remedy if the title has been certified as a European Enforcement Order[10].

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[10] For the same reason it is doubtful whether regulations which create European Titles which do not require Exequatur are applicable if the defendant's domicile is unknown. The Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure refers to Articles 13 or 14 Regulation No. 805/2004. Furthermore, provided that he acts promptly. the defendant shall be entitled to apply for a review of the judgment given in the European Small Claims Procedure before the court or tribunal with jurisdiction of the Member State where the judgment was given where the claim form or the summons to an oral hearing were served by a method without proof of receipt by him personally, as provided for in Article 14 Regulation No. 805/2004; and service was not effected in sufficient time to enable him to arrange for his defence without any fault on his part (Article 18 (1) a).

The Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure provides that for the purposes of this regulation, service under paragraph 1 is not admissible if the defendant's address is not known with certainty (Article 14 (2)). Moreover, provided that he acts promptly, the defendant shall be entitled to apply for a review of the

2.2. ECJ 17.11.2011, C-327/10[11], *Hypotečni banka a.s. v Udo Mike Lindner*

In the case of *Hypotečni banka a.s. v Udo Mike Lindner* the defendant (a German citizen) had moved and therefore the address he had given to the plaintiff was no longer valid. The plaintiff was seeking to secure payment of a sum corresponding to the arrears on a mortgage loan which had been granted to Mr Lindner. The action was brought before the court with general jurisdiction over the defendant. It granted a payment order which was set aside as it could not be served on the defendant personally. The defendant was not staying at any of the addresses known to the court and the court was unable to establish any other place of residence of the defendant in the Czech Republic. As a result a guardian *ad litem* was assigned to represent the defendant. The guardian raised only factual objections.

Firstly, the ECJ had to decide whether the regulation is applicable if the only certain cross-border element is that the defendant is a national of another Member State. It confirmed the applicability and argued that the regulation applies whenever questions relating to the determination of international jurisdiction arise. Such questions arise if an action is brought before a court of a Member State against a national of another Member State whose domicile is unknown to that court.

Secondly, the ECJ had to find a criterion on which to base jurisdiction. As Mr Lindner was a consumer it had to bear in mind that he could only be sued in the Courts of the Member State in which he is domiciled (Article 16 (2) Regulation No. 44/2001). If the defendant's domicile is neither in the Member State of the court seised nor in an another Member State nor has firm

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European order for payment before the competent court in the Member State of origin where the order for payment was served by one of the methods provided for in Article 14, and service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part, even though the time laid down in Article 16 (2) for a statement of opposition to the European order for payment has already expired (Article 20 (1) a).

The Regulation (EU) No. 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters provides special provisions for service on the debtor (Article 28) and remedies of the debtor against the Preservation Order in cases of lack of service (Article 33 (1) b, (3)). This regulation requires the debtor to indicate an address to which the documents can be sent (Article 33 (5)).

The Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations does not require Exequatur for decisions given in a Member State bound by the 2007 Hague Protocol. However the defendant has the Right to apply for a review in the state of origin if he did not enter an appearance in this state and was not served with the document instituting the proceedings or an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence (Article 19 (1) a).

[11] The ECJ already stated in the decision Gambazzi that the objective of avoiding situations of denial of justice, which the applicant would face should it not be possible to determine the defendant's domicile, constitutes such an objective matter of interest (ECJ 18.12.2008, C-394/07 *Marco Gambazzi v Daimler Chrysler Canada Inc. And CIBC Mellon Trust Company*.

evidence to support the conclusion that the defendant is in fact domiciled outside the EU then Article 16 (2) Regulation No. 44/2001 also covers the consumer's last known domicile. This interpretation avoids that the inability to identify the current domicile of the defendant precludes determination of the court having jurisdiction, thereby depriving the applicant of his right to initiate a lawsuit. When balancing the plaintiff's right to access to justice and the defendant's right to defence it the court also considered that the defendant was obliged to inform the other party to the contract of his change of address which took place after the long-term mortgage loan contract had been signed. Furthermore this solution promotes the application of uniform rules instead of divergent national rules und enables both parties to identify the court which has jurisdiction.

Again the ECJ took recourse to Article 26 (2) Regulation No. 44/2001 which allows the court to continue its proceedings only if all necessary steps have been taken to ensure that the defendant can defend his interests. This means that all investigations required by the principles of diligence and good faith must have been undertaken to trace the defendant. The possibility of taking further steps in the proceedings without the defendant's knowledge by means of notification of the action served on a guardian *ad litem* appointed by the court seised constitutes a restriction of the defendant's rights of defence but is justified in the light of an applicant's right to assert his/her claims in court. The defendant still has the opportunity to oppose the recognition of the judgment issued against him (Article 34 (2) Regulation No. 44/2001).

In this case the ECJ did not (yet) have to deal with the question whether submissions of a court-appointed guardian ad litem can be regarded as submissions made by the defendant for the purposes of Article 24 Regulation No. 44/2001. However a few years later this question had to be solved.

2.3. ECJ 11.09.2014, C-112/13, *A v B and Others*

B and Others brought an action for damages against A before an Austrian court. The plaintiffs submitted that A had his place of domicile within the jurisdiction of the Landesgericht Wien. After numerous attempts to serve the complaint the court appointed a representative *in absentia*. The court-appointed representative raised factual objections but did not contest the jurisdiction of the court seised. At a later point a lawfirm intervened on behalf of A and challenged the jurisdiction of the court seised arguing that the court-appointed representative's

submission could not form the basis for the jurisdiction of the court seised. He claimed that he had left Austria permanently before the beginning of the proceedings but refused to provide the court with details of his current domicile. In fact he was domiciled in Malta.

The question brought to the ECJ was to determine whether the defence lodged by that court-appointed representative was attributable to A and could be assimilated to A having "entered an appearance" for the purposes of Article 24 Regulation No. 44/2001.

In contrast to the cases cited above the ECJ found that the Austrian court would only have had jurisdiction if A had entered an appearance before the court seised for the purposes of Article 24 Regulation No. 44/2001. Again it pointed out that the provisions of the Regulation No. 44/2001 express the intention to ensure that proceedings leading to the delivery of judicial decisions observe the rights of the defence.

As Article 24 Regulation No. 44/2001 leads to a tacit acceptance of the jurisdiction of the court seised and, accordingly, to a prorogation of that court's jurisdiction, it is based on a deliberate choice which presupposes that the defendant was aware of the proceedings brought against him. Consequently an absent defendant upon whom the document instituting proceedings has not been served and who is unaware of the proceedings against him may not be regarded as having tacitly accepted the jurisdiction of the court seised. Moreover, such a defendant is unable to give the representative the information necessary to contest or accept that jurisdiction. Accordingly, an appearance entered by a court-appointed representative may not be regarded as tacit acceptance of the jurisdiction of that court. Only if the defendant can be regarded as not having entered an appearance, the court seised may determine its jurisdiction of its own motion (Article 26 Regulation No. 44/2001) or – in the course of recognition-proceedings – on the application of the defendant (Article 34 (2) Regulation No. 44/2001). If the appearance of the court-appointed representative led to the court's jurisdiction, the regulation's aim to provide predictable jurisdiction would be compromised. This interpretation of Article 24 Regulation No. 44/2001 is also compatible with the plaintiff's right to access to justice.

The plaintiffs argued that the denial of justice, caused by the defendant's continuing refusal to reveal his actual place of domicile, makes it necessary to enable the court-appointed representative to submit to the proceedings.

The ECJ elaborated that in the previous cases it had accepted the continuation of proceedings against an absent defendant and thus a deprivation of the defendant's opportunity to defend

himself effectively. This interpretation was, however, only possible because the defendant had had the opportunity to oppose the recognition of the judgment issued against him (Article 34 (2) Regulation No. 44/2001). As this remedy (Article 34 (2) Regulation No. 44/2001) presupposes that the defendant failed to enter an appearance and that the steps taken by the court-appointed representative are not considered as entering an appearance, it would fail if this representative could enter an appearance as referred to in Article 24 Regulation No. 44/2001. Basing the court's jurisdiction on the submission to the proceedings by the court-appointed representative would therefore fail to balance the right to an effective remedy and the right of the defence.

2.4. ECJ 21.10.2015, C-215/15, *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev*

This case concerned proceedings between Ms Gogova and Mr Iliev about the renewal of their child's passport. The 10 years old child, its father and its mother were Bulgarian nationals. All of them resided in Italy. The parents lived apart, the child resided with her mother who applied to a Bulgarian court to obtain a new passport for the child. As Mr Iliev could not be found at his reported address, the court appointed a legal representative.

The ECJ had to decide whether Article 12 (3) (b) Regulation No. 2201/2003 has to be interpreted to mean that the jurisdiction of the court seised may be regarded as having been "accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings" within the meaning of that provision solely because the court appointed representative has not contested the jurisdiction of this court.

As before (case C-112/13) the court pointed out that the acceptance of the jurisdiction of the court seised requires at least the absent defendant's awareness of the court proceedings. Furthermore the defendant's intention cannot be deduced from the conduct of a court-appointed representative. Thus in such a case it cannot be assumed that the jurisdiction has been "accepted expressly or otherwise in an unequivocal manner" within the meaning of Article 12 (3) Regulation No. 2201/2003.

In the opinion of the ECJ this interpretation does not lead to a denial of justice because the plaintiff is free to seek a judicial decision, possibly a judgment in default, from the courts which have jurisdiction under Article 8 Regulation No. 2201/2003.

3. Conclusion

The analysis of these decisions leads to the following results:

1. Firstly, the Regulation No. 1393/2007 does not apply in cases where the address of the person to be served with the document is not known (Article 1 (2) Regulation No. 1393/2007). The receiving agency should not be obliged to trace the defendant's address[12].

2. Secondly, a differentiation has to be made between those cases in which jurisdiction can be established despite the unknown domicile of the defendant and those cases in which due to the unknown domicile no jurisdiction can be found.

3. Jurisdiction can be established despite the unknown domicile of the defendant, if a provision is applicable, which does not build on the defendant's domicile, such as Article 7 Regulation No. 1215/2012. Furthermore the ECJ expanded the scope of Article 16 (2) Regulation No. 44/2001 to include the former domicile of the defendant (Lindner). In this case (if a former domicile is known) the plaintiff can – at least – reach a judgment in default. This requires that the law of the state of the forum provides some kind of fictitious service which includes all kinds of service assuming that the document has been delivered on a certain day, regardless whether the document was actually received by the defendant.

These forms of service are, however, not explicitly mentioned in the Regulation No. 44/2001 and Regulation No. 1215/2012. Indeed, Article 26 (2) Regulation No. 44/2001, Article 28 (2) Regulation No. 1215/2012 require the court to "stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him/her to arrange for his defence, or that all necessary steps have been taken to this end". The wording of Article 34 (2) Regulation No. 44/2001 and Article 45 (1) (b) Regulation No. 1215/2012 also speaks against their permissibility.

According to these provisions the recognition of a judgment shall be refused, where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.

[12] *Geimer*, IZPR[6] Rz 2166.

The ECJ (*G v Visser*) however held forms of service necessary to strike a balance between the plaintiff's right to access to justice and the defendant's right to defence. Therefore it stated that service by public notice does not preclude the issue of judgment by default against a defendant who cannot be located if the national court has satisfied itself that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant.

In this regard a fictitious service is permissible, if the national legal requirements for such a service are met. Even though fictitious service does not rule out recognition in other Member States the state of recognition may in individual cases refuse recognition. The ECJ provides flexibility to the national courts which have to decide whether a fictitious service was sufficient. It may take into account exceptional circumstances which arose after service was duly effected, e. g. whether the plaintiff after service learned where the defendant could be reached (*Debaecker*[13]). The state of recognition is free to verify that the information in the certificate issued by the state of origin is consistent with the evidence (*Trade Agency*[14]).

The German BGH[15] uses this flexibility in evaluative consideration of all circumstances of the individual case to strike a balance between the defendant's and plaintiff's interests.

Consequently fictitious services are permissible but the recognition of a judgment by default is questionable.

4. Quite different is the case if jurisdiction cannot be established due to the lack of a known current domicile of the defendant.

In such cases the court seised has to apply the Regulation No. 44/2001 and Regulation No. 1215/2012 if the absent defendant is a national of an EU Member State and there is no sufficient evidence that this person is actually residing outside the EU. On the other hand the national law of the state of forum has to be applied if there is enough evidence that the defendant lives outside the EU in a third state country or in the state of forum itself[16].

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[13] ECJ 11.06.1985, C-49/84 *Leon Emile Gaston Carlos Debaecker and Berthe Plouvier v Cornelius Gerrit Bouwman*.

[14] ECJ 06.09.2012, C-619/10 *Trade Agency Ltd v Seramico Investments Ltd.*

[15] IPRax 2010, 360.

[16] *Trenker*, Der prozessuale Abwesenheitskurator, insbesondere im Kontext europäischen Zivilprozessrechts, ZfRV 2013/28, 213 (224).

As the defendant's failure to enter an appearance principally results in the court's obligation to declare of its own motion that it has no jurisdiction (Article 26 (1) Regulation No. 44/2001), the question arises whether the actions of a court-appointed representative can establish its jurisdiction in accordance to Article 24 Regulation No. 44/2001.

The ECJ repeatedly refused to regard the court-appointed representative's submission as entering an appearance in accordance to Article 24 Regulation No. 44/2001. As a result – despite the court-appointed representative's appearance – the national court is obliged to declare of its own motion that it has no jurisdiction. In such a case the plaintiff is denied access to justice, if the defendant remains to be untraceable.

Even though this result is quite unsatisfactory (for the plaintiff), it has to be considered that otherwise the Member States' international jurisdiction would be expanded without restraint as the court cannot reject an action *a limine litis* but has to give the defendant (or the court-appointed representative) an opportunity to enter an appearance[17].

[17] *Trenker*, Der prozessuale Abwesenheitskurator, insbesondere im Kontext europäischen Zivilprozessrechts, ZfRV 2013/28, 213 (224).

4. Visions

In view of these findings it is obvious that the current legal framework was not intended to provide solutions for cases in which the defendant's domicile is unknown. However, it is necessary to grant the plaintiff access to justice even in cases where the defendant – due to his own conduct – is untraceable. In the light of this the ECJ tried to interpret the current legal framework in a way which strikes the balance between the plaintiff's and the defendant's rights. Naturally these interpretations are based on the various individual cases, answer specific questions and are consequently fragmentary. Adapting the legal framework to include provisions for cases in which the defendant's domicile is unknown, would make solutions in such cases more predictable. It would help to avoid situations in which a judgment is issued but later its recognition refused. It would also make it unnecessary to have recourse to national law regarding the fictitious service of documents and the appointment of representatives for the absent defendant. This would make things more predictable for the plaintiff and the defendant.

At the moment the state of recognition has to determine whether the fictitious service which was deemed to be lawful by the state of forum is sufficient to grant recognition. As long as the state of recognition is not guided by European rules concerning the permissibility of fictitious service, the courts of the various Member States could reach different results. Whereas recognition could be refused in one Member State, it could be granted in another. As a result this concept also leads to one Member State controlling the rules and decisions of another which is incompatible with the mutual trust. Ultimately it is unsatisfactory for the plaintiff who reached a judgment but has to have doubts about its recognition.

The use of fictitious service can only lead to a judgment by default when the court seised can find any provision on which to base its jurisdiction. Otherwise the court has to reject the action. The only solution in such cases could be the appointment of a representative who is able to establish jurisdiction by entering an appearance. The ECJ rejected an interpretation of the current legal framework, which would support this approach. This deprives the plaintiff of the possibility to gain legal protection.

In order to avoid such an outcome the legal framework has to be adjusted. This could be accomplished by creating provisions regarding the fictitious service of documents in the Regulation No. 1393/2007. These provisions should not only contain specific rules for a fictitious service but also determine the way in which the fictitious service is conducted. It

would, e. g., be helpful to create a public edict registry, meaning an internet homepage where the information about the fictitious service is publicized (see for example insolvency registry, business registry). Furthermore these provisions should also determine legal remedies against judgments which were issued after such a service. The state of recognition should be unable to refuse the recognition of judgments due to a fictitious service. Only the state of forum should be able to examine whether the requirements of a fictitious service and the issuing of the judgment are/were met.

In cases where the defendant is untraceable and the jurisdiction cannot be based on a provision which does not relate to the defendant's domicile (e.g. Article 7 (1), (2) Regulation No. 1215/2012), it is necessary to take steps to avoid denial of justice. The plaintiff has to be able to take his case to court. This could be achieved either by creating a “jurisdiction of the last known domicile“ or by creating common rules for appointing a representative for a defendant. This representative should be able to enter an appearance and in this way establish jurisdiction according to Article 26 (1) Regulation No. 1215/2012. Again, a judgment issued in such a proceeding should be recognized by all states. Which remedies can be taken in the state of forum should also be regulated by (EU) law.

A “jurisdiction of the last known domicile“ would have the advantage that it is predictable for both parties, where proceedings could take place in the future. However it would require a fictitous service and in most cases lead to a judgment in default.

Appointing a representative on the other hand would enable the plaintiff to choose the court of forum. In order to maintain the defendant's right to a fair trial he has to be able to find out about the legal action, the appointment of the representative, the judgment issued in such proceedings and the possible remedies. This information could be published in the (suggested) edict registry which could be also used for publishing fictitious services.

5. Closing remarks

Even though the appliance of the Regulation No. 1393/2007 by the Member States has in general been satisfactory and the delays for cross-border service have been progressively reduced[18], cases in which the defendant is untraceable bring the limits of the current regulations to light. Taking the steps described above to secure the plaintiff's right to access to justice and the defendant's right to a fair trial would promote the fundamental rights which are established by Article 47 Charter of Fundamental Rights of the European Union. It would also be a sign of mutual trust between the Member States and help to maintain and develop an area of freedom, security and justice, in which the free movement of persons is ensured. However, this fundamental right has to be complemented with safeguards to protect the rights of others. Such measures are also necessary for the proper functioning of the internal market. Otherwise a debtor could easily escape his creditor's claims by willfully concealing his domicile and thus acting like a submerging submarine.

[18]Report from the Commission COM (2013) 858 p. 16.

Bibliography

Judgements of the ECJ:

11.06.1985, C-49/84 *Leon Emile Gaston Carlos Debaecker and Berthe Plouvier v Cornelius Gerrit Bouwman;*

15.05.1986, C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary;*

15.10.1987, C-222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others;*

03.12.1992, C-97/91, *Oleificio Borelli SpA v Commission of the European Communities;*

18.12.2008, C-394/07 *Marco Gambazzi v Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company;*

17.11.2011, C-327/10, *Hypotečni banka a.s. v Udo Mike Lindner;*

15.03.2012, C-292/10, *G v Cornelius de Visser;*

06.09.2012, C-619/10 *Trade Agency Ltd v Seramico Investments Ltd.;*

11.09.2014, C-112/13, *A v B and Others;*

21.10.2015, C-215/15, *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev;*

Literature:

Eser in *Meyer* (Hrsg), Charta der Grundrechte der Europäischen Union4 (2014);

Trenker, Der prozessuale Abwesenheitskurator, insbesondere im Kontext europäischen Zivilprozessrechts, ZfRV 2013/28, 213ff;

Heiderhoff, Fiktive Zustellung und Titelmobilität, IPRax 2013, 309 ff.

Documents of the European Union:

Report from the Commission COM (2013) 858;

Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;

Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000;

Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations;

Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast);

Regulation (EU) No. 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters;